The Purpose of the Exclusion Clause and the Role of the UNHCR:

Protection or Impunity?

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Abstract

The thesis critically evaluates the UNHCR's role in an emerging area of law, "crimmigration", questioning how law enforcement agencies handle the threat of possible perpetrators of serious international crimes crossing their borders. The thesis mainly examines whether the UNHCR, mandated to provide protection for persons within its field of competence, has any duty to facilitate the prosecution of excluded persons in states where it has a 'state-substitute' role by taking over the exclusion adjudication process as per Article 1 F of the 1951 Refugee Convention. The first chapter involves a policy oriented and doctrinal analysis of the mandate of the UNHCR and its interpretation of the 1951 Convention. The chapter concludes that although the UNHCR has not been mandated to act on excluded persons, due to its evolving functions and shifting responsibilities, it might have an emerging duty in this regard. The second chapter evaluates the emergence of an impunity problem in relation to Article 1 F crimes, and states' duties to prosecute in light of the principle of aut dedere aut judicare. In assessing the UNHCR's role in host states' obligations, the thesis proposes Ralph Wilde's concurrent liability model to be applied in between them. Eventually, the last chapter applies the model to the impunity problem emerging as a result of the adjudication process of Article 1 F crimes within the context of Syrian refugees and other non-European refugees in Turkey. In order to prevent impunity and to lift the UNCHR's liability, the thesis proposes, as a viable option and among other alternatives, the establishment of an international commission having responsibility for and decision-making capacity over excluded persons.

Résumé

Ce mémoire évalue de façon critique le rôle du HCR des Nations-Unies dans la 'crimmigration', une nouvelle branche du droit : il met en cause la façon qu'ont les agences d'application de la loi d'aborder la menace que représente le franchissement de leurs frontières par des auteurs de crimes internationaux graves. Ce mémoire examine principalement si le HCR, chargé de la protection des personnes relevant de sa compétence, est tenu ou non de contribuer à la poursuite des personnes exclues de la protection internationale en vertu de l'article 1F de la Convention de 1951 relative au statut des réfugiés, et ce dans les États ou il a pris en charge le processus de jugement basé sur l'article 1 F, se

substituant ainsi à l'État. Le premier chapitre, par le biais d'une analyse politique et doctrinale du mandat du HCR, conclut que, même si le HCR n'a pas été chargé d'assister la poursuite pénale des personnes exclues, vu l'évolution et la nature changeante de ses tâches et obligations, il pourrait être sous le coup d'une obligation émergente à cet égard. Le second chapitre aborde l'apparition d'un problème d'impunité lié aux crimes mentionnés dans l'article 1F ainsi qu'à l'obligation qu'ont les États de poursuivre dans le contexte du principe dit *aut dedere aut judicare*. Dans l'analyse du rôle du HCR dans les obligations des États d'accueil, la thèse propose l'utilisation du modèle de responsabilité conjointe de Ralph Wilde. Le dernier chapitre applique finalement le modèle de responsabilité conjointe au problème d'impunité apparaissant à cause de l'application de l'article 1F dans le processus juridictionnel de détermination du statut des réfugiés syriens et autres réfugiés non-européens en Turquie. Pour empêcher l'impunité et éviter la mise en cause du HCR, cette thèse propose, entre autres options viables, la création d'une commission internationale mandatée pour prendre des décisions concernant les personnes exclues de la protection internationale.

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1. Introduction: The Syrian Conflict and the Impunity Problem

The outbreak of the Syrian conflict has caused millions of people to flee and seek asylum in neighboring countries[1] since 2010. United Nations High Commissioner for Refugees' (UNHCR) data shows that as of March 2016, 2,715,789 Syrian refugees have been registered only in Turkey[2] while this number rises up to 4,812,851 million in total including the ones registered in Egypt, Iraq, Jordan and Lebanon.[3] The UNHCR's referring to the crisis as being "the largest refugee population under the care of the UNHCR"[4] in its history can only stress the significance of it.

The size of this population brings responsibilities to different actors on a global level. At first sight, the concerns might be shaped around protecting and finding durable solutions for asylum-seekers. Taking a different perspective on the issue, the legal fate of the ones who had fought in the conflict and then have sought asylum in host countries can come into focus. The United Nations (UN) Human Rights Council's report prepared by the independent international commission of inquiry on Syria[5] indicates that government forces conduct "widespread attacks on civilians", systematically commit "murder, torture, rape and enforced disappearance amounting to crimes against humanity" as well as amongst others "the war crimes of murder, hostage-taking, torture, rape and sexual violence" while non-state armed groups have committed massacres and war crimes.[6] Despite the findings of the report and the UN Security Council's Resolution No. 2139 stressing the need to end impunity for violations of international humanitarian law (IHL) and to bring justice for perpetrators of the violations

[1] Hereinafter host countries.
[2] "Syria Regional Response Inter-agency Information Sharing Portal-Turkey" UNHCR (31 March 2016), online <data.unhcr.org/syrianrefugees/country.php?id=224>
[3] "Syria Regional Response Inter-agency Information Sharing Portal" UNHCR (31 March 2016), online < data.unhcr.org/syrianrefugees/regional.php >
[4] As declared by the UNHCR, "Syrians are now the world's largest refugee population under UNHCR care... and the Syria operation is now the largest in UNHCR's 64-year history." "Needs soar as number of Syrian refugees tops 3 million" UNHCR, (29 August 2014) online< www.refworld.org/docid/54002ca64.html>
[5] The report is based on 480 interviews and evidence collected between 20 January and 15 July 2014. Report of the independent international commission of inquiry on the Syrian Arab Republic, GA Doc, UNGA, 2015, UN Doc A/HRC/28/69
[6] *Ibid* at 48.

occurred in Syria[7], there is not yet any international or hybrid criminal courts investigating alleged crimes committed in Syria. Strikingly, host countries including Turkey, Jordan and Lebanon are hosting millions of Syrian asylum-seekers without knowing how many of them might have committed these crimes.

Overall, on a global level, states are faced with the question of how to deal with alleged perpetrators of serious crimes entering their territories.[8] However, little attention has been given to the question of "how law enforcement agencies and other institutional bodies in this ever more globalized world deal with the threat" of possible offenders of serious international crimes including war criminals, *génocidaires* and terrorists crossing their borders.[9] This emerging area of law called 'crimmigration' confers "the letter and practice of laws and policies" at the crossroads of criminal law and immigration law.[10] One of the ways that a growing number of European and North American countries resort to in tackling this issue is to identify alleged perpetrators of serious international crimes and exclude them from refugee protection on the basis of Article 1 F[11] of the 1951 Convention relating to the Status of Refugees[12] (1951 Refugee Convention).[13] The Article excludes from international refugee protection those against whom there is serious suspicion of having committed war crimes, crimes against humanity, serious non-political crimes and crimes against peace.[14] As a part of the Refugee Status Determination (RSD) process[15], exclusion assessment is carried out either

[7] The Resolution "[s]*tresses* the need to end impunity for violations of international humanitarian law and violations and abuses of human rights, and *reaffirms* that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice." Resolution to Ease Aid Delivery to Syrians, Provide Relief from 'Chilling Darkness', SC Res 2139 (2014), UNSC Res, 7116th Meeting, UN Doc SC/1192.
[8] Joke Reijven, Joris van Wijk "Alleged perpetrators of serious crimes applying for asylum in the Netherlands: Confidentiality, the interests of justice and security" (2015) 1:15 Criminol Crim Justice. [Reijven&Wijk]
[9] Reijven&Wijk, *supra* note 8 at 2.
[10] Reijven&Wijk, *supra* note 8 at 2.
[11] Hereinafter exclusion provision.
[12] *The Convention Relating to the Status of Refugees*, (28 July 1951), 189 UNTS 137.
[13] Reijven&Wijk, *supra* note 8 at 2.
[14] Hereinafter will be referred as "exclusion analysis."
[15] "This is the legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law. States have the primary responsibility for determining the status of asylum-seekers, but UNHCR may do so where states are

by host state authorities[16] or by the UNHCR.[17] The new 'crimmigration' area focuses on states' immigration policies in dealing with alleged offenders of serious crimes.[18] Surprisingly, to date, no attention has been payed to the UNHCR's acts in the context of "crimmigration", although the UN Agency has a significant role in the exclusion assessment in certain countries. For example, what happens to excluded persons[19] after they are excluded by the decision of the UNHCR is unknown.

Although, in the context of "crimmigration", to what extent immigration authorities are permitted to share information with regard to excluded persons with law enforcement agencies in the interest of justice and security is discussed[20], the same question has not been analysed from the perspective of the UNHCR's acts and omissions. This thesis will hence evaluate whether the UNHCR, as a UN Agency, has any duty to facilitate the prosecution of excluded persons' by sharing information with host state's authorities when the RSD process is solely conducted by the UNHCR, and hence, the organization is the only holder of information pertaining to possible perpetrators of serious crimes.

For example, pursuant to the UNHCR's Background Note on the Application of the Exclusion Clauses[21], "a decision by UNHCR to exclude a refugee means that that individual can no longer receive protection or assistance from the Office". In other words, there is no obligation for the UNHCR to assist host countries in prosecuting excluded persons, because

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unable or unwilling." "Refugee Status Determination" UNHCR, < online www.unhcr.org/pages/4a16b1d06.html>

[16] Per example Canada or the United Kingdom

[17] For example, "[I]n 2007, UNHCR was involved in refugee status determination in 68 countries. Over 90% of the RSD work in terms of applications received and decisions rendered was carried out in 15 countries; the largest operations were in Kenya, Malaysia, Turkey, Somalia, Egypt and Yemen." Richard Stainsby, "UNHCR and individual refugee status determination" (2009) 32 FMR

[18] Reijven&Wijk, *supra* note 8 at 2.

[19] The term 'excluded person' will be used to refer to asylum-seekers excluded from refugee and subsidiary protection for their alleged involvement in one or more of the crimes specified under Article 1F of the 1951 Convention.

[20] Reijven&Wijk, *supra* note 8 at 3.

[21] UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, (4 September 2003), online <www.refworld.org/docid/3f5857d24.html> [UNHCR- Background Note on the Application of the Exclusion]

there is no link between excluded persons and the UNHCR after the exclusion decision. Primarily mandated to provide "protection and humanitarian assistance and to seek solutions for persons within its competence"[22], the UNHCR is not initially mandated to act on excluded persons. However, acting under the auspices of the United Nations[23] the organization is still a part of the UN human rights system, and hence its current functions and roles require broader analysis.

Literature shows that legal debate has been shaped around the duties of states to prosecute or extradite excluded persons. But none of the arguments have analyzed the role of the UNHCR during the post-exclusion phase. For example, Simeon argues that it is essential to prosecute, "either domestically or internationally, those who have been excluded under Article 1 (F)" to ensure international human rights.[24] Similarly, the Michigan Guidelines on the Exclusion of International Criminals put forward that "refugees suspected of having committed an international crime are subject to the duty of states to either prosecute or extradite" which will be the appropriate means of "ensuring accountability for unexpiated international criminality".[25] On the contrary, Hathaway and Foster claim the purpose of Article 1 F is not ensuring legal accountability but rather ensuring protection.[26]

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[22] Volker Türk, Elizabeth Eyster "Strengthening Accountability in UNHCR" (2010) 22:2 Int'l J. Refugee L. at 162. [Türk&Eyster]

[23] Article 1 of the Statute Of The Office Of The United Nations High Commissioner For Refugees.

[24] James C. Simeon, "Ethics and the exclusion of those who are not deserving of Convention of Convention refugee status" in Satvinder Singh Juss &Colin Harvey eds. *Contemporary Issues in Refugee Law* (Gloucester: Edward Elgar: 2013), 258 at 264.

[25] The University of Michigan, The Michigan Guidelines on the Exclusion of International Criminals, (22-24 March 2013), online <http://www.mjilonline.org/wordpress/wp-content/uploads/2013/08/02a-The-Michigan-Guidelines-on-the-Exclusion-of-International-Criminals-English.pdf >

[26] "It is thus not appropriate to see the importance of legal accountability as informing the purpose of the whole of Art. 1(F). In the modern context, moreover, it might sensibly be argued that the combination of the evolution of universal jurisdiction over international crimes and the advent of more robust arrangements for the extradition of persons believed to have committed serious domestic crimes would largely obviate the rationale for Art. 1(F) if it were conceived as a means of ensuring prosecution and punishment." James C. Hathaway&Michelle Foster, *The Law of Refugee Status* (Cambridge: Cambridge University press, 2014) [Hathaway&Foster]

The exclusion provision has gained important profile "through the development of international law, especially international criminal law."[27] Particularly, in the 1990s atrocities committed in the former Yugoslavia and Rwanda showed a need for the international community to find mechanisms to hold perpetrators of crimes accountable which led to the creation of two international tribunals -the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – and subsequently, the International Criminal Court (ICC). [28] At the same time, the fact that many of the high-ranking offenders of the "Rwandan genocide were amongst the approximately two million people who fled to neighboring states" underlines the role of the exclusion provision in between refugee protection at one hand, and holding perpetrators of serious crimes accountable on the other hand.[29] A similar challenge occurred in the context of refugees from the Former Yugoslavia and Sierra Leone whereby both victims and perpetrators fled to and sought international protection[30] in host countries. At the moment, this problem can be seen in the context of the Syrian and Iraqi refugee crisis. Considering the increase in forced displacement due to violence and armed conflict in the first decades of the twenty-first century, it would be reasonable to expect that exclusion related cases will continue to maintain their importance in the future.[31]

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[27] Andreas Zimmermann. *The 1951 Convention Relating to The Status of Refugees and Its 1967 Protol- A Commentary* (New York: Oxford University Press, 2011) 609. [Zimmermann]

[28] Jennifer Bond, "Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and 'Guilty' Asylum Seekers*"* (2012) 24:1 Int'l J. Refugee L. [Bond]

[29] William O'Neill&Bonaventure Rutinwa&Guglielmo Verdirame, "The Great Lakes: A Survey of the Application of the Exclusion Clauses in the Central African Republic, Kenya and Tanzania" (2000) 12 IJRL 135, at 136; Bond*, supra* note 28.

[30] Michael Kingsley Nyinah, "Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice" (2000) 12 IJRL 295 at 302. [Nyinah] For a reflective exploration of exclusion provisions in the context of Sierra Leone please see: William O'Neill, "Conflict in West Africa: Dealing with Exclusion and Separation" (2000) 12 IJRL 171.; *Bond supra* note 28.

[31] James C. Simeon, "The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/ or Crimes Against Humanity in Canada" (2015) 27:1 Int'l J. Refugee L. 78 [Simeon- The Application and Interpretation of International Humanitarian Law].

In summary, this thesis argues that the aims of Article 1 F should be interpreted by the UNHCR in the light of the aforementioned progress, as including hence, the eradication of impunity for perpetrators of serious international crimes. Considering the enormity of the Syrian refugee crises and the lack of international consensus to investigate the alleged crimes, it is essential to revisit the purpose of the exclusion clause in order to evaluate whether or not UNHCR as an actor, has a duty of assisting in the prosecution of excluded persons.

The methodology to be used for the thesis will mainly be doctrinal research methodology. The research also included the conducting of anonymous interviews with officials from the UNHCR and Turkey's Ministry of Justice. The thesis will have three chapters. The first chapter will analyze the mandate of the UNHCR from the view of the post-exclusion phase and identify the possible treaty interpretation approaches to the exclusion provision. The second chapter will analyze the notion of eradicating impunity for international crimes, the principle of *aut dedere aut judicare* and assess the UNHCR's roles and duties in host states' obligation under international treaties. The last chapter will apply previous chapters' findings to the current Syrian refugee crisis and treatment of non-Syrian refugees in Turkey and its relation with the UNHCR. The last chapter will also analyze the possible drawbacks that the UNHCR has in sharing information pertaining to excluded persons with host states and suggest alternatives to the current system.

2. CHAPTER 1: Mandate of the UNHCR and Exclusion Clause

2.1.The mandate of the UNHCR, Its Functions and Duties

In this section, the foundation of the UNHCR and the organization's duties under its mandate will be analyzed. The discussion will not cover early refugee organizations such as the ones created by the League of Nations prior to the establishment of the UNHCR. An

attempt will be made to evaluate whether the UNHCR has any duty to facilitate prosecution of excluded persons under its mandate and its functions deriving from its practice.

In December 1949, the decision to establish a High Commissioner's Office for Refugees was given with the United Nations General Assembly[32] Resolution.[33] Subsequently, the UNHCR was founded in December 1950 pursuant to the adoption of its statute by the General Assembly.[34] The organization started to operate in January 1951. As specified under Article 1 of the Statute, the UNHCR acts under the authority of the General Assembly and functions under the auspices of the United Nations. Pursuant to the UNHCR's Statute, the UNHCR has two functions and core mandate responsibilities; providing international protection for refugees and finding durable solutions to their plight.[35] In carrying out its responsibilities, the UNHCR principally relies on a number of core instruments including the UNHCR's Statute, the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).[36]

In the pursuit of the UNHCR's Statute and subsequent General Assembly and the United Nations Economic and Social Council[37] resolutions, there are four different categories of persons of concern that the UNHCR's activities are aimed at:[38] refugees, asylum-seekers, stateless persons, returnees and under certain conditions internally displaced persons. As is obvious, excluded persons do not fall under these categories.

[32] Henceforth UNGA or General Assembly.
[33] UN GA Resolution 319 (IV)-Stateless and Refugee Persons, UNGA Doc, 4th Session, 3 December 1949.
[34] Statute of the Office of the UNHCR, contained in the Annex to UN General Assembly Resolution 428 (V) of 14 December 1950. UNGA Resolution 428 (V) (14 December 1950)
[35] Alexander Betts&Gil Loescher&James Milner, "The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection" (London&New York: Routledge, 2008)
[36] *Ibid* at 98.
[37] Henceforth ECOSOC.
[38] According to Articles 1,8, 9 and 10 of the UNHCR's Statute, those are refugees, asylum-seekers, stateless persons, returnees and under certain conditions the internally displaced persons.

Within the internal structure of the UN, the UNHCR is a subsidiary organ of the General Assembly which reports to and receives advice from it[39] in the form of resolutions. It also receives advice from the Executive Committee of the High Commissioner's Program[40] in the form of conclusions. [41]

Pursuant to Article 8(a) of the UNHCR's Statute, the organization is given four distinct responsibilities.[42] These responsibilities are the promotion of the conclusion and ratification of international treaties concerning refugees; the proposal of amendments to such treaties and "the supervision of the application by States of such treaties."[43] Thus, given its dependence on the General Assembly and the wording of its Statute, the UNHCR has been given a role to be "guidance, supervision, co-ordination and control."[44] Although its functions have expanded to activities including preventive action and participation in humanitarian efforts of the UN for which the UNHCR has particular expertise,[45] its role has mainly been complementary to states' responsibilities. As an example, states have the primary responsibility for determining the status of asylum seekers, but the UNHCR may do so where states are unable or unwilling.[46]

As seen above, the UNHCR's Statute or General Assembly Resolutions do not give any specific duty to the UNHCR to act on excluded persons; the UNHCR's responsibilities and main functions are related to providing and ensuring international protection to

[39] According to Article 11 of UNHCR's Statute, UNHCR annually reports to the General Assebly through Economic and Social Council.
[40] It is "an advisory body created by the United Nations Economic and Social and comprised of approximately 72 state representatives"Corinne Lewis. *UNHCR and International Refugee Law: From Treaties to Innovation* (Oxford: Routledge, 2012) 14. [Lewis]
[41] Lewis, *supra* note 40 at 14.
[42] Lewis,*supra* note 40 at 15.
[43] Lewis,*supra* note 40 at 15
[44] Lewis,*supra* note 40 at 14.
[45] UN GA Resolution 2956 (XXVII)- Report of the United Nations High Commissioner for Refugees, UNGA Doc, Doc 77th Session, 12 December 1972 at para. 2.
[46] "Refugee Status Determination" UNHCR, < online www.unhcr.org/pages/4a16b1d06.html>

refugees.[47] The states bear the main responsibilities to implement the 1951 Refugee Convention and the UNHCR intervenes only if states cannot provide the protection. Nevertheless, states' failure in fulfilling their protection duties is the turning point where the roles of the UNHCR and the states start to overlap. As mentioned above, the main responsibility to conduct RSD process lies with state parties. However, due to geographical reservations[48] made by states to the 1951 Refugee Convention in accordance with Article 1 B[49] of the Convention or due to non-ratification thereof, the UNHCR operates as sole determination authority in some host countries. For example, by July 2013, there are almost 70 states[50] falling under this category. In parallel with this reality, since the beginning of the debate over the governance of the international refugee law regime in 1990s, the UNHCR's supervisory responsibilities have evolved and expanded.[51] Particularly, over the past years, due to the sharp increase in emergency situations, the UNHCR has expanded its RSD operations all over the world.[52] In 2013, the number of UNHCR personnel engaged in RSD increased by 11 percent representing "the highest total number and the largest annual

[47] Lewis, *supra* note 40.

[48] "Art. 1 B of the Refugee Convention also allows a government to restrict its obligations on a geographical basis, specifically to protect only European refugees." James Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 97. [Hathaway]

[49] Article 1 of the 1951 Convention reads as follow; 1. A. For the purposes of the present Convention, the term ''refugee'' shall apply to any person who: . . . (2) [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it . . . B. (1) for the purposes of this Convention, the words ''events occurring before 1 January 1951'' in article 1, section A, shall be understood to mean either (a) ''events occurring in Europe before 1 January 1951''; or (b) ''events occurring in Europe or elsewhere before 1 January 1951'';
and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

[50] The Standing Committee International Protection, Report on the 65th Session, UNHCR,UN Doc A/AC.96/1122 at para 18. [Committee Report]

[51] Martin Jones. "The Governance Question: the UNHCR, the Refugee Convention and the International Refugee Regime" in *The UNHCR and the Supervision of International Refugee Law* (New York: Cambridge University Press, 2013) 78. [Jones]

[52] ExCom, 2014, 60th Meeting, UN Doc EC/65/SC/CRP.10 (2014) at para 33.

increase."[53] Hence, the organizations' responsibilities have shifted away from its traditional supervisory functions to "the direct provision of services."[54]

In some countries especially in Africa, the Middle East and some parts of Asia, the UNHCR takes on a state substitution role due the lack of "capacity of the authorities to protect and care for refugees."[55] In these places, "the UNHCR has often stepped in, substituting, de facto, for the state."[56]As described by Amy Slaughter, in some situations, the UNHCR is perceived as a "'surrogate state' with "its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation and so forth) and even ideology (community participation, gender equality)."[57] Status determination is one of these areas in which the organization took a state-substitution role. [58]

The "state-substitution role" of the organization in certain countries brings important responsibilities to the UNHCR. The evolving nature of its protection function seems to be inadequate to explain the specifics of the situation under the UNHCR's "supervisory role"[59]. Indeed, in the situations explained above, the UNHCR acts as a principal actor similar to "surrogate state". Hence, although there is no explicit duty or role mandated to the UNHCR to act on the excluded persons, being a part of the broader UN human rights protection system and functioning under the auspices of the UN, it may still need to cooperate with host states and international organization for the post-exclusion phase.

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[53] *Committee Report, supra* note 50 at para 34.
[54] Jones, *supra* note 51 at 78.
[55] Türk&Eyster*, supra* note 22 at 164.
[56] Volker Türk, "The UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate" in *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013) at 49. [Türk]
[57] Amy Slaughter, Jeff Crisp, "A surrogate state? The role of UNHCR in protracted refugee situations'" *New Issues in Refugee Research*, EPAU Working Papers, Research Paper no. 168. (Geneva: UNHCR, January 2009) 2.
[58] Türk*, supra* note 56 at 49.
[59] Lewis asserts that "UNHCR's participation in national asylum determination procedures also be considered as part of UNHCR's supervisory responsibility." Lewis*, supra* note 40 at 46.

Indeed, the UNHCR should not be considered separate to the broader human rights context. The UN Agency was "born in a human rights context" and refugee protection is encompassed in "the broader international human rights protection regime."[60] Despite a dominant view that the UNHCR must be adjusted to evolving international developments, its Statute has not been changed in any fundamental manner.[61] Furthermore, the concept of supervision and responsibility attached to the concept continue to be fuzzy.[62] Beyond, the Statute's mentioning of a supervisory role for the UNHCR "it remains relatively vague and undefined sixty years after it was adopted by the UN General Assembly."[63]

Considering these realities, it would not be proper to assess the UNHCR's functions and responsibilities over the vague concept of supervision found in Article 8 of the Statute. Embedding this responsibility with the realities requires us to examine the practice of the UNCHR. If the UNHCR's current practice in certain places is exceeding its supervision responsibility, then the UNHCR's duties should be analyzed according to its shifted responsibilities in the light of a so-called evolving functions' approach. In such a case, the main departure point in analyzing the current situation should be the "enhanced supervision function" or shifted responsibilities.

In conclusion, I argue that the UNHCR's existence in the broader UN human rights' protection system, and the evolving nature of its functions may still require that the UN Agency act on excluded persons despite the fact that the UNHCR has not been mandated to do so under its Statute or General Assembly Resolutions. The issue of its state-substitute roles and liability of the UNHCR stemming from this role will be analyzed in detail in Chapter II.

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[60] Michael Barutciski. "The Limits to the UNHCR's Supervisory Role" in *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013) at 62. [Barutciski]
[61] *Barutciski supra* note 60 at 63.
[62] *Barutciski supra* note 60 at 72.
[63] *Barutciski supra* note 60 at 72.

2.2. The Purpose of the Exclusion Provision and Interpretation of Treaties

The previous section shows that the UNHCR's Statute and the subsequent General Assembly resolutions and ECOSOC decisions do not give any particular role to the organization for the post-exclusion phase. Nevertheless, there is a debate in academia about the shifting responsibilities of the organization in line with its state-substitute role despite the fact that its Statute has not been changed for more than 60 years. Accordingly, I argue that there might exist emerging duties of the UNHCR arising under other branches of international law in parallel with its shifting responsibilities.

In order to evaluate this notion, the purpose and object of Article 1 F of the 1951 Refugee Convention must be elucidated as it might give hints about the emerging duties –if there is any- of the UN Agency related to the post-exclusion phase. In doing so, the rules regulating the interpretation of treaties[64] will be taken into account.

Article 1 F of the 1951 Refugee Convention states:

> "The provisions of this Convention shall not apply to any person with regard 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."

The UNHCR documents define the primary purpose of this clause as rendering the perpetrators of certain acts undeserving of international protection as refugees and safeguarding "the receiving country from criminals who present a danger to the country's

[64] Article 31 of the Vienna Convention on the Law of Treaties. *Vienna Convention on Law of Treaties,* (23 May 1969), UNTS 1151 at 331.

security."[65] Excluding common law criminals from protection also "serves the purpose of preventing the benefits of refugee status from applying to fugitives from justice."[66] In literature there are different views about Article 1 F's purpose, especially when it comes to the *prosecution vs. persecution* dilemma. For example, Hathaway and Foster claim that the purpose of Article 1 F is not ensuring legal accountability but rather ensuring protection.[67] Contrarily, Gilbert and Rüsch assert that the exclusion provision was proposed to ensure that criminals could not use refugee status to escape punishment[68], which is the ground for states to exercise their jurisdictional competence to avoid impunity.[69] Similarly, it is argued that, in framing the exclusion provision, the drafters of the 1951 Refugee Convention "have been guided by a twofold objective: the wish to protect the refugee status from abuse while preventing impunity from justice."[70]

The *travaux préparatoires*[71] indicate that there were some drawbacks about the implementation of the exclusion provision; avoiding impunity was one of these concerns.[72] During the drafting period some countries emphasized the importance of ensuring the bringing to justice of fugitives as a purpose of the Article. As an example, the second aim of

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[65] UN High Commissioner for Refugees, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, (4 September2003), HCR/GIP/03/05,online <www.refworld.org/docid/3f5857684.html> [UNHCR Guideline on Application of the Exclusion Clause]

[66] Zimmermann, *supr*a note 27 at 583.

[67] Hathaway&Foster, *supra* note 26.

[68] Geoff Gilbert&Anna Magdalena Rüsch, "Jurisdictional Competence Through Protection to What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?" (2014)12 JICJ at 1904. [Gilbert&Rüsch]

[69] Gilbert&Rüsch, supra note 68 at 1904.

[70] Nina Larsaeus. "The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers" (2004) 73:69 Nordic J Int'l L.[Larseaus] Please also see UNHCR, *Guidelines on Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention relating to the Status ofRefugees* (HCR/GIP/03/05, 4 Sept. **2003) at** 2; G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in **E.** Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR 's Global Consultations on International* Protection (Cambridge University Press, Cambridge, 2003) at 425.

[71] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, statements of Herment (Belgium) and Hoare (UK).

[72] Gilbert&Rüsch, *supra* note 68 at 1904.

the provision was declared to be ensuring that "those who had committed grave crimes in World War II, other serious non-political crimes or who were guilty of acts contrary to the purposes and principles of the United Nations did not escape prosecution."[73] French representatives declared that since there was no international court competent to try war criminals, the exclusion provision is faulty.[74]

To sum up, the *travaux préparatoires* of the 1951 Refugee Convention and some scholars in line with this understanding identify the second objective of the exclusion provision as being the preventing impunity. This should be approached cautiously as there is no provision in the 1951 Refugee Convention or in the UNHCR's Statute directly referring to the post-exclusion era. This fact triggers questions related to the importance of the *travaux préparatoires* in interpreting treaties; to what extent do the *travaux préparatoires* alter the interpretation of the 1951 Refugee Convention and Article 1 F? Would using the drafters' objectives be sufficient to interpret the exclusion provision with a view to preventing impunity or could there be other grounds justifying this approach?

2.2.1. Treaty Interpretation

There are three main schools of treaty interpretation: the 'intentions of the parties' school; the 'textual' or 'ordinary meaning of the words' approach, focusing on the treaty text; and the 'aims and objects' approach, focusing on the treaty's object and purpose.[75] The International Law Commission (ILC) acknowledged that an approach taking into account

[73] Geoff Gilbert, "Exclusion is Not Just about Saying 'No'Taking Exclusion Seriously in Complex Conflicts" *in* David Cantor&Jean-François Durieux eds. Refuge from Inhumanity? War Refugees and International Humanitarian Law (Netherlands: Brill/Nijhoff, 2014) 155. [Gilbert]

[74] During the drafting of the 1951 Convention, French representatives stated that exclusion "might have certain drawbacks which it was unfortunately not possible to remedy, since, in the present state of affairs, there was no international court of justice competent to try war criminals or violations of common law already dealt with by national legislation": Statement of Mr. Rochefort of France, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951 at 13.

[75] These are also called the subjective approach, the objective approach and the teleological approach respectively. Zimmerman, *supra* note 27 at 82.

both the terms of the treaty itself as well as its object and purpose is more appropriate than one that is "purely textual or that sought to divine the drafters' intentions."[76]

Pursuant to Article 31 (1)[77] of the Vienna Convention on the Law of Treaties (VCLT), treaty provisions are interpreted "in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in the light of its object and purpose." Together with paragraph 2 and 3, Article 31 combines three types of interpretation into a concurrent approach: a literal approach, a systematic approach and a teleological approach.[78] Hathaway defines this concurrent approach as an "interactive understanding of treaty interpretation" which eliminates a hierarchical approach under which "context, object, and purpose are to be considered only where a treaty's text cannot be relied upon to disclose its 'ordinary meaning.''[79] As put forward by Aust, ''[a]though at first sight paragraph 1, 2 and 3 might appear to create a hierarchy of legal norms, this is not so: the three paragraphs represent a logical progression, nothing more."[80] As Article 5 of the VCLT clearly stipulates that the VCLT is applied to "any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization"[81], the rules of interpretation for a treaty can be applied to the UNHCR's Statute and these rules are valid for

[76] Zimmerman, *supra* note 27 at 83.

[77] Article 31 of the Vienna Convention on the Law of Treaties reads as follows "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended." *Vienna Convention on Law of Treaties,* (23 May 1969), UNTS 1151 at 331.

[78] Zimmerman, *supra* note 27 at 83.

[79] Hathaway, *supra* note 48 at 50.

[80] Aust also mentioned that ''[p]lacing undue emphasis on text, without regard to what the parties intended; or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more 'effective,' irrespective of the intentions of the parties, is unlikely to produce a satisfactory result." Anthony Aust, Modern Treaty Law and Practice (Cambridge University Press, 2000) at 187.

[81] Article 5 of the Vienna Convention on the Law of Treaties.

the UNHCR in its interpretation of the 1951 Refugee Convention. Thus, in the pursuit of Article 31 of the VCLT, the object, purpose and context of the 1951 Refugee Convention will be identified. Afterwards, the weight of the preparatory work and other possible principles in interpreting international treaties will be evaluated.

Foster argues that the 1951 Refugee Convention provides for refugees' rights and entitlements under international law and hence, its primary purpose is a human rights one.[82] The Supreme Court of Canada has ruled the underlying objective of the 1951 Refugee Convention as the "international community's commitment to the assurance of basic human rights without discrimination."[83] The High Court of Australia has characterized its main object "to impose obligations on the signatories to the Convention to provide protection and equality of treatment for the nationals of countries who can not obtain protection from their own countries."[84] The opinions from different jurisprudence and literature indicate that the object and purpose of the 1951 Refugee Convention is purely shaped around the protection of refugees. In other words, none of the arguments are related to excluded persons. On the other hand, the object and purpose of the overall treaty and that of Article 1 F differ substantially. While the 1951 Refugee Convention does not directly deal with possible perpetrators of international crimes, one of the purposes of Article 1 F indeed is preventing fugitives to escape from justice in line with its *travaux préparatoires.* Thus, the key point will be the importance of the *travaux préparatoires* in interpreting treaties in accordance with the VCLT.

As per Article 32 of the VCLT, the *travaux préparatoires* of the Convention and "the circumstances of its conclusions are a legal source and supplementary means of interpretation"[85]. In other words, if only "the ordinary meaning is 'ambiguous or obscure' or

[82] Zimmerman, *supra* note 27 at 92; Hathaway&Foster, *supra* note 26 at 44.
[83] Zimmerman, *supra* note 27 at 92.
[84] Zimmerman, *supra* note 27 at 92.
[85] Zimmerman, *supra* note 27 at 48.

'leads to a result that is manifestly absurd or unreasonable'" the preparatory work can be referred to as supplementary means of interpretation.[86] In case the meaning of the treaty is apparent from its text "when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable", and referral to such sources are not preferred.[87] This approach is also adopted by the decision of the International Court of Justice (ICJ).[88]

On the other hand, Hathaway purports that the supplementary nature of the *travaux préparatoires* points out its role to provide "evidence of the true meaning of a treaty's text construed purposively, in context, and with a view to ensuring its effectiveness."[89] Setting aside Hathaway's "effectiveness" argument, a conclusion might be that as there is no ambiguity in the wording of Article 1 F, there is no reason to use the preparatory work as a supplementary means of interpretation.

Overall, given that the object and purpose of the 1951 Refugee Convention are not directed towards excluded persons and the preparatory work of the exclusion provision can only be supplementary means for the interpretation, the 1951 Refugee Convention does not "regulate the treatment of excluded persons in any way".[90] This conclusion might be viable under the hierarchical approach for the treaty interpretation. However, in accordance with the

[86] Zimmerman, *supra* note 27 at 49. Guy S Goodwin-Gill, Jane McAdam. *The Refugee in Internarnational Law* (Oxford: Oxford University Press, 2007) at 8. [Goodwin-Gill&McAdam]
[87] Goodwin-Gill&McAdam, *supra* note 86 at 8.
[88] "When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meanings." Admission to the United Nations case, ICJ, Rep. (1950) Goodwin-Gill&McAdam, *supra* note 86 at 9.
[89] Hathaway, *supra* note 48 at 59.
[90] Indeed, if parties intended the prevention of impunity to be the main objective of the convention, why did they not choose to include a provision with that meaning? It seems that the only viable conclusion must be that the Refugee Convention does not regulate the treatment of excluded persons in any way. It may be in line with the spirit of the convention but the convention, as such, does not demand that states prosecute those excluded. Larseaus, *supra* note 70 at 77.

"interactive understanding of treaty interpretation" or concurrent use of three methods[91], Article 31, 3(a) and (b)[92] of the VCTL should be applied to the exclusion provision.

Subsequent agreement and practice can significantly alter the interpretation of the text.[93] Accordingly, any subsequent agreement[94] or practice in the application of the 1951 Refugee Convention regarding the interpretation of Article 1 F might change the current implementation of the provision in a way that encompasses preventing impunity approach in its implementation. As put forward by Lord Bingham,

> "…the Convention was made more than half a century ago. Since then the world has changed in very many ways. The existence of the Convention is not obstacle in principle to the development of an ancillary or supplementary body of law, more generous than the Convention in its application…"[95]

Likewise, the ILC has advised that subsequent agreements and practice are particularly important in interpreting treaties in pursuance of the Vienna rules[96] because they constitute "objective evidence of the understanding of the parties as to the meaning of the treaty."[97] On the other hand, it is often difficult to determine "concordant state practice" in a multilateral treaty like the 1951 Refugee Convention.[98] Despite this, there is an emerging practice, mostly in European Union (EU) countries, of maintaining the information flow between the

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[91] Bos affirms that the article ''refers the interpreter to the concurrent use of no less than three methods, viz., the grammatical (ordinary meaning to be given to the terms of the treaty), the systematic (in their context) and the teleological method (in the light of its object and purpose). Maarten Bos , ''Theory and Practice of Treaty Interpretation" (1980) 27 Netherlands International Law Review 135 at 145.

[92] VCTL Article 31, paragraph 3 reads as follow; "There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties."

[93] Sarah Singer. "Terrorism and Article 1F(c) of the Refugee Convention Exclusion from Refugee Status in the United Kingdom" (2014) 12 JICJ. [Singer]

[94] It "can, for example, be derived or inferred from the actions of the States parties at the diplomatic level, including through the adoption or promulgation of unilateral interpretative declarations, and at the national level the promulgation of laws and the implementation of policies and practices." Zimmerman, *supra* note 26 at 96.

[95] *Zimmerman supra* note 27 at 98.

[96] *Singer supra* note 93.

[97] UN 'Yearbook of the International Law Commission' (n 73) 219, para 15.

[98] *Singer supra* note 93.

countries' immigration offices and their respective prosecution services for the purpose of prosecuting excluded persons. For example, a Report on The Practice of Specialized War Crimes Units[99] shows that as of 2010, ten countries including Denmark, Norway, Belgium, the Netherlands, Germany, Sweden, Canada and the United States had set up units or initiated relevant specialized procedures within their immigration services to work on serious international crimes cases.[100] Strikingly, an important number of cases that have led to "investigations or proceeded to trial in Canada, Denmark, Sweden, the Netherlands, Belgium, France, Finland, Germany and the United Kingdom involved victims, witnesses or suspects who had entered the respective countries as asylum applicants."[101]In support of this emerging practice, the EU Council decision dated 8 May 2003 stipulates that

> "the member states should ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and prosecution of genocide, crimes against humanity and war crimes."[102]

As an example, the Netherlands has intensified the cooperation between its immigration authorities and the Dutch Office of the Public Prosecutor in order to facilitate the prosecution of excluded persons since 2002.[103] Danish immigration authorities are referring all exclusion triggered cases to the national prosecution services[104] while the Swedish national migration authority informed the specialized war crimes unit within the national criminal

[99] Redress, International Federation for Human Rights, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialized War Crimes Units* (2010). [Report on the War Crimes Units]
[100] *Report on the War Crimes Units, supra* note 99.
[101] *Report on the War Crimes Units, supra* note 99.
[102] Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14 May 2003.
[103] "The Dutch immigration authorities have over the last decades pursued a relatively active no safe haven policy by excluding 810 asylum applicants between 1997 and 2011…UNHCR (2003) guidelines indicate the refugee framework should not stand in the way of serious criminals facing justice. This suggests that all states that ratified the Refugee Convention should (attempt to) facilitate prosecution of excluded persons, or at the very least avoid frustrating efforts to bring these individuals to trial." *Reijven&Wijk supra* note 8.
[104] *Report on the War Crimes Units*, *supra* note 99.

police over 35 reports on suspected war criminals.[105] Similarly, when the Belgian Commissioner General for Refugees and Stateless Persons (CGRA) takes a decision on the basis of Article 1 F and can not deport the applicant, the Federal Prosecution Service is informed to decide whether or not to initiate an investigation on the basis of the information provided.[106] All these examples show that there is an emerging practice of ensuring information flows between immigration authorities and the prosecution services of each country for the prosecution of the Article 1 F crimes. On the other hand, there is no basic information on the same topic in host countries in which the UNHCR is mandated to implement the RSD process.[107] What we know as of today is that there are 10 countries out of 193 UN member states[108] sharing this information. This considerably small number of states indicates that there is a need for more research and stable data proving the states' implementation of the abovementioned information sharing practices in order to assert, whether or not there is a concordant state practice which will alter the implementation of Article 1 F in a way to prosecute excluded persons. Although I argue that there is an emerging practice in this regard, accepting that there is a "subsequent practice" within the meaning of Article 31 (3) b of the VCLT to prosecute excluded persons is not a very viable conclusion. Nevertheless, taking into account the drawbacks described in the *travaux préparatoires* of the exclusion provision, developments in the field of international criminal law, and the states' increasing attention to the post-exclusion phase, this emerging practice is likely to be accepted as a "subsequent agreement or practice" in the future.

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[105] *Report on the War Crimes Units, supra* note 99.

[106] Also, "[a]ccording to information provided by the ZBKV in Germany one of its responsibilities also includes the exchange of information with the Federal Office for Migration and Refugees ("Federal Office"), though no war crimes unit or specific procedures were in place in the Federal Office at the time of writing. Accordingly, cooperation between the ZBKV and the Federal Office only takes place on a case by case basis." *Report on the War Crimes Units, supra* note 99.

[107] Simeon, "The Application and Interpretation of International Humanitarian Law", *supra* note 31 at 82.

[108] "Growth in United Nations membership, 1945-present" UN (3 August 2015), online <www.un.org/en/members/growth.shtml >

The last analysis for the interpretation of the treaties will be from the perspective of the "relevant rules of international law". Article 31 (3) c of the VCLT refers to the "relevant rules of international law" as another requirement for the interpretation of a treaty.[109] This implies that treaties cannot be considered in a "legal vacuum" and have "to be interpreted within the wider background of international law."[110] The ILC, in its Fragmentation Law report, mentioned that customary international law and general principles of law can be relevant to the interpretation of a treaty when, among others "the treaty is silent on the applicable law and it is necessary for the interpreter, to look for rules developed in another part of international law to resolve the point."[111] This is very similar to the "living instrument" approach or dynamic approach to treaty interpretation whereby treaties are to be interpreted "in the light of present day conditions".[112] This approach was introduced by the European Court of Human Rights (ECHR) in *Tyrer* and extended to the 1951 Refugee Convention by the House of Lords.[113] Likewise, the International Court of Justice (ICJ) in its Advisory Opinion on Namibia asserted that interpretation of treaties

> "cannot remain unaffected by the subsequent developments of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation."[114]

Similarly, the Institute of International Law, in its 1975 Resolution on Intertemporal Problems in Public International Law[115], noted that "[a]ny interpretation of a treaty must take into account all relevant rules of international law which apply between the Parties at the time

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[109] *Singer supra* note 93.
[110] *Singer supra* note 93.
[111] International Law Commission (ILC), 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/61/10 (ILC Fragmentation Report, Summary Conclusions) para 20.
[112] *Zimmermann supr*a note 27 at 103; *Tyrer v. United Kingdom* (1979-1980) 2 EHRR 1, para. 31.
[113]"House of Lords has recognized the 1951 Convention as a living instrument 'in the sense that while its meaning does not change over time its application will." *Zimmermann supr*a note 27 at 103 footnote 227.
[114] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276,* Advisory Opinion, [1996] ICJ Rep 4 at 21.
[115] *Singer supra* note 93.

of application."[116] In line with this understanding, the obligations of states arising under other international instruments must be considered in interpreting the exclusion provision.

In the *North Sea Continental Shelf* case, Judge Ammoun stated that it was ''imperative in the present case to interpret [the treaty] in the light of the formula adopted in the other three [related] conventions, in accordance with the method of integrating the four conventions by co-ordination."[117] In a separate opinion, Judge Mosler has mentioned that "[t]he method of interpreting a treaty by reference to another treaty, although it is sometimes contested, has rightly been admitted in the decisions of the Court [International Court of Justice]."[118] As put forward by Hathaway, this understanding is in line with Article 31 (3) of the VCTL indicating the recourse to any relevant rules of international law applicable in the relations between the parties.[119]

In fact, "contemplating an interpretation of the 1951 Convention in an isolated manner detached from any normative evolution outside refugee law" would conflict with the object and purpose of the 1951 Refugee Convention, and "gradually render the instrument devoid of any substance by causing its inherent standards of protection to lag behind generally accepted standards."[120] In accordance with this understanding, courts from different jurisdictions have interpreted the 1951 Refugee Convention in a view of international law obligations arising under other treaties and instruments.[121]These obligations, which will be discussed under Chapter II in details, are related to the prosecution of excluded persons. On the other hand, the

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[116] Institut de Driot International, 'Resolution Adopted by the Institute of International Law at Wiesbaden on the Intertemporal Problems in Public International Law' (1975) 399 Yearbook of the Institute of International Law para 4.
[117] *Hathaway supra* note 48at 66.*North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3 at 125 (Separate Opinion of Judge Ammoun).
[118] *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization (IMCO)*, [1960] ICJ Rep 73, at 126 (Separate Opinion of Judge Mosler).
[119] *Hathaway supra* note 48at 66.
[120] *Zimmermann supr*a note 27 at 609.
[121] "[I]ncluding the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the ICCPR, the CEDAW, the UDHR, the Draft Programme of Action of the United Nation's International Conference on Population and Development, the UNHCR's Guidelines on Persecution, the UNHCR ExCom Conclusions, the 1996 Joint Position of the Council of Europe, and under customary international law." *Zimmermann supr*a note 27 at 106.

1951 Refugee Convention's core purpose is to "ensure that the physical security, legal protection needs and human dignity of refugees receive the necessary attention of international community."[122] Taking into account the core purposes of the 1951 Refugee Convention, the exclusion provision should be put in appropriate balance between the exemptive rationales of exclusion and the broader humanitarian aims of refugee protection.[123]

2.3. Preliminary Results

In conclusion, it is clear from the context of the 1951 Refugee Convention that its overall purpose is to provide protection to refugees rather than focusing on preventing impunity for perpetrators of serious international crimes. However, the 1951 Refugee Convention was drafted more than 60 years ago. It was the second binding human rights treaty prepared by the UN and has come into force more than two decades before the Human Rights Covenants.[124] Considering this historical perspective, the 1951 Refugee Convention should be interpreted in a way that reconciles it with its contemporary international legal context.[125] As to Article 1 F, since its promulgation, important developments have occurred in the field of international criminal law. In the light of a "living instrument" approach and "interactive understanding of treaty interpretation", it is possible to interpret the exclusion provision in a way to preventing impunity for perpetrators of serious international crimes. Indeed, this understanding would be in line with the *travaux préparatoires* of Article 1 F considering that the second objective of the article was put forward as preventing impunity from justice. Some scholars purport that when interpreting the exclusion provision by reference to the VCLT, it is not possible to identify an international legal obligation to

[122] *Nyinah supra* note 30 at 299.
[123] *Nyinah supra* note 30 at 299.
[124] *Hathaway supra* note 48 at 64.
[125] *Hathaway supra* note 48 at 64.

prosecute acts and crimes relevant to the exclusion provision. [126] Considering the subsequent agreement and practice part of Article 31 (3) of the VCLT, this understanding is not inherent and open to change. Although the subsequent agreement or practice is not established yet, there is an emerging practice among states to initiate criminal investigations against excluded persons and keep the information flow between their immigration authorities' and the prosecution offices about the profile of the excluded persons.

On the other hand, the UNHCR is not mandated to act on excluded persons. However, this fact is also contentious considering the UN Agency's evolving functions and shifting responsibilities in certain states. In line with Article 31 (3) c of the VCLT, the 1951 Refugee Convention must be interpreted by taking into account all relevant rules of international law applicable to the Parties. That is to say, if there is an international obligation to prosecute offenders of extraterritorial international crimes for a state where the UNHCR takes the state-substitute role, this obligation is valid for the UNHCR as well. It is an undisputed fact that the UNHCR cannot initiate any criminal investigation against excluded persons, as it does not have a competence to do so. However, it can cooperate with the host states to facilitate the prosecution of excluded persons, which might be considered its emerging duty according to Article 31 (3) c of the VCLT.

Also, having information about the possible perpetrators of serious international crimes but not taking any action on the basis of not being mandated should not be considered as interpreting the 1951 Refugee Convention in "good faith". The General Assembly adopted a Resolution recalling that "states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible" for the gross violations of international human rights law and serious violations of international

[126] *Larseaus supra* note 70 at 72.

humanitarian law and constituting crimes under international law. [127] In the UN system, in which combatting impunity is of great importance, one of its institutions not taking action against it creates a dichotomous situation. Nevertheless, the UNHCR may have some valid concerns in assisting the host states in eradicating impunity, which will be discussed under Chapter III. Under this Chapter, I limited my arguments to evaluating the UNHCR's emerging duties in parallel with its shifting responsibilities and its evolving functions.

3. Chapter II: Impunity Problem

Under Chapter I, the mandate of the UNHCR, the organization's functions and the rules for interpretation of treaties are discussed. Although I argued that the UNHCR might have duties in relation to its adjudication role in the exclusion process, how the impunity problem occurs was not evaluated. Under this chapter, first I will assess how the impunity problem emerges due to the exclusion process. Then the universality principle and the principle of *aut dedere aut judicare* will be discussed in relation to Article 1 F crimes. Lastly, I will analyze the question of as to whether there is any responsibility of the UNHCR in host states' international obligations to suppress serious international crimes.

Pursuant to Article 33 (1)[128] of the 1951 Refugee Convention, states are obliged not to expel refugees to the frontiers of territories where their life or freedom would be threatened. The principle of *non-refoulement* is one of the fundamental safeguards for refugees under

[127] Principle 4 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law*, GA Res 60/147, UNGA Doc A/RES/60/147, Doc 60th Session, 16 December 2005. [Basic Principles and Guidelines on the Right to a Remedy*]*

[128] Article 33 reads as follows "1. 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. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

international refugee law.[129] However, the principle can only be applicable as long as a person is recognized a refugee. In other words, persons excluded from international protection are not considered refugees[130] and not considered to benefit from this protection umbrella. On the other hand, the implementation of the exclusion provision will usually result in the expulsion or extradition of excluded persons from host states.[131] This is because there will be no legal basis for them to stay in a country foreign to them and indeed, being possible perpetrators of past crimes, they might create security problems in the host state.

Nevertheless, as international human rights have evolved since 1951, even if the 1951 Refugee Convention does not provide protection for excluded persons during which a state is deporting an excluded individual, other human rights guarantees can be applicable.[132] A number of human rights treaties' provisions, most notably Article 3 of the European Convention on Human Rights[133], Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[134] provide safeguards for excluded persons. As an example, in the case of *Chahal v. United Kingdom*, the ECHR ruled that an alleged terrorist could not be expelled to India where there was a real risk of his right under Article 3 of the Convention to be free from torture, inhuman or degrading treatment or punishment would be violated.[135]

As a result, states are finding that they are sheltering persons who have allegedly committed crimes outside of their territories but at the same time, cannot be returned to the

[129] Guy S. Goodwin-Gill, "Chapter 9- Crime In International Law: Obligations Erga Omnes And The Duty To Prosecute" in Guy S. Goodwin-Gill& Stefan Talmon eds. The Reality of International Law (Clarendon Press, 1999) 201. [Goodwin-Gill]
[130] Joan Fitzpatrick, "The Post-Exclusion Phase: Extradition, Prosecution and Expulsion" (2000) 12 Int'l J. Refugee L. at 288. [Fitzpatrick]
[131] *Larseaus supra* note 70 at 74.
[132] *Gilbert&Rüsch* supra note 68 at 1099.
[133] Pursuant to Article 3 of the European Convention on Human Rights, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[134] Article 3 of the CAT explicitly prohibits to return or extradite a person to another state where the individual would suffer torture as defined in Article. '
[135] *Chahal v. UK*, Appl. no. 70/1995/576/662, ECtHR, Grand Chamber, 15 November 1996.

locus delicti.[136] This situation creates a "limbo" for excluded persons since they are neither under refugee protection nor being deported.[137] Hence, if not prosecuted by their host countries or extradited to a third country in which prosecution is possible, this situation will create an impunity zone for excluded persons. As put forward by Gilbert and Rüsch, it is clear that some asylum-seekers will have committed crimes before their entry to other countries but "being accorded international protection, either under international refugee law or international human rights law, cannot equate to impunity."[138] Hence, in the following section the meaning of impunity will be discussed in light of the situation excluded persons face during the post-exclusion phase.

3.1.What does impunity mean?

According to the UN ECOSOC Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity[139] (Principles to Combat Impunity), impunity refers to

> "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

According to the first principle of the document, impunity occurs when states fail in meeting their obligations to investigate violations and taking appropriate measures in respect of perpetrators in the area of justice by ensuring that suspects are prosecuted, tried and duly punished.[140] In a broader sense, a culture of impunity implies "the political acceptability of

[136] *Gilbert&Rüsch* supra note 68.
[137] Joke Reijven & Joris van Wijk, "Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law" (2014) 26:12 Int'l J. Refugee L at 249. [Reijven&Wijk-Caught in Limbo]
[138] *Gilbert&Rüsch* supra note 68 at 1114.
[139] Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UNECOSOC, 64th session, Supp No.1, UN Doc E/CN.4/2005/102/Add.1
[140] *Ibid.*

massive human rights abuses."[141] It is an obstacle to achieve post-conflict peace building and stability [142] and contributes to continued violence and stability.[143] Presumably, that is the reason why the UN Security Council has affirmed that '[…] ending impunity' is essential to preventing human rights abuses[144].

Considering the serious consequences of the culture of impunity and the UN's efforts to combat against it, simply excluding alleged offenders of serious international crimes from international refugee protection will not be sufficient. States might have a duty to prosecute such persons before their domestic courts or to refer them to international courts. [145] There are three suggested approaches in combatting impunity in the context pertaining to excluded individuals. First, states may prosecute excluded individuals according to the principle of universality jurisdiction. Second, excluded persons might be extradited to a third state where a fair trial and prosecution is possible. Third, states may refer them to *ad hoc* international criminal tribunals or the ICC.[146]

The last two options are less viable then the first one. This is because requests for extradition of excluded persons are rarely made; but, even if there were such requests, barriers such as the absence of a bilateral or multilateral extradition treaty, concerns of due process and the human rights record of the country of origin might prevent extradition.[147] Secondly, transfer of excluded persons to the ICTY, ICTR and the ICC is not always possible. This is because the ICTY and ICTR are closing down[148] while the ICC has a limited capacity.[149]

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[141] Payam Akhavan, "Beyond impunity: Can International Criminal Justice Prevent Future Atrocities?" 96:7 (2001) Am. J. Int'l L. 8. [Akhavan]
[142] *Akhavan supra* note 141 at 28.
[143] *Akhavan supra* note 141 at 30.
[144] Nicolas Michel&Katherine Del Mar, *In the essay of Transitional Justice* in Andrew Clapham& Paola Gaeta eds. *The Oxford Handbook of International Law in Armed Conflic*t (Oxford University Press, 2014)
[145] Lawyers Committee on Human Rights, "Safeguarding the Rights of Refugees Under the Exclusion Clauses: Summary Findigs of the Project and a Lawyers Committee for Human Rights Perspective", (2000) 12 Int'l J. Refugee L Supplementary Issue at 322. [Lawyers Committee on Human Rights]
[146] *Lawyers Committee on Human Rights supra* note 145 at 322.
[147] *Reijven&Wijk-Caught in Limbo supra* note 137 at 255.
[148] On the other hand, "…the Security Council assert not only an obligation on the part of UN Member States to surrender indicted suspects but also the primacy of the tribunals' jurisdiction." *Fitzpatrick supra note* 130 at 288.

Also, not all host countries have ratified the Rome Statute. Therefore, host states' exercising universal jurisdiction over alleged perpetrators of international crimes is the most feasible way to prevent impunity.

The principle of *aut dedere aut judicare* (principle to extradite or prosecute) is particularly of relevance for the treatment of excluded persons who can not be extradited to a country where alleged crimes are committed due to states' human rights obligations arising under different human rights' treaties.[150] The principle guarantees that suspects are brought to justice "wherever they are found, either before the courts of the custodial state or that of another state requesting extradition."[151] In such situations, the assertion of jurisdiction to prosecute is one part of one response to this phenomenon.[152]

3.2. Principle to extradite or prosecute and the Principle of Universality

The principle obliges a state which has the custody of a person who has committed a "crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him prosecuted before its own courts."[153] The question of as to whether there is a general duty incumbent on all states to extradite or prosecute alleged offenders of serious international crimes is not easy to answer and depends on jurisdictional competency provisions of the international treaties and customary international law.[154]

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[149] Other reasons are that tribunals generally require a high threshold of evidence and complementarity principle of the Roma Statute. *Reijven&Wijk-Caught in Limbo supra* note 137 at 255.
[150] *Larseaus supra* note 70 at 75.
[151] Payam Akhavan, "Whither National Courts? The Rome Statute's Missing Half", 8 (2010) JICJ 1154. [Akhavan-Whither National Courts]
[152] *Gilbert&Rüsch* supra note 68 at 1114.
[153] M.C. Bassiouni and E.M.Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht-Boston-London: Martinus Nijhoff, 1995), at 3. [Bassiouni&Wise]
[154] Customary international law status of the priniciple is highly contentious. Robert Cryer, *Prosecuting International Crimes Selectivity and International Criminal Law Regime* (New York: Cambridge University Press, 2011) at 101. [Cryer]

International law generally provides for duties that "fall upon the *locus delicti* or the state of nationality of offender than fall upon states with less of a link to crimes."[155] Therefore, the principle of universal jurisdiction[156] creates an exception to the principles of (active) nationality and territoriality.[157] As such, under different international treaties, states are obliged or authorized to exercise their criminal jurisdictions over persons charged with international crimes.[158] Separately, some rules oblige states to "enact the necessary national legislation to provide for criminal jurisdiction."[159]

Under the principle of universality, any state can exercise its criminal jurisdiction over crimes committed abroad, by foreigners and against foreigners.[160] In other words, it empowers domestic courts of a state to try crimes that have no connection to that state, based on obligation *erga omnes* deriving from the exceptional gravity of the core international crimes.[161] Some excludable crimes are so grave under international law, particularly the ones enumerated under Article 1 F (a) including genocide, war crimes and crimes against humanity, that host states might be able to investigate, try and punish their perpetrators on the basis of the principle of universal jurisdiction.[162] According to the principle of conditional universal jurisdiction (*forum deprehensionis*)[163] only the state where the accused is in custody may exercise its jurisdiction over him or her. As the excluded persons are likely to be present in the country where exclusion decisions are made, conditional universal jurisdiction is of relevance for the treatment of excluded individuals. However, the question of whether exercising universal jurisdiction over excluded individuals is an obligation or has a permissive

[155] *Ibid* at 101.; *Larseaus supra* note 70 at 78.
[156] The principle was developed in the 17th and 18th centuries with regard to crimes over piracy. *Gilbert&Rüsch* supra note 68 at 1101.
[157] *Larseaus supra* note 70 at 78.
[158] Antonio Cassese&Paola Gaeta, *Cassese's International Criminal Law* (Oxford: Oxford University Press, 2013) 281. [Cassese& Gaeta]
[159] *Cassese& Gaeta supra* note 158 at 281.
[160] *Cassese& Gaeta supra* note 158 at 281.
[161] Akhavan, "Whither National Courts", *supra* note 151 at 1252.
[162] *Lawyers Committee on Human Rights supra* note 145 at 322.
[163] There are two different types the universality principle; the narrow notion is conditional universal jurisdcition while the broad Notion is absolute universal jurisdiction. *Cassese& Gaeta supra* note 158 at 278.

nature for host states depends on treaty law and customary law status of the principle. Hence, in the following sections treaty law and customary international law penalizing Article 1 F crimes will be assessed. In doing so, the focal point will be the question of as to whether there are any obligations incumbent upon host states to extradite or prosecute alleged offenders of the Article 1 F crimes.

3.2.1. Jurisdiction Arising from Treaty- Obligation under Treaty Law

3.2.1.1. Article 1 F (a)- War Crimes

Under Article 1 F (a) of the 1951 Refugee Convention, serious suspicion of commission of war crimes leads to exclusion from international refugee protection. Thus, the first legal instrument to be examined with regard to the principle of *aut dedere aut judicare* is grave breaches provisions of the 1949 Geneva Conventions and Additional Protocol I. Pursuant to Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention,

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

Considering the wordings of the provisions, grave breaches of the 1949 Geneva Conventions give rise to mandatory universal jurisdiction with regard to crimes committed in the context of international armed conflict (IAC).[164] Since there are no similar references to grave breaches in Additional Protocol II and no clear state practice suggesting otherwise, it is not likely to support the idea that states have an obligation to prosecute war crimes committed

[164] *Gilbert&Rüsch* supra note 68 at 1102.

in a non-international armed conflict (NIAC).[165] Indeed, in light of the ICTY's decision in *Tadic*[166], grave breaches committed during NIACs do not give rise to mandatory universal jurisdiction;[167] but rather states have discretion to prosecute alleged war criminals.[168] In addition, only the war crimes amounting to grave breaches in the context of IACs fall under the scope of the mandatory universal jurisdiction.[169] Although states can still try other war crimes which do not amount to grave breaches, the jurisdiction over these crimes is not mandatory but instead permissive.[170]

3.2.1.2.Article 1 F (a)- A Crime against Humanity

The second crime enumerated under Article 1 F (a) is a crime against humanity. As per the applicability of the principle of *aut dedere aut judicare*, since there is no international treaty directly regulating a crime against humanity, the conclusion will be that there is "no treaty-based duty to prosecute crimes against humanity *per se*."[171]

On the other hand, some international instruments prohibiting specific offences also encompass the underlying offences of crimes against humanity.[172] For instance, according to Article 5 (2)[173] of the CAT, state parties having alleged offenders on their territories shall

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[165] *Larseaus supra* note 70 at 80.

[166] As per the ICTY Appeals Chamber in Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadic; "The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts at least not the mandatory universal jurisdiction involved in the grave breaches system."*Prosecutor v. Dusko Tadic A/K/A* "Dule", IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995) at 80 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber)

[167] Akhavan, "Whither National Courts", *supra* note 151 at 1255.

[168] *Gilbert&Rüsch* supra note 68 at 1255.

[169] Akhavan, "Whither National Courts" *supra* note 151 at 1255.

[170] *Gilbert&Rüsch* supra note 68 at 1103.

[171] M. Cherif Bassiouni, "Crimes Against Humanity: The Need for a Specialized Convention" (1994) 31 CJTL 457.

[172] Akhavan, "Whither National Courts" *supra* note 151 at 1255.

[173] Article 5 (2) reads as follows; 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

extradite or prosecute them regardless of the place where the crime was committed in addition to jurisdiction based on the territorial and active nationality principles.[174] Indeed, the Working Group of the ILC concluded that "while extradition was an option to states to fulfill their treaty requirements, the obligation was to prosecute- *aut judicare, aut dedere-"*[175] Similarly, Article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance include the principle of *aut dedere aut judicare.* However, as mentioned earlier, both treaties have provisions dealing with limited prohibited acts[176] of crimes against humanity within the meaning of Article 7 of the Rome Statute, namely torture and enforced disappearance.

The French *Cour de Cassation* ruled in the Barbie case[177] that there is universal jurisdiction with regard to crimes against humanity. The Court held that,

> "[By] reason of their nature, the crimes against humanity…do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign."

Yet, there is no consensus in legal literature as to whether "universal jurisdiction exists in relation to crimes against humanity, as a matter of customary international law."[178]

3.2.1.3. Article 1 F (a)- A Crime against Peace

The third excludable act stipulated under Article 1 F (a) is a crime against peace. Pursuant to Article 6 of the Charter of International Military Tribunal, a crime against peace was defined as planning, preparing, initiating or waging of a war of aggression, or a war in violation of international treaties or participating in a common plan or conspiracy for the

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[174] Akhavan, "Whither National Courts", *supra* note 151 at 1255. On the other hand, passive nationality principle depends on the state.

[175] International Law Commission, *Report of the Working Group on the Obligation to extradite or prosecute (aut dedere aut judicare),* UNILC Doc, 65th session, UN Doc. A/68/10, Annex B. In doing so, the working group relied on the ICJ judgement in Belgium v. Senegal that was dealing with Article 7 of the UN Convention against Torture. *Gilbert&Rüsch* supra note 68 at 1108.

[176] Akhavan, "Whither National Courts" *supra* note 151 at 1255

[177] *Federation Nationale de Deportes et Internes Resistants et Patriotes and others v. Barbie*, Criminal Chamber, 6 October 1983 (1984) International Law Reports, Vol. 78, 1988.

[178] *Larseaus supra* note 70 at 81.

accomplishment of war crimes or crimes against humanity. As such, the waging of a war of aggression constitutes the core of crimes against peace.[179] Despite the fact that the crime is defined in early years of international criminal law, there has been no international criminal trial for the alleged crime.[180] As per the ICC era, the definition for the crime of aggression has been reached in 2010 during the ICC Review Conference in Kampala, Uganda. Yet, the ICC does not have a competence over the crime of aggression until 1 January 2017 at the earliest.[181] That is to say, to date, there is no clear jurisprudence about the crimes against peace or the crime of aggression. Therefore, there is no mandatory or permissive universal jurisdiction and; hence, no obligation to prosecute or extradite upon the host states with regard to crimes against peace.[182]

Indeed, in terms of the exclusion process, a crime against peace is one of the less applicable acts enumerated under Article 1 F (a). It is because Article 8 *bis* of the Rome Statute[183] regulating crimes against aggression restricts criminal liability to individuals who are in a position "effectively to exercise control over or to direct the political or military action of a state." In other words, the crime of aggression is a leadership crime[184] and can only be committed by high officials. Therefore, in reality, it is very rare to encounter an offender who might have committed crimes against peace and; hence, be subject to the exclusion process in a host state.

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[179] Don E. Scheid, "Crimes against peace"in *Encyclopedia of Global Justice,* by Deen K. Chatterjee (Springer: 2011) at 216-220
[180] *Cassese& Gaeta supra* note 158 at 135.
[181] Gilbert, *supra* note 73 at 166.
[182] *Larseaus supra* note 70 at 82.
[183] According to Article 8 (1) bis of the Rome Statute, … "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. *Rome Statute of the International Criminal Court,* (17 July 1998), UNTS 2187 at 3.
[184] *Cassese& Gaeta supra* note 158 at 140.

3.2.1.4. Article 1 F (b)-A Serious non-political crime

Under Article 1 F (b), a serious non-political crime is one of the excludable acts. In the context of Article 1 F (b), serious criminality refers to violence against individuals including homicide, rape, child molesting, wounding, arson, drugs trafficking and armed robbery.[185] Seriousness of the crime was added to ensure that "anomalous extradition practices…would not also deprive minor offenders of deserved protection from persecution."[186] As to the non-political element of the provision, when other motives including personal reasons or gain are the dominant feature in committing a serious crime, such an act can be considered "non-political".[187] Article 1 F (b) has a nature of encompassing both common crimes and crimes of international concern.[188]

When there is no link between the crime and its alleged political objective or "when the act in question is disproportionate to the alleged political objective", the conclusion is that non-political motives are predominant in the act.[189] Though, this is the most challenging element of the provision given the further complexities that have emerged after the 1951

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[185] Atle Grahl-Madsen, *The Status of Refugees in International Law: Refugee character* (Leyden: A.W. Sijthoff, 1966-) *at 297;* Hathaway&Foster, *supra* note 27 at 224*;* Goodwin-Gill&McAdam, *supra* note 86 at *104–106;* Hathaway&Foster, *supra* note 27 at 349.

[186] *Fitzpatrick supra note* 130.

[187] *UNHCR- Background Note on the Application of the Exclusion supra* note 21 at 15.

[188] *Fitzpatrick supra note* 130 at 277.

[189] *UNHCR- Background Note on the Application of the Exclusion supra* note 21 at 15.
"This approach is reflected in the jurisprudence of many States. In Aguirre-Aguirre v. Immigration and Naturalization Service (INS), 119 S.Ct. 1439 (1999), the US Supreme Court endorsed the approach taken in the earlier case of McMullen v. INS, 788 F. 2d 591 (9th Circuit 1986), which held that a "serious non-political crime" is a crime not committed out of "genuine political motives", not directed toward the "modification of the political organization or ... structure of the state", with no direct "causal link between the crime committed and its alleged political purpose and object" or where the act is disproportionate to the objective. In T. v. Secretary of State for the Home Department, [1996] Imm AR 443, the UK House of Lords held that a crime is political for the purposes of Article 1F(b) if it is committed for a political purpose (i.e. overthrow of government or inducing change in government policy) and there is a sufficiently close and direct link between the crime and the alleged purpose. In determining the latter, consideration must be given to whether the means employed were directed towards a military/government target and whether it was likely to involve indiscriminate killing or injury to members of the public. In Wagner v. Federal Prosecutor and the Federal Justice and Police Department, the Swiss Federal Tribunal ruled that "a common crime or offence constitutes a relative political offence if the act, given the circumstances and in particular the motivation and goals of the perpetrator, has a predominantly political character". This is presumed if the offence "was carried out in the context of a power struggle within the State or if it was carried out to remove someone from under the power of a State suppressing all opposition. There must be a close, direct and clear link between such acts and their intended goal". *UNHCR- Background Note on the Application of the Exclusion supra* note 21 at footnote 31.

developments[190] in international law including the criminalization of terrorism. With respect to terrorist acts, the alleged political objective will always fail to be proportionate considering their egregious nature.[191] Similarly, in *T. v. Secretary of State for the Home Department*, [1996] Imm AR 443, the UK House of Lords stated:

> "We too think it is inappropriate to characterise indiscriminate bombings which lead to the death of innocent people as political crimes. Our reason is not that all terrorist acts fall outside the protection of the Convention. It is that it cannot be properly said that these particular offences qualify as political. In our judgement, the airport bombing [at issue in the case] in particular was an atrocious act, grossly out of proportion to any genuine political objective. There was simply no sufficiently close or direct causal link between it and the appellant's alleged political purpose. It offends common sense to suppose that FIS's [Front Islamique du Salut] cause of supplanting the government could be directly advanced by such an offence."[192]

Therefore, in order to be considered political, the political objective should be consistent with human rights and fundamental freedoms.[193] With regard to the principle of *aut dedere aut judicare* and universal jurisdiction, "there are no generally applicable rules to utilize the traditional heads of jurisdiction in a uniform fashion."[194] On the other hand, some serious non-political crimes such as drug offences and terrorist assaults are regulated by multilateral conventions with binding extradition provisions.[195] Therefore, excluded individuals on this basis might be subject to extradition. Having said this, practice relating to common crimes as described in Article 1F (b) varies "depending on the terms of relevant

[190] *Fitzpatrick supra note* 130 at 276.
[191] *UNHCR- Background Note on the Application of the Exclusion supra* note 21 at 15.
[192] *T v. Secretary of State for the Home Department,* House of Lords [1996] 2 All ER 865, [1996] 2 WLR 766.
[193] A political goal which breaches fundamental human rights cannot form a justification. This is consistent with provisions of human rights instruments specifying that their terms shall not be interpreted as implying the right to engage in activities aimed at the destruction of the human rights and fundamental freedoms of others. *UNHCR- Background Note on the Application of the Exclusion supra* note 21 at 16.
[194] *Gilbert&Rüsch* supra note 68 at 1106.
[195] For example, International Convention Against the Taking of Hostages, 1316 U.N.T.S. 205 (1979), *Fitzpatrick supra note* 130 at 277.

extradition agreements and national law on cooperation in law enforcement."[196] Hence, for most extraterritorial common crimes, the host country will lack jurisdiction to prosecute.[197]

When it comes to serious international crimes, such as genocide, although states are not barred of exercising their jurisdictions over the crime of genocide on the basis of the principle of universality, the 1948 Genocide Convention obliges "only the territorial state to prosecute the alleged perpetrators of acts of genocide."[198] The ICJ ruled in the *Reservations Case* that all states have jurisdiction to prosecute *génocidaires*.[199] The question of as to whether the principle of *aut dedere aut judicare* has customary international law status with regard to the crime of genocide will be discussed under Section 3.2.2. Jurisdiction Arising from Customary International Law.

Other than genocide, there are twelve UN treaties criminalizing acts that can fall under the scope of Article 1 F (b). These treaties are the CAT; International Convention for the Suppression of the Financing of Terrorism; Convention for the Suppression of the Unlawful Seizure of Aircraft (Hague Convention); International Convention for the Suppression of Terrorist Bombing; the UN Convention Against Transnational Organized Crime (Trafficking Protocol); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; the 1963 Tokyo Convention; Montreal Convention of 1971 on Unlawful Acts Against the Safety of Aircraft; the New York Convention on Offences Against Internationally Protected Persons; International Convention Against the Taking of Hostages; Convention on the Physical Protection of Nuclear Materials; the UN Convention Against Transnational Organized Crime (Trafficking Protocol). As per the principle of *aut dedere aut judicare,* other

[196] *Fitzpatrick supra note* 130 at 281.
[197] *Fitzpatrick supra note* 130 at 277.
[198] Article 6 of the Genocide Convention reads as follows, "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." *Convention on the Prevention and Punishment of the Crime of Genocide,* (9 December 1948), UNTS 78 at 277. Please also see Cassese&Gaeta, *supra* 158 at 286.
[199] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* ICJ Reports (2007), at 442 and 449.

than the Tokyo Convention, all these treaties establish that in case an alleged offender is not extradited for the crime, "then s/he will be considered for prosecution in the host state."[200]

To sum up, as there is no serious non-political crime under international law *per se,* the international crimes such as act of torture within the meaning of the CAT or terrorist acts can fall under this category. Particularly, with regard to act of torture, jurisdictional competency of a host state should be solved in accordance with Article 5 of the CAT which provides for the principle of *aut dedere aut judicare.* Since the acts of terrorism are also relevant to the acts contrary to the purposes and principles of the UN within the meaning of Article 1 F (c), this issue will be discussed in the following section.

3.2.1.5. Article 1 F (c)- Acts contrary to the purposes and principles of the UN

According to Article 1 F (c) of the 1951 Refugee Convention being guilty of acts contrary to the purposes and principles of the UN amount to exclusion from international refugee protection. The principles and purposes of the UN are set out in Article 1 and 2 of the UN Charter.[201] The purposes of the UN include the maintenance of international peace and security, the development of friendly relations among nations, international cooperation, promoting respect for human rights and "principles such as the sovereign equality of all states fulfillment of obligations under the Charter in good faith and the settling of disputes by peaceful means."[202]

Due to the ambiguity of these statements, in interpreting Article 1 F (c), practical content of the declared purposes and principles of the UN should be determined according to the developments in international law including, multilateral conventions adopted under the auspices of the UN General Assembly and UN Security Council resolutions.[203]

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[200] *Gilbert&Rüsch* supra note 68 at 1106.
[201] *Zimmermann supr*a note 27 at 603.
[202] *Singer supra* note 93 at 1077.
[203] *Singer supra* note 93 at 1078; Goodwin-Gill&McAdam, *supra* note at 186; *UNHCR- Background Note on the Application of the Exclusion supra* note 21 at 17.

As an example, terrorism is defined as a violation of the purposes and principles of the United Nations in the various statements and resolutions of the UN General Assembly and of the Security Council, which also urge states to take measures to exclude persons suspected of terrorism from refugee status.[204] Despite of this calling by the UN, none of the UN resolutions or statements define what terrorism means and; hence, it is not clear what constitutes terrorist act within the meaning of the acts contrary to the principles and purposes of the UN.[205] This part is also contentious under international criminal law as there is no internationally accepted definition of terrorism.[206] On the other hand, in the absence of a universally agreed definition for terrorism relying on domestic definitions for terrorism can result in breach of restrictive and cautious interpretation.[207]

The solution might be the use of the international or regional anti-terrorism conventions (e.g. the 1999 Convention for the Suppression of the Financing of Terrorism[208], the European Convention on the Suppression of Terrorism[209]) defining terrorist acts to establish a "list of elements' forming the commonality"[210] of these acts. This sort of a list can be of a guidance to determine which acts may constitute terrorism under 1 F (c) and; "thus, be contrary to the purposes and principles of the United Nations."[211] With regard to the universal

[204] Please see UNGA, *Measures to Eliminate International Terrorism,* GA Res, 84th Session, 9 December 1994, UNGA Doc A/RES/49/60; UN SC Resolution 1269 (1999), UNSC Res, 4053rd meeting, 19 October 1999, S/RES/1269; UN SC Resolution 1373 (2001), UNSC Res, 4385th meeting, 28 September 2001, S/RES/1373 (2001) In the European context, the Council of the European Union has pronounced that '[a]ppropriate measures shall be taken in accordance with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts.' Council Common Position of 27 December 2001 on combating terrorism (2001/930/CFSP). Article 16.

[205] *Singer supra* note 93 at 1078.

[206] This even though there exists a comprehensive draft convention on Terrorism.

[207] Per example, "*Al-Sirri and dd (Afghanistan)* (n 7) para 25(1) relying on the cjeu in Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B & D* [2010] ecr 1–000." Gilbert, *supra* note 73 at 168.

[208] *International Convention for the Suppression of the Financing of Terrorism,* 9 December 1999, UNTS 197 (entered into force on 10 April 2002).

[209] *The European Convention on the Suppression of Terrorism*, 27 January 1977, ETS-90

[210] *Larseaus supra* note 70 at 84.

[211] *Larseaus supra* note 70 at 84.

jurisdiction, although such a list can define acts contrary to the purposes and principles of the UN, it will not bind states in terms of the principle of *aut dedere aut judicare.*

3.2.2. Jurisdiction Arising from Customary International Law

According to Article 38 of the Statute of the ICJ, international custom is one of the sources of international law together with treaty law and general principles of law. Although there is no hierarchy between these sources, as treaty law authoritatively binds state parties; and hence, creates legal obligations upon them, it might be most clearly obeying one. On the other hand, customary international law has the benefit of binding all states regardless of what treaties they have signed.[212] Therefore, in cases where there is no treaty law provision with regard to the principle of *aut dedere aut judicare,* host states may still rely on customary international law.[213]

In order to ascertain the existence of custom with regard to the principle of *aut dedere aut judicare* for crimes of international concern, elucidating what constitutes an international custom is a priority. In this regard, for a norm- a provision or a prohibition- to be considered binding within international law, there must be a general practice "evidenced by long term, widespread compliance by many states" and *opinio juris* which refers to states' belief that compliance with a standard is not merely desired but required by international law.[214] *Opinio juris* both comprises of what states refrain from doing and what they say.[215]

As put forward by Akhavan, the focus of the customary international status of *aut dedere aut judicare* should be directed to crimes against humanity and genocide as "such an obligation can not be derived from the existing treaty law."[216] Article 53 of the VCLT, defines a *jus cogens* norm as being "accepted and recognized by the international community of states

[212] *Larseaus supra* note 70 at 84.
[213] *Gilbert&Rüsch* supra note 68 at 1103.
[214] Connie de la Vega. "Customary International Law" *Encyclopedia of Human Rights*, by David P. Forsythe (Oxford: New York: Oxford University Press, 2009) at 451.
[215] C. Enache-Brown and A. Fried, 'The Obligation of Aut Dedere Aut Judicare in International Law' 43 *McGill Law Journal* (1998) 627 [Enache&Fried]; *Larseaus supra* note 70 at 84.
[216] Akhavan, "Whither National Courts", *supra* note 151 at 1258.

as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[217] Based on the ICTY's decision in *Kupreskic*, it can be said that the prohibition of war crimes, crimes against humanity and genocide is generally recognized as part of the *jus cogens*.[218] On the other hand, prosecuting international crimes on the basis of the universal jurisdiction is a right rather than a duty.[219]

Some scholars argue that if a state has signed and ratified a significant number of treaties containing the *aut dedere aut judicare* formula, then that state has demonstrated through practice that *aut dedere aut judicare* is a customary norm [220] As such, "through the act of signing related international agreements" states demonstrate the belief that "*aut dedere aut judicare* is an accepted norm and that is the most effective way of preventing certain forms of conduct."[221] Similarly, Bassiouni argued that the principle of *aut dedere aut judicare* has become *jus cogens* due to the "common interest which all states have in the suppression of international offences. It is a duty owing to the international community as a whole."[222] For Bassiouni, this rationale comes from the idea that "recognizing international crimes as *jus cogens* carries with it the duty to prosecute or extradite."[223] Goodwin-Gill also refers to the

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[217] Article 53 of the VCLT.

[218] Akhavan, "Whither National Courts", *supra* note 151 at 1258.

[219] The ICTY in the Furundzja case stated that, "..one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. :::This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes." *Prosecutor v. Anto Furundzıja,* IT-95-17/1, Judgement, (10 December 1998) at 156 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber)

[220] *Enache&Fried* at 629.

[221] "This belief satisfies the requirement of *opiniojuris* when establishing customary norms. If a state accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law. By agreeing to the formula of *aut dedere autjudicare* in multiple treaties that are concerned with international offenses, a state has indicated that with respect to international offenses it believes that the best way to ensure compliance is to impose such an obligation." *Enache&Fried* at 629.

[222] Bassiouni&Wise, *supra* note 153 at 24.

[223] Bassiouni&Wise, *supra* note 153 at 65-66.

very nature of international crimes in support of its basis for an obligation *erga omnes*, to extradite or prosecute.[224] Although not legally binding, the General Assembly resolutions can arguably be indicative of "reflecting the *opinio juris* of states regarding the universal repression of the core international crimes."[225]

On the other hand, some other scholars decline the idea that the principle of *aut dedere aut judicare* has achieved the status of customary international law, since "[t]here is almost no evidence of any state practice confirming prosecution on a universal jurisdiction basis as a customary duty rather than a right."[226]

Recently, in 2014, the ILC's working group completed its work on the customary international law status of the principle of *aut dedere aut judicare; "*gaps in existing conventional regime…. the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms"[227] Subsequent to the majority's view in the ICJ in Belgium v. Senegal,[228] the Working Group rejected to conclude on a question of as to whether the principle of "*aut dedere aut judicare* had crystallized into a rule of customary international law"[229] However, the Final Report suggested that the principle of *aut dedere aut judicare* should be applicable both to Conventional crimes and war crimes in general, genocide and crimes against humanity.[230] At least, this proposition affirms the urgent need to

[224] Goodwin-Gill, *supra* note 129 at 220.
[225] Akhavan, "Whither National Courts", *supra* note 151 at 1260; Also, please see Basic Principles and Guidelines on the Right to a Remedy, *supra* note 127.
[226] Cryer, *supra* note 154 at 109.
[227] International Law Commission, *Final Report of theWorking Group on the Obligation to Extradite or Prosecute (aut dedere, aut judicare)*, UN Doc. A/CN.4/L.844, 5 June 2014. See also the Fourth Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare) of the Then Special Rapporteur, Zdzislaw Galicki, UN Doc. A/CN.4/648, 31 May 2011. See also, Bassiouni&Wise, *supra* note 152. *Gilbert&Rüsch* supra note 68 at 1103.
[228] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement [2012] ICJ Rep 2012 at 122(2)
[229] *Gilbert&Rüsch* supra note 68 at 1103.
[230] International Law Commission, *Final Report of theWorking Group on the Obligation to Extradite or Prosecute (aut dedere, aut judicare)*, UN Doc. A/CN.4/L.844, 5 June 2014.

address "jurisdictional competence of states in relation to serious crimes where the accused can not be returned to the *locus delicti*."[231]

3.2.3. The Preliminary Conclusion on the Principle of Universal Jurisdiction and the Principle of *aut dedere aut judicare*

The international jurisprudence and the UN documents (i.e. the General Assembly and Security Council) resolutions show that there are some developments in recognising the principle of *aut dedere aut judicare*[232] as customary international law for international crimes, though it still remains far from being binding and consensual. In case of accepting that the principle has started to be crystallized into a rule of customary international law, this will likely be accepted in relation to the war crimes[233], genocide and crimes against humanity. [234] Having said this, to date, it is not likely to accept "an obligation *erga omnes* of prosecuting or extraditing those responsible for violations of *jus cogens* norms" [235] due to the lack of state practice.

On the other hand, the overall picture is not that bleak when it comes to the treaty law with regard to mandatory universality principle and the principle of *aut dedere aut judicare*. There are a number of UN conventions widely ratified by states providing for the principle of *aut dedere aut judicare* and prioritizing the universal jurisdiction as a mandatory condition. The significance of these conventions for the sake of the exclusion process is that the crimes penalized under the respective conventions significantly overlaps with the acts enumerated under Article 1 F. Particularly, the 1949 Geneva Conventions and Additional Protocol I, the CAT and the Hostage Taking Convention oblige states having custody of suspects to

[231] *Gilbert&Rüsch* supra note 68 at 1108.
[232] *Fitzpatrick supra note* 130 at 286.
[233] Since grave breaches of the Geneva Conventions give rise to mandatory universal jurisdiction, war crimes which do not amount to the grave breaches fall under this category.
[234] *Gilbert&Rüsch* supra note 68 at 1103
[235] *Larseaus supra* note 70 at 91.

cooperate in an "extradition request from a competent international or national authority."[236] If the extradition is not possible due to the legal or political bars, host states are obliged to submit the case to their own legal authorities for the purpose of prosecution.[237]

On the other hand, there are a number of crimes of international concern which have a great importance for exclusion analysis but do not entail an obligation to render suspects to international or national authorities or to oblige host states to prosecute the alleged offenders. For instance, war crimes committed within the context of a NIAC do not give a rise to the mandatory *aut dedere aut judicare*. This fact is particularly significant given that most on-going armed conflicts today are considered NIACs.[238] For this paper, its importance comes with the reality that the Syrian conflict has been considered a NIAC.[239] This issue will be discussed under Chapter III in details. Similar challenge can be noticed in the Genocide Convention. The Genocide Convention does not impose an obligation on custodial states to exercise their jurisdictions over alleged suspects who are not rendered to "a competent international tribunal or to the state in which the crime was committed."[240]

On the other hand, the CAT obliges custodial states to extradite or prosecute suspects of an act of torture. Similarly, grave breaches committed within the context of an IAC must be prosecuted "as a matter of conventional and customary law."[241] The categorization of crimes under different international treaties and changing status of the principle of *aut dedere aut judicare* (either compulsory or permissive) elucidates the fact that "universal jurisdiction

[236] *Fitzpatrick supra note* 130 at 286.
[237] *Fitzpatrick supra note* 130 at 286.
[238] "The most widely prevalent type of armed conflict today is non-international in nature." Michelle Mack, "Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts" ICRC (February 2008) online <www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf >
[239] "Examples of recent non-international armed conflicts include the hostilities that broke out in northern Mali in early 2012 between armed groups and the Malian armed forces, and the fighting in Syria between armed groups and Syrian government forces." "Internal conflicts or other situations of violence – what is the difference for victims?", ICRC (10 December 2012) online <www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm >
[240] *Fitzpatrick supra note* 130 at 286.
[241] *Larseaus supra* note 70 at 92.

is limited to certain crimes in international law that are narrower than the grounds for exclusion."[242]

When it comes to the exclusion provision, what is clear is that an obligation of *aut dedere aut judicare* is applicable to (i) war crimes amounting to grave breaches within the context of an IAC under Article 1 F (a) war crimes and (ii) an act of torture under Article 1 F (b) serious non-political crimes. That is to say, although war crimes committed within the context of an NIAC do not fall under the compulsory universal jurisdiction of a custodial state, a single act of torture, even if committed during the armed conflict, will lead to the compulsory universal jurisdiction in pursuit of the CAT.[243] This is because the existence of an armed conflict does not preclude the state parties to the CAT from implementing its provisions. Indeed, the state parties cannot invoke a state of war as a justification for torture.[244] This fact is particularly important for the Syrian conflict as there could be suspects of an act of torture who will eventually be excluded under Article 1 F (b) and might be obliged to be tried. In order to make it clear, a chart created by Nina Larsaeus which shows jurisdiction over crimes and acts relevant to Article 1 F and as to whether the jurisdiction over them are permissive or mandatory is attached.

Summing up, setting aside the debate of whether an obligation of *aut dedere aut judicare* crystallized into customary international law, it is due to the international law and obligations arising under it that a host state must exercise its jurisdiction (i.e. initiating an investigation) over individuals excluded on the basis of Article 1 F (a) - war crimes amounting to grave breaches in a IAC- and Article 1 F (b) – an act of torture as a serious non-political crime. Thus, crystallization of the principle of *aut dedere aut judicare* into customary

[242] *Gilbert&Rüsch* supra note 68 at 1104
[243] This will only be applicabel to host states which are parties to the Convention agaisnt Torture. The customary international law status of the torture convention in whole is a contentious issue.
[244] According to Article 2 of the Convention against Torture, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

international law will only extend the scope of jurisdiction of a host state over excluded persons.

The doctrine of universal jurisdiction and the fight against impunity are intertwined. The former endorses the latter, "with the aims of making alleged criminals accountable for their crimes."[245] Recalling the meaning of impunity, which is --states failing in meeting their obligations to investigate violations and taking appropriate measures by ensuring that suspects are prosecuted, tried and duly punished[246]--, non-action from the side of host states will concurrently result in impunity.

The UN Principles to Combat Impunity stipulates that states must ensure to completely fulfill "any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there are credible evidence of individual responsibility for serious crimes under international law."[247] During the exclusion adjudication process, if there are "serious reasons to consider" that a person committed Article 1 F crimes then this person is excluded from refugee protection. That is to say, in most of the cases "serious reasons to consider" element of Article 1 F will amount to "credible evidence" in criminal law to institute criminal proceedings against excluded persons. Hence, host states which do not launch criminal investigations against excluded persons for the mentioned crimes often violate their international obligations. In the following section, I will evaluate to what extent the same rationale will be applicable to the UNHCR. In doing so, the UNHCR's role in host states' obligation of *aut dedere aut judicare* will be evaluated.

3.3. The UNHCR as an Actor in International Criminal Law

Until now, I mainly analysed the duties of states under international law with regard to the post-exclusion phase. Recalling the numbers of states where the RSD process and

[245] Yves Beigbeder. *International Justice Against Impunity* (Leiden: Martinus Nijhoff, 2005) 45.
[246] Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UNECOSOC, 64th session, Supp No.1, UN Doc E/CN.4/2005/102/Add.1
[247] *Ibid* at Principle 21.

exclusion analysis are conducted by the UNHCR, the question of as to whether there is any role or duty of the UNHCR with regard to prosecution of excluded persons is of utmost importance. Yet, figuring out international law obligations pertaining to states and implementing them upon an international organization is not an easy task nor feasible- in certain cases-.

In other words, is it possible to argue that the UNHCR has an obligation of *aut dedere aut judicare* under international law akin to that of states in host countries where the UNHCR conducts refugee status process or otherwise obtains information implicating asylum-seekers in grave international crimes?[248] This question arises due to the fact that in some circumstances (i.e. mass influx or inability or unwillingness of a host state to conduct RSD process), the "UNHCR may have the best access to information concerning criminal acts, through contact with suspects, victims or witnesses."[249] However, due to the high degree of "confidentiality" reasons[250], it might not be able to share this information with host states. Some scholars argue that the UNHCR has no *aut dedere aut judicare* obligation since involvement in law enforcement might harm protection function of the UNHCR by endangering the neutral position of the institution and "by exposing witnesses to retaliation".[251] On the other hand, not sharing this information with host states' authorities when prosecution is possible on the basis of the universality principle and indeed, is an obligation, inaction of the UNHCR might lead host states' to be in breach of their international obligations.

Under Chapter I, I argued that the UNHCR might have duties under international law due to its evolving functions and the state-like responsibilities. I conclude that the UNHCR's Statute or the 1951 Refugee Convention does not preclude the UNHCR from interpreting

[248] *Fitzpatrick supra note* 130 at 279.
[249] *Fitzpatrick supra note* 130 at 279.
[250] *Fitzpatrick supra note* 130 at 279.
[251] *Fitzpatrick supra note* 130 at 279.

Article 1 F in a view to preventing impunity. Under this section, I will analyze the duty argument in depth and assess the question from the perspective of the relation between international organizations and the states.

3.3.1. The UNHCR and International Law

Early discussions surrounding the responsibilities of international organizations under international law emerged in questioning the doctrine of "state responsibility".[252] Clyde Eagleton stated that the rules of international law of responsibility are applicable- with some variations- to any subject of international law including international organizations.[253] Having said this, as an international organization, the UN might not be able to cause harm to others due to its lack of army, military instruments and having a little territory or population to protect.[254]

This presumption was challenged by Mahnoush Arsanjanit who stated that prediction of international organizations' causing little injury was wrong since some of their activities can be very similar to those of states.[255] Similarly, the first Special Rapporteur to the International Law Commission, Francisco V. Garcia-Amador, claimed that due to the increased activities of international organizations, non-performance of obligations by international organizations, like the breach or non-observance of them, necessarily involves their responsibility.[256] In some sense, "it is even possible to establish a definite analogy with the responsibility imputable to the State."[257] This is because being members of the

[252] "In international law, the principle has long been expressed and applied in the doctrine of "State responsibility."Mahnoush H. Arsanjanit,"Claims Against International Organizations: Quis custodiet ipsos custodes" (1981) 7:2 Yale J. World Pub. Ord. 130 [Arsanjanit]
[253] Clyte Eaglaton, *International Organization and the Law of Responsibility*,(Paris:Sirey,1951) vol. 76.
[254] *Ibid* at 386.
[255] *Arsanjanit supra* note 252 at 131.
[256] State Responsibility, 8 U.N. GAOR, U.N. Doc. A/CN.4/96 *(1956), reprinted in [1956]* 2 Y.B. NrT'L L. COMM'WN 173, 189-90, U.N. Doc. A/CN.4/SER.A/1956/Add. I (report prepared by Garca-Amador).
[257] *Ibid*.

international community, "international organizations have both rights and obligations."[258] It is argued that being "both creations and creators of international law, international organizations can not ignore the principles that created them and that they are designed to promote."[259] Since international organizations can not "exclude themselves arbitrarily from international obligations" their use of power must be in compliance with international law.[260] In the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the ICJ asserts that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[261]

When does an international organization have a legal personality? Robert McCorquodale states that when an entity has "direct international rights and responsibilities, can bring international claims, and is able to participate in the creation, development and enforcement of international law," then it is possible to assert a separate international legal personality.[262] The ICJ in the Advisory Opinion on *Reparations for Injuries Suffered*[263] (Reparations case) mentioned that

> [T]he [UN] Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane… What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

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[258] *Arsanjanit supra* note 252 at 131.
[259] *Arsanjanit supra* note 252 at 131.
[260] *Arsanjanit supra* note 252 at 131.
[261] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* Advisory Opinion [1980] ICJ Rep p 89–90, at para. 37.
[262] Robert McCorquodale, "International Organisations and International Human Rights Law: One Giant Leap for Humankind" in Kaiyan Homi Kaikobad&Michael Bohlander eds. *International Law and Power: Perspectives on Legal Order and Justice Essays in Honour of Colin Warbrick* (Netherlands: Brill, 2009) 141[McCorquodale]
[263] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion [1949] ICJ Rep 174 at 180 [The Reparations Case]

It might be clear from the ICJ's Advisory opinion and scholars' views that the UN has a legal personality and bears rights and duties under international law. When it comes to the UNHCR, is it possible to assert that it has a legal personality separate than that of the UN?

As explained under Chapter I, the UNHCR is an agency of the UN established through a General Assembly resolution. Article 1 of the UNHCR's Statute establishes that the organization's protection activities form part of the UN's activities.[264] Therefore, Henry Schermers argues that the UNHCR does not have an independent personality but it does fall within the jurisdiction of the UN as a part of the organization.[265]

On the other hand, increasing activities of the UNHCR might indicate that the institution has a separate legal personality. As an example, many refugees are located in medium term development camps[266] which are under *de facto* control of the UNHCR.[267] "In taking over the role of the state in refugee protection, UNHCR performs a function that only it has the mandate to monitor."[268] Since the UN members confer some competence to the UNHCR by entrusting certain functions to it in its mandate and having been mandated by states to act differently from them, the UNHCR has a legal personality.[269] Similar analogy can be done with regard to its role in host states where the RSD process is conducted by the UNHCR. As it will be discussed in details under Section 4.1. Background on Turkey's Refugee Law and the UNHCR, in some occasions, (for example in Turkey), the UNHCR's decisions about asylum-seekers has a substantive effect on host country' authorities. On the basis of its own RSD decisions, the UNHCR resettles refugees to third countries. In such

[264] Henry G. Schermers& Niels M. Blokker, *International Institutional Law* (Leiden&Boston: Martinus Nijhoff Publishers, 2011).
[265] *Ibid*.
[266] "The term refers to UNHCR-run refugee camps which are located in the developing world, and also have UNHCR status of being in a "development situation." Ralph Wilde, *Quis Custodiet Ipsos Custodes?*:Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law (1998) 1:1 Yale H.R. & Dev. L.J. 108. [Wilde]
[267] *Wilde supra* note 266 at 107.
[268] *Wilde supra* note 266 at 115.
[269] *Wilde supra* note 266 at 107.

situations, "there is no practical difference between the exercise of authority by UNHCR and that which the host state would exercise if it were capable."[270]

Building on the evolving functions of the UNHCR and the presumption that it has a legal personality, the UNHCR entails responsibility in international law.[271] Indeed, this argument is not far from the fact that can be derived from analysis of the conditions. For example, the UNHCR can be a party to legal disputes, bring international claims and most importantly, conduct RSD processes. Also, the European Court of Human Rights has described the UNHCR as a body "whose independence, reliability and objectivity are…beyond doubt."[272] Hence, in this paper, the UNHCR will be considered a separate legal person/actor in international law.

3.3.2. The Relationship between the UNHCR and Host States' Obligations

As an international legal person bearing responsibilities and rights, what can be the UNHCR's responsibility in the context of host states' obligations with regard to the principle of *aut dedere aut judicare* in relation to Article 1 F crimes? [273] To answer this question, I will firstly assess the limits of the responsibilities of the international organization.

Different international organizations have different functions and obligations.[274] In the *Reparations Case*, the ICJ stated that the rights and duties of an international organization must "depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[275] "[I]nternational organizations with international legal personality are … only subject to international law to the degree that the nature of their

[270] *Wilde supra* note 266 at 114.
[271] *Wilde supra* note 266 at 115.
[272] *K.R.S. v. United Kingdom*, Appl. No. 32733/08, ECtHR, 2 December 2008.
[273] This is a relevant question so long as the RSD and exclusion analyis are conducted by the UNHCR rather than a host state.
[274] Iain Scobbie, "International organizations and international relations" in *A Handbook of International Organisations* (The Hague, London and Boston: Kluwer Law International, 1998) 831.[Scobbie]
[275] *The Reparations Case, supra* note 263 at 180.

personality dictates."[276] Similarly, Gowlland-Debbas puts forward that accountability of an international organization is directly related to "the proper exercise of the power or authority which is granted to them" and to "these powers and the mechanisms by which these are controlled". As such, accountability is linked to the "overall objectives" of the respective organization.[277]

Recalling that the UNHCR is mandated to protect refugees and not mandated to act on excluded persons, the quick conclusion might be that it has no explicit duty towards the latter. However, taking into account the evolving functions of the UNHCR and its state-substitution role in certain states, the issue becomes more complex since in some situations, omission by the UNHCR tacitly causes host states' to violate their international obligations. In support of this argument, Robert McCorquodale claims that the UN must ensure that its acts do not lead member States to breach their international human rights obligations.[278] This approach to the international responsibility of international organisations for human rights reinforces the broad obligations of States to respect, protect and fulfill human rights in all their activities."[279] Dupuy argues that "the customary rules regulating State responsibility are, in principle, equally applicable to organizations."[280] Thus, it can be argued that a situation where the UNHCR fails to share information with host states about excluded persons or to take any step towards for their prosecution might lead the organization to be in non-compliance with international norms.[281]

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[276] *Wilde supra* note 266 at 116.
[19] Vera Gowlland-Debbas. "The Security Council and Issues of Responsibility under International Law (volume 353)." *Collected Courses of the Hague Academy of International Law* The Hague Academy of International Law (08 February 2015) online <referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/the-security-council-and-issues-of-responsibility-under-international-law-volume-353-ej.9789004227279.185_444> [Gowlland-Debbas]; For a similar approach please see "Also, the purposes and functions of each international organization it nevertheless highlights the need to be clear about the purposes and functions of each international organisation in order to determine its own rights and responsibilities within the international legal system." *McCorquodale supra* note 262 at 13.
[278] "whether arising from customary international law or treaties)…" *McCorquodale supra* note 262 at 13.
[279] *McCorquodale s supra* note 262.
[280] *Scobbie supra* note 274 at 893
[281] *Ibid.* Please also see, *crimes under international law include, as a minimum, genocide, crimes against humanity and war crimes. The reach and content of such crimes have been amply developed in state practice, in*

For example, the Security Council of the UN increasingly asserts that amnesties covering international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, are inconsistent with international law.[282] In an era in which amnesties and other national measures of cancelling criminal prosecution and punishment are accepted as violating international law, when there is an obligation to prosecute or extradite alleged perpetrators of international crimes[283], the UNHCR's cooperation with host states in relation to the Article 1 F crimes might constitute a duty for the organization. In order to test this argument objectively, the counter-arguments against the existence of such a duty should be carefully analysed.

As mentioned earlier, the UNHCR is not mandated to act for the post-exclusion phase. Considering that -in light of the ICJ's advisory opinion- its purpose and function are not related to the excluded persons, the UNHCR may not be expected to cooperate with host states in combatting against impunity. At least, such an expectation should not be perceived as a rule but might be regarded as a permission or discretion to do so.

Second, although there are some areas where the UNHCR has adopted the state substitution role towards refugees and the relationship between them is very akin to that of state and refugees, this legal relationship operates differently.[284]As it is argued, "[i]n an international legal order based on post-Westphalian system of state sovereignty" non-state entities are in a secondary legal position.[285] Even if international organizations can have functions "typically associated with states, states and organizations are not easily

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conventions, and in the literature, and are still evolving. Each is said to be subject to universal jurisdiction, in the sense that any state having custody over the alleged offender is entitled to try him or her. Goodwin-Gill, *supra* note 129 at 199.

[282] Konstantinos Salonidis "Amnesty And Prosecution In Non-International Armed Conflicts." *Law Books of the Academy. The Hague Academy of International Law (*08 February 2015) online <referenceworks.brillonline.com/entries/law-books-of-the-academy/amnesty-and-prosecution-in-non-international-armed-conflicts-ej.9789004172838.3_1032.83> [Salonidis]

[283] *Ibid.*

[284] *Wilde supra* note 266 at 119.

[285] *Wilde supra* note 266 at 119.

interchangeable as legal entities, because they are not the same *typus*."[286] Accordingly, the UNHCR cannot have "the authority to act without the consent of the host state, since only the state has the legal personality to allow it into its territory."[287] Therefore, "the degree to which international law can apply to UNHCR governance is inextricably linked to international law's influence on the sovereign entity."[288] The content and enforcement of the applicable law depends on this relationship.[289]

Ralph Wilde argues that the content of the applicable law to the UNHCR "is determined by the particular circumstances of UNHCR's exercise of its international legal personality."[290] That is to say, in each case the UNHCR's role in the process will determine its responsibility as an international legal person. Having said this, the state will still remain liable under international law "regardless of the degree to which the state has handed over its *de facto* responsibilities to UNHCR".[291] As a consequence, liability will be shared between host states and the UNHCR. The reason lying behind this logic is that the UNHCR can only act in so far as the host state allows it, "which can vary from almost total control by UNHCR, to considerable involvement by the host state."[292] As for the accountability – who will be held accountable for violations- the question can be solved through the hierarchy of liability model [293] or concurrent liability model.

This argument has emerged in relation to the UNHCR's direct enforcement of international human rights law, particularly in relation to its policies in refugee camps. On the other hand, I am analyzing the UNHCR's role in the international criminal jurisdiction area,

[286] Catherine Brölmann. "A Flat Earth? International Organizations in the System of International Law" (2001) 70 ActScandJurisGent at 329. [Brölmann]
[287] *Wilde supra* note 266 at 119.
[288] *Wilde supra* note 266 at 119.
[289] *Wilde supra* note 266 at 119.
[290] *Wilde supra* note 266 at 119.
[291] *Wilde supra* note 266 at 121.
[292] *Wilde supra* note 266.
[293] Accordingly, "at the top of the hierarchy, the state would be fully and ultimately liable. Below that, UNHCR would be liable insofar as it is given a prerogative by the state to determine the human rights situation." *Wilde supra* note 266 at 121.

which is not directly related to the institution's function. This is the point where defining the UNHCR's potential role in international criminal law becomes critical since it is not as obvious as its role in the human rights' field. The relation between the host states and the UNCHR in terms of Article 1 F crimes is unique from several perspectives. This is due to the fact that the UNHCR's omission to act does not directly result in any explicit injury or damage but results in a jurisdictional problem. In other words, the UN Agency's omission might cause a host state's failure in exercising its obligatory universal jurisdiction over the crimes in question, which is related to crimes repression. The question of as to whether such a breach results in any concrete penalty for the host state is also contentious. This is because neither in the Geneva Conventions nor in the CAT is there a penalty associated with states' failure in asserting their jurisdictions over alleged offenders of international crimes.

The International Committee of the Red Cross (ICRC) puts forward that "the penal repression of war crimes" must be seen as "one means of implementing humanitarian law, whether at national or international level."[294] It is also argued that responsibility does not depend on the presence of material damage or loss, but occurs directly from the breach of the obligation.[295] The main difference between states and international organizations in terms of responsibility is that an international organization's capacity to act is functional, not sovereign. [296] Based on Article 55(c) of the UN Charter, the UN is mandated to promote "the universal respect for, and observance of human rights". The promotion of human rights requires both the presence of "substantive norms, i.e., prohibitions, but of procedural norms as well."[297] In the absence of "mechanisms for implementation, prohibitions become empts

[294] "How are war criminals prosecuted under humanitarian law?", ICRC-Resource Center (1 January 2004) online <www.icrc.org/eng/resources/documents/misc/5kzmnu.htm >
[295] *Scobbie supra* note 274.
[296] *Scobbie supra* note 274.
[297] Colleen Enache-Brown, Ari Fried. "Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law" (1997) 43 McGill L J. [Enache-Brown&Fried)

vessels." [298] Hence, a duty must be directed for the effective treatment of universal crimes, which requires states to take actions against alleged offenders of the acts envisaged in Article 55(c). [299] "Without the recognition of such an obligation, the perpetrators of heinous crimes are effectively acquitted." [300] Hence, in order to assert the responsibility of the UNCHR, there is no need to identify concrete loss or damage; breach of an obligation is sufficient to discuss the organization's responsibility. Since it is possible to discuss the organization's responsibility, the question of to what extent the breach of an international obligation can be attributed to an international organization if this breach results in an act or omission by the organization[301] is crucial to examine.

Pursuant to the draft articles adopted by the ILC on the "Responsibility of International Organizations"[302] the wrongful act of an international organization consists in action or in an omission. It is argued that "the ILC draft articles which have customary status are, at least presumptively, also applicable to organizations."[303] In case an international organization is required to take some positive action and fails to do so, these omissions are wrongful[304] regardless of their resulting from the application of the organization's decision-making process under its constitutive instrument.[305] This is because "difficulties relating to the decision-making process could not exonerate the United Nations."[306] On the other hand, it is clear that the UNHCR is not required to take positive action towards excluded persons under its mandate. However, under international law, requirements do not only derive from the explicit duties stipulated under an international organization's constitutive instrument.

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[298] *Ibid.*
[299] *Ibid.*
[300] *Ibid.*
[301] *Brölmann supra* note 286 at 330.
[302] International Law Commission, *Draft Articles on the Responsibility of International Organizations*, UNILC Doc, 63rd session, 2011, UN Doc A/66/10, para. 87. [ILC Draft Articles on the Responsibility of International Organizations]
[303] *Scobbie supra* note 274.
[304] *ILC Draft Articles on the Responsibility of International Organizations, supra* note 302 at 31.
[305] Giorgio Gaja, Special Rapporteur. *Responsibility of International Organizations*, Third report on responsibility of international organizations Document A/CN.4/553* at para 8.
[306] *Ibid* at para 10.

Recalling that rights and duties of an international organization depends on the functions implied in its constituent document but also developed in practice[307]; wrongful acts can be a result of a failure of an international organization in fulfilling its requirements deriving from developed practice. Although there is uncertainty as to what "developed practice" means in this context, it is regarded that the practice should be established.[308] Hence, determining what constitutes developed practice for the UNHCR in relation to the exclusion phase will identify its "duty" –if there is any- for the post-exclusion phase. Since the UNHCR is a multi-faceted actor, the operational context within which the organization works[309] is the departure point.

Micheal Kagan mentioned that the UNHCR conducts RSD process "in dozens of countries in the Middle East, Africa and Asia" whereby there is "a *de facto* transfer of responsibility for managing refugee policy from sovereign states" to the UN agencies.[310] As explained earlier, in conducting these functions, the UNHCR "acts to a great extent as a "surrogate state," performing a "state substitution role" but without the capacity to fully substitute for a host government."[311] As the UNHCR and partner humanitarian agencies assume effective responsibility for delivering direct assistance to refugees[312], they often take over unnatural roles in the south.[313] This responsibility shift is almost universal in the Middle East.[314] As a result, it is an established practice that the UNHCR conducts the RSD process and as a part of it, makes exclusion analyses in these countries. Yet, to what extent the

[307] *The Reparations Case, supra* note 263 at 180.
[308] *Scobbie supra* note 274 at 874.
[309] *Türk supra* note 56 at 53.
[310] Michael Kagan. *We Live in a Country of UNHCR': The UN Surrogate State and Refugee Policy in the Middle East*, The UN Refugee Agency: Policy Development & Evaluation Service Research Paper 201 (Switzerland: UNHCR, 2011). [Kagan]
[311] *Ibid* at 1.
[312] *Ibid* at 3.
[313] *Ibid* at 3.
[314] *Ibid* at 3.

UNHCR "discloses information on (prospective) excluded applicants with (inter)national law enforcement agencies or local government in the country it is operating in" is not known. [315]

As confirmed by the UNHCR, the organization is "responsible for integrating human rights into all areas of its work."[316] According to the General Assembly Resolution numbered 60/147 of 16 December 2005, the obligation to respect and implement international human rights law emanates from treaties to which a State is a party to and customary international law.[317] This obligation to respect and implement international human rights law includes among others a duty to "[i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."[318] The Resolution recalls that "international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States."[319] Hence, as a UN Agency responsible for integrating human rights into all areas of its work, it is a result of this responsibility for the UNHCR to co-operate with host states in fulfilling their international law obligations related to the obligatory *aut dedere aut judicare.*

To sum up, I argue that the discussions surrounding the logic behind the responsibilities of international organizations (i.e. the ICJ's decision on the relation between the duties and the functions of an international organization) point out that the UNHCR has a duty, which derives from its developed practice, over excluded persons in order to facilitate their prosecution on the (inter)national level. It has become the proper exercise of the UNHCR's authority which is implicitly granted to it with its evolving and expanding functions and shift in responsibilities over time in countries where the UNHCR carries out

[315] *Reijven&Wijk supra* note 8.
[316] "Office of the United Nations High Commissioner for Human Rights", UNHCR, online < http://www.unhcr.org/pages/49c3646c2e7.html >
[317] Basic Principles and Guidelines on the Right to a Remedy, *supra* note 127 at Art 1.
[318] Basic Principles and Guidelines on the Right to a Remedy, *supra* note 127 at Art 3.
[319] Basic Principles and Guidelines on the Right to a Remedy, *supra* note 127 at *Preamble.*

RSD process. In line with the ILC's articles[320], the UNHCR's failure in taking positive actions to facilitate the prosecution of excluded persons' might be considered a wrongful act. On the other hand, "[t]he division of labour between states and the UN would need to be explicit, and the UN would need to address its own internal accountability gaps."[321] As argued before, for the matters that the UNHCR can control, it should be held accountable and due process should apply. But for matters beyond its capacities, there should be clarity that responsibility lies with the state. [322]

Therefore, similar arguments related to "sharing in responsibility" in the field of human rights can be made to the relationship between host states and the UNHCR in implementing the obligatory *aut dedere aut judicare.* According to the concurrent liability model, "in those areas where UNHCR has taken on the state's obligations in international human rights law, there is *prima facie* liability concurrent with that of the state."[323] Similarly, there is a concurrent liability of the UNHCR and a host state in implementing Article 1 F and in taking legal steps to launch criminal investigation with regard to excluded persons who might fall under the scope of a host state's compulsory universal jurisdiction. As argued, "the human rights law pertaining to these responsibilities is the law that should apply when UNHCR takes them over."[324] In other words, the "UNHCR is bound by that human rights law to which the state is bound."[325] If the same analogy is made for the relationship between the UNHCR and the host states in terms of obligatory *aut dedere aut judicare,* the UNHCR is bound by the obligations that the host state has in this regard. However, what is crucial under the concurrent liability model is to be able to discern who is liable for what.

[320] *ILC Draft Articles on the Responsibility of International Organizations, supra* note 302.
[321] *Kagan supra* note 310.
[322] *Kagan supra* note 310.
[323] *Wilde supra* note 266 at 119.
[324] *Wilde supra* note 266 at 119.
[325] *Wilde supra* note 266 at 119.

It is not always possible to discern responsibilities when it comes to the competence sharing between the UNHCR and a host country. In other words, the questions of who does what in particular circumstances and details of a memorandum of understanding between a host country and the UNHCR regulating this division of labor are not always answerable. This is because there is often no publicly available information in respect to these questions the issue of which also casts doubt on transparency. For example, while the agreements between Jordan, Lebanon and the UNHCR assign responsibilities to the UNHCR for RSD process[326], we do not know the details of any agreement between the UNHCR and Turkey.

3.3.3. The "Concurrent Liability Model" and the Post-Exclusion Phase

If all these arguments are applied to the relation between the UNHCR and a host country in terms of the implementation of the exclusion clause, what could be the results? Considering that the UNHCR can operate within a host state's borders only with the states' permissions; even if there is a lack of co-operation between the UNHCR and host states with regard to the post-exclusion phase, the UNHCR cannot solely be held responsible. The very fact that the exclusion analysis is done by the UNHCR in case a host state is unwilling or unable to do so endorses this finding. The 1951 Refugee Convention primarily endows state parties with powers. In the international arena states are assumed to "have the clearest ability and authority to act" and hence, should often be held responsible.[327] Indeed, the shift in responsibilities occurs because "it addresses political interests of states, both in terms of material benefits and symbolic benefits."[328] In case the state is not able to fulfill its responsibilities arising under the Convention, the UNHCR takes over the responsibilities in order to protect

[326] *Kagan supra* note 310.
[327] *Kagan supra* note 310.
[328] *Kagan supra* note 310.

refugees.[329] This fact indicates that the humanitarian nature of the UNHCR should always be taken into account in assessing the situation.

On the other hand, could this argument justify the impunity gap emerging through non-co-operation or lack of information flow between the UNHCR and the host state in relation to Article 1 F crimes? The answer would be no. Under the "concurrent liability model", the UNHCR is still responsible for the part solely carried out by it, its humanitarian nature not being of import. As explained above, the critical point lies in the agreement between the UNHCR and the host state. As long as the agreement is known, it will be possible to "identify the locus of power" [330] that the UNHCR has. In the areas in which the UNHCR has a locus of power, the organization "would be obliged to act in the same manner that a state would."[331]

As to the agreement issue, there are two possibilities, one where the UNHCR shares the information with the host state, one where it does not. Firstly, if the UNHCR shares information and the profile of excluded persons with the host country and the host country does not launch any investigation towards these persons. In such a situation, there is no possibility to discuss the UNHCR's liability anymore. Since the UNHCR's liability is limited to the part that it has a sole power over, at the time that the information is shared with the host state, its power is exhausted and the liability passes to the host state. Furthermore, the UNHCR does not have any duty to follow as to whether excluded persons are prosecuted or not. However, the organization might intervene when excluded persons are about to be extradited to a county where persecution is likely to take place.

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[329] "The UNHCR is often trapped into accepting quasi-government functions indefinitely, fearful that if it pulls back refugees would simply be abandoned because host governments would turn out to be unwilling to step in." *Kagan supra* note 310.

[330] "The full terms of the agreement between the host state and UNHCR constitute the point of departure. Such an inquiry would reveal the extent to which UNHCR has taken on the host state's legal responsibilities, and thus enable the identification of UNHCR activities to which internationalhuman rights law applies." *Wilde supra* note 266.

[331] *Wilde supra* note 266.

Secondly, if the UNHCR does not share any information or shares very limited information about excluded persons with the host states' authorities. This is the problematic part that might lead the UNHCR's liability. If there is no provision with regard to the information flow in relation to Article 1 F crimes in the agreement between the UNHCR and the host state, then the discretion as to whether sharing it with the host state or to what extent this share takes place is under the discretion of the UNHCR. In such a situation, UNHCR's liability co-exists with the host state's supervision liability.

The situation of how to apply the concurrent liability model to the post-exclusion phase is illustrated in Chart-II.

3.4. The Preliminary Results

In this section, I argue that the UNHCR has a separate legal personality because it fulfills the conditions set out in the ICJ's decision[332] for the recognition of a legal person. Having a legal personality comes with duties and rights under international law. Therefore, the second step was to analyse whether one of the duties of the UNHCR under international law includes co-operation with host states' for crimes triggering their international obligations of *aut dedere aut judicare* arising as a result of the exclusion analysis. It is difficult to answer that the UNHCR has an explicit duty of co-operation in this area by only analyzing the mandate of the UNHCR and taking into account the humanitarian nature of its functions; the UN Agency was not mandated to act on the post-exclusion phase. On the other hand, the developed practice of the UNHCR in certain states in relation to Article 1 F crimes clearly point out the existence of a duty for the organization. The evolving and expanding functions of the UNHCR indicate that the proper exercise and authority of the organization includes analyzing extraterritorial international crimes. Having said that, the evolving functions of the UNHCR are limited to countries where the UNHCR is the sole adjudicator during the exclusion process. In the countries where the UNHCR has a supervision role or where it

[332] *The Reparations Case, supra* note 263.

shares the exclusion process with the host states' authorities, it is not possible to assert that the UNHCR has an authority.

It is a fact that the UNHCR is conducting the exclusion analysis for the purpose of excluding undeserved ones from international refugee protection and not conducting the process and aftermath from an international criminal justice perspective. Nevertheless, the organization is collecting very important information pertaining to suspected offenders of serious international crimes. Some of these crimes explicitly bring about the host state's obligation to extradite or to prosecute. In such a situation, there are two alternatives; either there is an effective information flow between the UNHCR and the host state about the alleged crimes or the UNHCR has discretion not to share them with the host states' authorities. In either case the agreement between the organization and the host state is the departure point to determine the distribution of the locus of power.

This thesis argues that in the countries where the UNHCR has authority to decide on exclusion cases, the UNHCR's liability co-exists with the host states' responsibility to suppress international crimes under the concurrent liability model. In other words, the host state is still liable for non-effective information flow about the alleged extraterritorial international crimes, even if the reason is due to the UNHCR's high level of confidentiality rules. This is mainly because the UNHCR is not able to operate in any country without the consent of the host state. Furthermore, it is crucial to underline that the UNHCR operates in states when the host state is not able to or unwilling to[333] conduct RSD process. Therefore, the UNHCR should not solely be held liable for this issue under any circumstances.

On the other hand, how would it be possible to accept that the UNHCR has no explicit duty under its mandate but is still liable together with the host state for the investigation of the

[333] The unwillingness and unability occurs when (a) the countries are parties neither to the 1951 Refugee Convention or 1967 Protocol, (b) the countries continue to implement geographical reservation, (c) there is capacity-building problem.

alleged international crimes under the concurrent liability model? I used the developed practice of the UNHCR and its state-substitution role in order to assert that the organization has a duty regarding excluded persons. However, would the developed practice be sufficient to create concrete policies in this regard? Given this concern, I conclude that there are three potential solutions to conciliate the humanitarian nature of asylum-seeking, the confidentiality rules of the organization and still holding perpetrators of international crimes accountable.

According to Article 3 of the UNHCR's Statute, the High Commissioner must follow policy directives given to him by the General Assembly or the ECOSOC.[334] Therefore, the first option might be to amend the mandate of the UNHCR or to receive an ECOSOC or General Assembly's policy directive conciliating the UNCHR's current policy with the host states' obligations to extradite or to prosecute. Second, the evolving function approach might be adopted by the UNHCR and be harmonized in its policies to co-operate with the host states. The shortcoming of this suggestion is unclarity of each host state's legal situation to repress serious international crimes and rule of law situations. A third solution might be the establishment of an independent international commission which will exclusively tackle this matter. Yet, these suggestions need to be analysed in depth which will be done in the conclusion.

In order to make these arguments more concrete, in the following chapter, I will assess Turkey's international obligations in relation to Article 1 F crimes and the UNHCR's role in Turkey's enforcement of obligations under the concurrent liability model.

4. Chapter III: Case Study: UNHCR and Syrian Refugee Crisis

Under this chapter, the concurrent liability model will be applied to the relationship between the UNHCR and the Turkish state with regard to Syrian refugee crisis' management. The case study will be limited to the operations of the UNHCR's branch office in Ankara in

[334] Article 3 of the UNCHR's Statute

relation to refugees having exclusion related profiles. Although the Syrian cases will be my departure point, non-Syrian refugees having exclusion related profiles will also be a part of the analysis. In order to understand the refugee system in Turkey, firstly, Turkish law relating to refugees and asylum-seekers will be introduced. Secondly, the UNHCR's role in this system will be analysed.

4.1.Background on Turkey's Refugee Law and the UNHCR

Turkey has ratified the 1951 Refugee Convention[335] and acceded to the 1967 Protocol relating to Status of Refugees. Since the time of the ratification, Turkey has maintained the geographical reservation[336] from the 1951 Refugee Convention, whereby only those fleeing as a result of "events occurring in Europe" can be given a refugee status.[337] In other words, "Turkey does not extend refugee status to persons fleeing conflicts or other situations outside Europe."[338] The UNHCR has been operating in Turkey since 1960 pursuant to Turkey's ratification of the 1951 Refugee Convention.[339] As the majority of asylum-seekers arriving to Turkey from non-European countries[340] and due to the protection gap occurring as a result of the geographic limitation, the UNHCR has been conducting RSD processes for non-Europeans independent of the government for more than decades.[341]

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[335] The convention was ratified by Turkey on 30 Mar 1962. *The Convention Relating to the Status of Refugees*, (28 July 1951), UNTS 189 at 137.

[336] "The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey." *Protocol relating to the Status of Refugees*, (31 January 1967), UNTS 606 at 267.

[337] "Protecting Refugees", Human Rights Watch, online < www.hrw.org/reports/2000/turkey2/Turk009-10.htm > [HRW Report on Protecting Refugees]

[338] Sarah Bidinger, Aaron Lang, Yoana Kuzmova Danielle Hites & Susan M Akram Elena Noureddine. *Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing* (Boston University School of Law). [Protecting Syrian Refugees Law and Policies Report]

[339] *Protecting Syrian Refugees Law and Policies Report supra* note 338.

[340] As of January 2015, there are 32,330 asylum-seekers from Afghanistan, 10,250 from Islamic Republic of Iran and, 43,070 from Iraq. These figures do not count Syrians who are subject to different regime in Turkey. "2015 UNHCR country operations profile – Turkey", UNHCR, online <www.unhcr.org/pages/49e48e0fa7f.html# >

[341] HRW Report on Protecting Refugees, *supra* note 336.

Although there were decrees or circulars issued by the Council of Ministers prior to 1994[342], the first broader regulation with regard to refugee policy in Turkey was the Regulation No. 1994/6169 on the Procedures and Principles related to Population Movements and Aliens Arriving in Turkey[343] ("1994 Regulation") [344] which was recently replaced by the Law on Foreigners and International Protection that came into force in April 2014. According to the 1994 Regulation, Turkey allows persons in need of international protection to stay in Turkey on a temporary basis until they are resettled[345] by the UNHCR to another country. Through this regulation, Turkey gives the UNCHR authority to conduct the RSD process and facilitate resettlement for non-European refugees.[346] Once they are registered with the police, within 10 days of arrival, "the applicant(s) would register at a local UNHCR office and undergo a UNHCR RSD procedure."[347]

The new law has brought significant change about by providing "protection and assistance for asylum-seekers and refugees, regardless of their country of origin" in spite of the fact that Turkey still retains the geographical limitation from the 1951 Refugee Convention.[348] That is to say, since the protection problem for non-European asylum-seekers in Turkey has been solved by the new law, the Directorate General of Migration Management (DGMM) which has been established by the law has become the sole institution responsible for asylum matters and will begin conducting RSD process for all asylum-seekers regardless of their country of origin. Although the date is not specified yet, UNHCR-Turkey "will start a

[342] "Because of the broad language of the text of the 1994 Regulation, this practice of "filling in" missing details from the text continued after its enactment." *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[343] *Turkey: Regulation No. 1994/6169 on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum From Another Country (last amended 2006)*, 19 January 1994, < online www.refworld.org/docid/49746cc62.html> [1994 Regulation].
[344] The Regulation includes provisions for identification of the principles and procedures to be applied for foreigners who came individually or in groups for seeking asylum in Turkey and for identification of authorized institutions in this regard. Source: "Migration", Republic of Turkey Ministry of Interior Directorate General of Migration Management Publications, Publishing Number 18, September 2014.
[345] *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[346] *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[347] *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[348] "2015 Country Operations File Turkey" UNHCR, online < www.unhcr.org/pages/49e48e0fa7f.html#>

phased handover of registration and RSD."[349] However, to date, UNHCR-Turkey continues to conduct RSD procedures for Iraqi, Afghani, Iranian and other non-European asylum-seekers.[350] In doing so, the UNHCR's attempt is to find a durable solution for non-European refugees, which is to resettle those whom it determined to be refugees to third countries.[351] This shows that, to date, UNHCR-Turkey still has a determinative role in the RSD process for non-European asylum-seekers.

4.2. The Syrian refugee Crisis, Turkey and the UNHCR

The management of the Syrian refugee crisis is a different process. Unlike the ordinary procedure relating to the non-European asylum-seekers in Turkey, the main actor in the Syrian refugee crisis is the Turkish government.[352] Turkey maintains an open-border policy with Syria, and "Syrians are given unrestricted access to cross the border at designated points."[353] "The Ministry of the Interior (MoI) shares with the Prime Ministry ultimate authority on the Syrian refugee situation."[354] There is no formal registration process for Syrians and "the MoI and the Prime Ministry have sought to centralize the treatment of Syrian refugees to this point."[355]

Syrians are not subject to the same procedure non-European asylum-seekers are subject to. Turkey has implemented a "temporary protection regime"[356] for Syrians.[357] This new regime is based on the Temporary Protection Regulation issued by the Council of

[349] *Ibid.*
[350] *Ibid.*
[351] HRW Report on Protecting Refugees, *supra* note 337.
[352] *Protecting Syrian Refugees Law and Policies Report supra* note 338 at 97.
[353] *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[354] *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[355] *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[356] "Still, Turkey is providing Syrians with many of the services traditionally afforded to persons under international protection, including shelter, food, and healthcare. UNHCR supports the GoT's [government of Turkey] temporary protection regime and considers it compatible with international standards." *Protecting Syrian Refugees Law and Policies Report supra* note 338.
[357] Şenay Özden "Syrian Refugees in Turkey" MPC Research Report 2013/05 at 5.

Ministers on 22 October 2014[358] to be applied to Syrian nationals and stateless persons.[359] The principles of the new temporary protection regime are an open border policy, *non-refoulement* and "registration with the Turkish authorities and support inside the borders of the camps."[360]

Since Syrians are not considered refugees and are currently subject to the new Temporary Protection Regime, the ordinary RSD procedure with regard to non-European asylum-seekers is not implemented upon them. Syrians are not eligible neither for the process established by the new law -because they are covered by the temporary protection regime, and seen as a temporary mass influx[361]- or for the ordinary RSD process conducted by UNHCR-Turkey.[362] The new system does not allow the UNHCR to perform an RSD procedure.[363] Accordingly, exclusion adjaducation process related to Syrians is also deviating from the normal procedure. Under such an exceptional regime, it is hard to identify the power sharing between the UNHCR and Turkish authorities with regard to the exclusion process.

Nevertheless, although UNHCR-Turkey does not carry out registration and RSD processes for Syrians, the organization conducts a very limited scope of RSD procedure for resettlement purposes.[364] This is because "certain governments have informed UNHCR of their interest in resettling Syrians from the region," and the UNHCR is the institution identifying limited numbers of Syrians to be resettled to these countries.[365] In doing so, the

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[358] The regulation is available in Turkish online at www.resmigazete.gov.tr/eskiler/2014/10/20141022-15-1.pdf. The regulation was issued on the basis of Article 91 of the Law on Foreigners and Inetrnational Protection. Before the Regulation came into force in 2014, there was a directive issued by the Turkish government in April 2012 to "explain the substance and application of the Temporary Protection regime." *Protecting Syrian Refugees Law and Policies Report supra* note 338.

[359] "Syrian Refugees in Turkey Frequently Asked Questions", UNHCR (January 2015), online < www.fluechtlingshilfe.ch/assets/hilfe/syrien/faq-syrians-in-turkey-english.pdf >

[360] Senay Ozden, "Syrian refugees in Turkey." (2013) at 5.

[361] *Protecting Syrian Refugees Law and Policies Report supra* note 338 at 113.

[362] Which is done by the UNHCR.

[363] *Protecting Syrian Refugees Law and Policies Report supra* note 338 at 113.

[364] "Resettlement and humanitarian admission are processes through which refugees who are vulnerable in their country of asylum can be moved to a third country." "Syrian Refugees in Turkey Frequently Asked Questions", UNHCR (January 2015), online < www.fluechtlingshilfe.ch/assets/hilfe/syrien/faq-syrians-in-turkey-english.pdf > at 8.

[365] *Ibid.*

UNHCR is eliminating Syrians who can not be eligible for resettlement at the first stage. This process of elimination is called "de-prioritization."[366] A quick conclusion might be that since the Turkish authorities solely carry out the registration process for Syrians, the UNHCR does not have any decisive roles in the Syrian refugee crisis in terms of the RSD process. This result is partially correct. However, I argue that the key point lies in the "deprioritization" process of the UNHCR. In other words, through the deprioritization processes, the UNHCR still collects information about the alleged offenders of Syrian nationals of serious international crimes. However, as the organization does not carry out RSD procedure for Syrians, the cases with serious exclusion triggers are de-prioritized and not adjudicated. What happens to the de-prioritized cases afterwards and how many Syrian cases are de-prioritized on this basis, are unknown. At the time of writing, information about the current policy and as to whether the UNHCR shares profiles of Syrians in deprioritized cases with the Turkish authorities has been officially requested from UNHCR-Ankara; but, there has been no answer.

4.3. Agreement between UNHCR-Turkey and Turkish authorities

Another unknown area is the agreement between UNHCR-Turkey and the Turkish authorities. There is no publicly available information about the presence of such an agreement. As it is indicated in the recent report on Syrian Refugees, there is no record of a memorandum of understanding between the Turkish government and the UNCHR.[367] Information pertaining to the existence of such an agreement and to the exclusion part have officially been requested from UNHCR-Ankara; no answer at the time of writing.

In spite of the fact that the content of the agreement is not available, there are only two possible ways the exclusion matter can be handled by UNHCR-Turkey: either the profile of excluded persons is shared with the Turkish state or not.

[366] Correspondence with a legal officer at the UNHCR. (On file with author)
[367] "The only publicly available document regarding the status of UNHCR in Turkey is a "letter from 1960 through which the Turkish Prime Minister extends permission to UNHCR to establish representation in Turkey." *Protecting Syrian Refugees Law and Policies Report supra* note 338.

I will apply "the concurrent liability model" to two groups; first, the ordinary exclusion process for non-European asylum-seekers, and second, the exclusion process for Syrian asylum-seekers. The scope of this assessment will be limited to crimes triggering the obligation of Turkey to extradite or prosecute.

4.4. The Concurrent Liability Model and Non-European Asylum Seekers in Turkey

Recalling that UNHCR-Turkey continues to conduct exclusion analyses as a part of the ordinary RSD procedure for non-European refugees, the first possibility is that the UN Agency shares information and profile of excluded persons with Turkey; but Turkish authorities do not launch criminal investigations against them as a result.[368] In such a situation, the Turkish authorities are either expelling excluded persons to their home countries or allowing them to stay in Turkey, creating a "safe haven" situation. The third possibility is Turkey launching criminal investigations against these people. Though, this is not easy to determine as there is no publicly available document with regard to such an investigation. On the other hand, expulsion is not an unfamiliar scenario considering the policies followed by other countries towards excluded persons. Most states have often been reluctant to enforce jurisdiction over extraterritorial offences, given the obvious difficulties in securing witness testimony and corroborating the evidence.[369] For example, in the Netherlands, the applicant is sometimes 'tolerated' in 1 F cases.[370] Likewise, in the United Kingdom, in those cases, applicants are then placed on 'discretionary leave' and their status is regularly reviewed "until removal becomes a viable option."[371]

Nonetheless, as the UNHCR's liability is limited to the process it has sole power over, at the time the information is shared with the Turkish authorities, its liability is over and the

[368] There is no publicly available document about the numbers of excluded persons by the UNHCR-Ankara and the cases currently processed by the institution. This information is requested; but no answer yet.
[369] Goodwin-Gill, *supra* note 129 at 204.
[370] *Report on the War Crimes Units supra* note 99.
[371] *Report on the War Crimes Units supra* note 99.

liability passes to Turkey. Since this thesis focuses mainly on the responsibilities of the UNHCR during the post-exclusion phase, I will not analyse Turkey's international obligations to prosecute that might occur in relation to the excluded persons.

The second alternative is that the UNHCR does not share any information or share very limited information about excluded persons with Turkish authorities. In this scenario, in order to apply the concurrent liability model, first, international crimes triggering enforcement of the obligation to extradite or prosecute will be evaluated from the perspective of Turkey's obligations under international law.

4.4.1. Turkey's Obligations under International Law

As discussed under Chapter II, international crimes requiring the implementation of the obligation to extradite or prosecute within the context of Article 1 F crimes are grave breaches committed within the context of an IAC and an act of torture pursuant to the CAT. Turkey is a party to the 1949 Geneva Conventions. [372] Therefore, under international law Turkey is obliged to extradite or prosecute alleged offenders of the grave breaches of the Geneva Conventions committed within the context of an IAC. Indeed, Turkey is under an obligation to search for suspected offenders, regardless of their nationality and of the place of the offence, and either to bring them before their own courts or hand them over to another State party.[373]

As indicated by the UNHCR's Guidelines[374], this situation might be relevant[375] to persons excluded on the basis of serious suspicion of involvement in grave breaches of the 1949 Geneva Conventions during the Iran-Iraq war, the invasion and occupation of Kuwait in

[372] Turkey ratified The 1949 Geneva Conventions on 10 February 1954. However, Turkey has not signed the 1977 Additional Protocols. "Turkey- International treaties adherence", Geneva Academy of International Humanitarian Law and Human Rights Law-Rule of Law in Armed Conflicts Project, <www.genevaacademy.ch/RULAC/international_treaties.php?id_state=226 >

[373] "The scope and application of the principle of universal jurisdiction" ICRC (15 October 2010) online <www.icrc.org/eng/resources/documents/statement/united-nations-universal-jurisdiction-statement-2010-10-15.htm >

[374] UN High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May 2012, HCR/EG/IRQ/12/03, online <www.refworld.org/docid/4fc77d522.html > [UNHCR Eligibility Guideline for Iraqis]

[375] In the context of UNHCR-Turkey's work

1990, subsequent Gulf War and "[t]he period from the U.S.-led invasion in March 2003 until the handover of sovereignty to the Iraqi Interim Government on 28 June 2004."[376] As to acts of torture, Turkey is a party to the CAT.[377] Accordingly, Turkey is obliged either to extradite or prosecute alleged offenders of an act of torture. This might be relevant for the persons excluded on the basis of serious suspicion of involvement in torture committed by Iraqi Security Forces under former- Saddam Hussein regime and the current Iraqi regime.[378]

I used examples from Iraq because UNHCR-Turkey's monthly statistics as of March 2015 shows that with 23.525 registered Iraqi cases, Iraqis constitute the largest population in Turkey followed by Afghans and Iranians.[379] UNHCR-Turkey continues to carry out RSD processes and exclusion analyses for these cases. In doing so, the UN Agency implements an initial screening process seeking "to identify both those whose vulnerabilities create an urgent need for resettlement and those who require a more thorough exclusion assessment."[380] Consequently, Iraqi cases triggering the need for an exclusion interview are flagged by the UNHCR.[381] In those cases, the UNHCR staff undertakes a separate exclusion analysis.[382] Yet, there is no publicly available information as to how many exclusion triggered cases are processed and how many refugees are excluded by the decision of UNHCR-Turkey.

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[376] UNHCR Eligibility Guideline for Iraqis, *supra* note 374 at 143.
[377] Ratification by Turkey on 1984 UN Convention against Torture- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, UNTS 1465 at 85.
[378] "In the Iraq context, acts such as assassinations, abductions or torture committed by State security forces, armed opposition groups (pre-2003) or insurgency or criminal groups or militias (post-2003) may fall within the scope of Article 1F(b)." UNHCR Eligibility Guideline for Iraqis, *supra* note 374 at 143.
[379] Please see UNHCR monthly statistics for 2015; "UNHCR Turkey's Monthly Statistics as of January 2015", UNHCR (January 2015) online < www.unhcr.org.tr/uploads/root/eng(26).pdf >
Also, "Iraqis were the second largest group of asylum-seekers with a total of 28,900 new applications registered during the first half of 2014, most of them in Turkey (15,700), Jordan (5,700), and Germany (2,100)." "UNHCR Mid-Year Trends 2014", UNHCR, < online www.unhcr.org/54aa91d89.pdf >
The unprecedented increase in the number of non-Syrian new arrivals continues in the first quarter of 2014, thus making Turkey the fifth largest recipient of individual asylum claims amongst all industrialized nations. As of end of April 2014, there are 86,927 persons of concern in Turkey – not including Syrian refugees- registered with UNHCR. UNHCR. *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report –Universal Periodic Review: Republic of Turkey* (2014).
[380] *Bond supra* note 28 at 44.
[381] *Bond supra* note 28.
[382] "Resettlement of Iraqi Refugees",UNHCR (12 Mar 2007), online <www.unhcr.org/refworld/docid/45fab0242.html> 6.

Recalling that under the concurrent liability model, the UNHCR is liable for the parts that it has a sole authority over, the organization might be liable for the information that it gathered during the exclusion assessment. However, this argument is more relevant to the finalized exclusion cases. That is to say, sharing information with the Turkish state for the purpose of initiating a criminal investigation should be considered only for the persons who are to be excluded from international protection. This is because the UNHCR is very careful and generally reluctant to exclude refugees, which indicates that individuals finally excluded by a decision of the UNHCR show a robust profile for the commission of alleged crimes. As a part of the exclusion assessment there is a proportionality test whereby the gravity of the offence in question is weighed against the consequences of exclusion to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Refugee Convention.[383] The UNHCR perceives Article 1 F as "an exception to human rights...and advocates for a restrictive approach to its application" [384] and ensures that all of the relevant circumstances are considered before denying protection.[385]

In Turkey, the universal jurisdiction based on treaty obligation with regard to certain offences, has been incorporated into national legislation. As put forward by Goodwin-Gill, the obligation to prosecute would appear to result in the obligation to conduct a "preliminary enquiry into the facts, to co-operate, and to exchange information with other states or international organizations having a recognized interest in the matter or the offender, as well as obligations generally relating to process, impartiality."[386] In case the profiles of excluded persons are shared with Turkish authorities, public prosecutors can launch a criminal investigation against the excluded persons upon the request from the Minister of Justice based

[383] UNHCR Guideline on Application of the Exclusion Clause, *supra* note 65.
[384] *Bond supra* note 28.
[385] Other individuals who are initially flagged for an exclusion assessment but not excluded at the final stage due to their not failing in fulfilling the proportionality test or other reasons should not be considered under the scope of the concurrent liability model.
[386] Goodwin-Gill, *supra* note 129 at 220.

on Article 13 of the Turkish Criminal Code.[387] Information collected from the International Law department of Turkish Ministry of Justice shows that the Ministry of Justice has requested prosecution of extraterritorial international crimes several times, one of which was concluded recently.[388]

To sum up, in cases in which UNHCR-Turkey is a sole authority for the exclusion process and hence, collects information about excluded persons' profile, the UN Agency is concurrently liable to facilitate prosecution of excluded persons. This is because, in case UNHCR-Turkey does not inform them, Turkish authorities can not learn commission of alleged crimes that might trigger Turkey's international obligation to extradite or prosecute. This is the direct result of having sole power over the process. On the other hand, under the concurrent liability model, Turkey is still liable to ensure proper information exchange between the UNHCR and its authorities. Having said this, UNHCR-Turkey might have reasonable concerns in not sharing the information with local authorities, which will be discussed under Section 4.6. Possible Drawbacks of the UNHCR regarding the Information Exchange.

4.5.Concurrent Liability Model and Syrian exclusion related cases

The key point under the concurrent liability model is to have a state like authority over the process, partially or totally. However, as explained earlier (under Section 4.2), unlike the ordinary RSD procedure, the Turkish state has a sole authority- including exclusion analysis- over the management of the Syrian refugee crisis. UNHCR-Turkey is only identifying Syrian refugees to be resettled to the third countries. In doing so, the UN Agency is deprioritizing

[387] According to Article 13 of the Turkish Criminal Code, following extraterritorial crimes can be prosecuted in Turkey; genocide, torture, crimes against humanity, human trafficking, felonious homicide, intentional environmental pollution, production and trade of drugs and stimulants , facilitating use of drugs and stimulants, manufacturing and trade of instruments used in production of money and valuable seals/stamps,bribery, whoredom, confiscation or hijacking of aircraft, vehicles or vessels or offences committed with the intention to give damage to these properties. Turkish Criminal Code No. 5237 (entered into force on12 October 2004).

[388] However, due to confidentiality reasons, the department does not provide more information as to how many cases have been processed until now. Source: Correpondence with a legal officer working in the International Relations department of the Ministry of Justice on 1 June 2015. (On file with author)

exclusion triggered cases. That is to say, although UNHCR-Turkey is collecting information about possible perpetrators of international crimes, this remains at a very preliminary level. The information being collected through the de-prioritization process should not be compared to that of being collected through an ordinary exclusion assessment. Therefore, considering that UNHCR-Turkey does not have state-like power over the exclusion assessment of Syrian cases and the deprioritization of Syrian cases on the basis of exclusion related reasons do not amount to gathering credible and sufficient information in relation to the alleged crimes, the concurrent liability model is not applicable to the relation between UNHCR-Turkey and Turkey for the Syrian cases. To date, Syrian cases triggering serious exclusion assessment can only raise a question as to whether the Turkish state is fulfilling its international obligations with regard to the principle to extradite or prosecute. Yet, this topic is not within the scope of this research.

4.6. Possible Drawbacks of the UNHCR regarding the Information Exchange

As mentioned earlier, UNHCR-Turkey may still have liability to share non-Syrian excluded persons' profile with Turkish authorities with a view to facilitating criminal investigation against them. However, elucidating possible concerns preventing the UNHCR's cooperation with host states is of great importance. Some of those are very similar to the problems concerning the implementation of the universal jurisdiction. These drawbacks can be categorized into four main areas; (i) concerns relating to politicizing the humanitarian nature of asylum seeking and selectivity in criminal prosecutions by a host state, (ii) procedural and due process related problems, (iii) the concerns related to evidentiary standards and (iv) the confidentiality related problems. I will analyse these drawbacks from a general UNHCR perspective.

First, when it comes to the politicization of the humanitarian nature of asylum-seeking, a too strict application of the exclusion provision might cause considerable amount of

individuals to be *de facto* 'pre-sentenced'.[389] A punitive function of the process would eventually threaten or harm "the confidence which asylum-seekers should have in asylum procedures."[390] Also, the UNHCR may not want to cooperate with host states due to the selectivity problem.[391] Selectivity in international criminal law occurs when "international crimes are prosecuted only where there is a political reason for doing so."[392] For example, according to the latest Rule of Law Index[393], Turkey's criminal justice level, including the components of no discrimination, no corruption, no proper government influence and due process of law is considered in "low" with a rank of 76 out of 102 countries. Considering this data, the selectivity problem is likely to occur in the Turkish State's position against the current regime in Syria[394] and its possible effects might be traced on the future prosecutions of Syrians - if there will be any- on the basis of Article 1 F crimes.[395]

The second concern is about ensuring basic due process rights of asylum-seekers during the adjudication part of the exclusion process and that of excluded persons during the criminal investigation to be conducted by a host state. During exclusion interviews, "asylum seekers suspected by the UNHCR of involvement in criminal activity do not benefit from a number of the procedural protections to which they would be entitled if they were charged before" international courts and national courts at large.[396] These procedural rules include the right to counsel, the right to know the allegations against them, the right to challenge evidence on a variety of grounds, and the right to cross-examine witnesses.[397] In case procedural laws have not been adapted by a host state, this can violate the right of the accused to a fair trial,

[389] *Reijven&Wijk supra* note 8.
[390] Cryer, *supra* note 154 at 95.
[391] *Ibid.*
[392] *Ibid.*
[393] "Rule of Law Index 2015-Turkey", World Justice Project, online < data.worldjusticeproject.org/#/groups/TUR>
[394] Please see Fadi Hakura, "Why Turkey is increasing pressure on Assad" CNN (February 10, 2012) online <http://www.cnn.com/2012/02/09/opinion/syria-turkey-oped/>
[395] For example, while opponents of the Esad regime can get political favour during the prosecution phase, it can be totally opposite for the proponents.
[396] *Bond supra* note 28 at 46-47.
[397] *Bond supra* note 28 at 46-47.

because "the position of the defence in these types of proceedings, is considerably weaker than in proceedings related to domestic crimes."[398] The defence will encounter challenges in conducting "its own investigation, particularly abroad."[399] In exercising universal jurisdiction, host states might be biased against international crimes having a political nature and punishments' might be inhuman, which raises serious questions regarding sufficient respect for basic due process rights.[400]

"The detection, investigation and prosecution of suspects" of serious international crimes requires special knowledge and skills.[401] Due to the absence of a specialized and well resourced units, there might be limited investigations and prosecutions in spite of "the existence of relevant domestic legislation providing for universal jurisdiction" in a host state.[402] The lack of sufficient resources and structures in a host state can also result in the host state's failure in estimating how many suspects are indeed staying on its territory. [403]

Similar to the due process related problems, there might be concerns related to the evidentiary standards. One of the most important problems associated with the evidentiary standards is that asylum-seekers might lie about their activities in their countries of origins.[404] In case they are not aware of the existence of the exclusion provision, they may make up "stories about defection or rebellion, hoping that this will convince immigration officials that they risk persecution upon return and that such stories will only increase their chances of obtaining refugee protection."[405] When it comes to the levels of threshold required for

[398] *Report on the War Crimes Units supra* note 99.
[399] *Report on the War Crimes Units supra* note 99.
[400] Cryer, *supra* note 154 at footnote 160.
[401] *Report on the War Crimes Units supra* note 99.
[402] "The experiences in countries such as Germany, Belgium and The Netherlands, where the establishment of specialised units resulted in the prosecution and conviction of a relatively high number of suspects, suggest that the limited investigations and prosecutions in the United Kingdom since 2005, despite the existence of relevant domestic legislation providing for universal jurisdiction, and despite a relatively high number of suspects already present and others frequently travelling to the United Kingdom, could be attributed to the lack of a specialised and well resourced unit." *Reijven&Wijk supra* note 8.
[403] *Report on the War Crimes Units supra* note 99.
[404] *Reijven&Wijk supra* note 8.
[405] *Reijven&Wijk supra* note 8.

criminal convictions, "[t]he evidentiary standard of proving 'serious reasons for considering'" that an applicant committed any of the crimes enumerated under Article 1 F is much lower than "the 'beyond reasonable doubt' threshold required for a criminal conviction."[406] Considering this, there may not be "a high conviction rate of excluded persons."[407]

In case the profile of the excluded persons is shared with a host state for the prosecution purposes, "collecting evidence abroad in post or actual conflict situations and transporting such evidence to a court" situated far away is another challenge for the investigation phase and may cast a doubt on the credibility of such evidence.[408] Also, witnesses are generally located in the territorial state and victims are often too traumatised [409] to be a part of a criminal investigation.

Presumably, one of the most important challenges related to the information sharing is the confidential nature of asylum-seeking. According to the UNHCR's Guidelines on Exclusion, the principle of confidentiality is applied in principle "even when a final determination of exclusion has been made" in order to "preserve the integrity of the asylum system- information given on the basis of confidentiality must remain protected."[410] The dilemmatic nature of sharing information with third parties is not only relevant to the relation between the UNHCR and host states but also between the state's immigration offices and prosecution services. For example, in the Netherlands, RSD interviewers assure the confidentiality regarding the information provided by the applicant and "that it will not be shared with third parties."[411] Despite this, "information sharing about (possibly to be)

[406] *Fitzpatrick supra note* 130 at 292.
[407] "So far, only four excluded individuals have been successfully prosecuted and convicted in the Netherlands.21 Considering this low success rate, it is disputable whether notifying the Prosecutor of all potential 1F cases at an early stage is in fact desirable." *Reijven&Wijk supra* note 8.
[408] *Report on the War Crimes Units supra* note 99.
[409] *Report on the War Crimes Units supra* note 99.
[410] *UNHCR- Background Note on the Application of the Exclusion supra* note 21.
[411] "unless this is necessary in the execution of the Aliens Act and in supervising aliens" *Reijven&Wijk supra* note 8.

excluded applicants" can still be in the interest of security and justice.[412] Although information sharing with a wide range of actors is not encouraged, "careful sharing of information about a selected number of high risk individuals with a selective number of actors could be the way forward."[413] In support of this argument, "[t]he Dutch Supreme Court in 2008 confirmed in a case against two former members of the KhAD that the use of statements obtained in the asylum procedure as proof in a criminal procedure did not violate the nemo tenetur principle and the right against self-incrimination."[414] In deciding so, the Court asserted that "the use of such information and the violation of privacy had been proportional."[415]

In case the information related to "the alleged criminal background and whereabouts of (possibly to be) excluded applicants" is shared, this would ease for forum states monitoring, treatment and potentially preventing the commission of new crimes.[416]

To sum up, the drawbacks related to the information sharing should carefully be evaluated in their potentially being against the humanitarian nature of asylum-seeking. In the Rule of Law Index, Turkey is ranked 80th out of 102 countries. This shows that if the information related to excluded persons are shared by the UNHCR with the Turkish state, there might be serious challenges in relation to due process rights of the excluded persons during the criminal investigation phase. Considering all the drawbacks, it is disputable whether sharing information with all host states or otherwise holding the UNHCR concurrently liable in this failure is still desirable. So what should the UNHCR do in such a dilemmatic situation? On the one hand, if the UN Agency does not share the information, this might cause its liability in international arena. On the other hand, if it shares them, this might lead more serious problems. In the following section, I will make some suggestions.

[412] *Reijven&Wijk supra* note 8.
[413] *Reijven&Wijk supra* note 8.
[414] *Reijven&Wijk supra* note 8.
[415] *Reijven&Wijk supra* note 8.
[416] *Reijven&Wijk supra* note 8.

4.7. Slicing the Gordian knot

Although the UNHCR's work has officially been confined to an "entirely non-political character, the organization "does not operate in a political vacuum."[417] The refugee phenomenon affects global community raising "political, security and humanitarian concerns."[418] The UN Agency's evolving functions makes it necessary in involving decisions of a political nature. The problem is that there is no "coherent conceptual framework to guide the consequences of this constantly evolving role."[419] In proposing suggestions to tackle this problem, I will build on the suggestions that have been put forward to harmonize incongruities between international refugee law and human rights law.

There might be two ways to address the lack of harmonization between international refugee law and human rights law; "either by solving the incongruities of both areas of international law, or by reconciling various ad hoc solutions."[420] For the former, change in the provisions of the 1951 Refugee Convention or in the Statute of the UNHCR might be a solution; though, this would imply a serious adjustment which might discredit their value. [421] Given this concern, "reconciling various ad hoc solutions" in solving the problem of the lack of harmonization between international refugee law and international criminal law could be the most feasible and sustainable ones.

Earlier, the establishment of "an independent international judicial commission" by the UNHCR with the function of providing "reasoned opinions on major questions relating to the constructions of the Convention"[422] was proposed. Similarly, the International Council of Voluntary Agencies (ICVA) proposed, as a part of the reform of the supervision of the 1951

[417] *Wilde supra* note 266.
[418] *Wilde supra* note 266.
[419] *Wilde supra* note 266.
[420] *Reijven&Wijk-Caught in Limbo supra* note 137.
[421] *Reijven&Wijk-Caught in Limbo supra* note 137.
[422] Anthony M North, Joyce Chia. "Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission" in *The UNHCR and the Supervision of International Refugee Law* (Oxford: Oxford University Press, 2013) 215.

Refugee Convention, the foundation of an independent treaty body "that would receive periodic reports and group complaints and establish linkages to the UNHCR, civil society, and other institutions within the UN." [423] Gilbert further questioned whether an International Refugee Court could be "the means and the mechanisms to invoke greater 'coherence and oversight' in the application and interpretation of international refugee law."[424]

To date, the suggestions at large are related to the general interpretation and application of the 1951 Refugee Convention and finding a way in unifying the interpretation among member states. On the other hand, suggestions related to the post-exclusion phase and treatment of excluded persons should have a specific and straightforward approach.

In this vein, as mentioned under Chapter II, an ECOSOC or General Assembly's policy directive reconciliating the UNCHR's current policy with the host states' obligations to extradite or to prosecute might be a suggestion. Concretely, the foundation of an independent international commission composed of members from the host states and international experts exclusively tackling the post-exclusion phase could significantly contribute to harmonization. Considering the concerns related to fluctuant rule of law situations in each host state, the commission might address these problems specific to the each state and support capacity building in states' judiciary -only for the exclusion related prosecutions. This might include assignment of national or international judges or prosecutors having expertise in international criminal law and establishing mechanisms and procedures to ensure accountability and transparency for acts within this kind of exclusion related investigations. The commission can also provide effective coordination and cooperation between national authorities.

Alternatively, specialized units[425] can be established to investigate and prosecute Article 1 F crimes in each host state. For example, specialized war crime units were founded

[423] *Jones supra* note 51 at 81.
[424] Simeon, "The Application and Interpretation of International Humanitarian Law", *supra* note 31 at 82.
[425] "The first specialised units were established to investigate and prosecute Nazi war criminals in Germany (1958),the United States (1979), Canada, (1985), the United Kingdom (1991), Australia (1987) and Poland

within the Immigration and Naturalisation Department of the UK Border Agency in 2004. [426] A special Article 1 F unit was established in the Netherlands in 1997. [427] The unit is forwarding Article 1 F cases to the Dutch Prosecution Service when a case meets the criteria of Article 1 F.[428] However, the U.K. and the Netherlands are countries which conduct RSD process within their own systems. In order for specialized units to work in a host state where the UNHCR conducts the exclusion phase, the UN Agency should share the profile of the excluded persons with the units. In the case of Turkey, specialized Article 1 F units deciding which cases are to be forwarded for a criminal investigation can be established under the direction of a newly introduced DGMM. In order to ensure impartiality, the units can be composed of experts from the UNHCR and the Turkish state. The shortcoming of the system might be the UNHCR's strict confidentiality rules which might impede sharing of the profile of the excluded persons and ensuring due process rights of the suspects during the investigation phase. Also, the system of specialized units in host states will continue to put the UNHCR under a spotlight because of the information exchange system.

5. Conclusion

At present, there are more than 15 million refugees in the world.[429] There are almost 70 states[430] including Lebanon, Jordan[431] and Turkey where the RSD processes are conducted by the UNHCR. In Southeast Asia, only three countries are parties to the 1951 Refugee Convention while the countries receiving most asylum-seekers, such as Thailand and Malaysia, are not parties to the Convention.[432] This shows that the UNHCR has a state-

(1998). The units were typically established in response to the findings of national commissions of inquiry, which invariably determined a large presence of Nazi war crime suspects living in the countries concerned." *Report on the War Crimes Units supra* note 99.

[426] *Ibid.*

[427] *Ibid.*

[428] *Ibid.*

[429] *Jones supra* note 51 at 76.

[430] *Committee Report, supra* note 50 at para 18.

[431] Both agreements concluded between the UNHCR and Lebanon and Jordan assigned responsibility for refugee status determination to UNHCR. *Kagan supra* note 310.

[432] Sriprapha Petcharamesree. "International Protection and Public Accountability: The roles of Civil Society" in

substitute role in many countries due to the lack of protectoral framework for refugees. Yet, the rights, cooperation and commitment defined more than 60 years ago[433] appear to not support the realities of international law. Although other international regimes including international human rights have seen profound changes since the establishment of the UNHCR, "the governance of the international refugee regime can be described at best as static and at worst as inert."[434]

The phenomenon of exclusion assessment conducted by the UNHCR and failure in sharing information pertaining to excluded persons with host states causing a "safe haven" in the host states is a reality regardless of how and where it results from. I argue that if ensuring the flow of information between an immigration office and a prosecution office to suppress international crimes is a legal obligation for a state, then the same obligation emerges for the UNHCR in states where the organization takes over the state's responsibility in these areas. On the other hand, this is an emerging area of law. There might be strong criticism against such an argument given that states at large do not ensure such an information flow when the RSD process is carried out by the states themselves. In such a situation, why should the global community give this task to the UNCHR, which must maintain its humanitarian nature. This is a very valid concern.

However, not questioning the UNHCR's policies towards excluded persons is creating another odd scenario where an organization working under the auspices of the UN tacitly causes the impunity for perpetrators of the international crimes. As articulated under Article 55(c) of the UN Charter, the UN is mandated to promote "the universal respect for, and observance of" human rights which, arguably include a duty to suppress international crimes.

The UNHCR and the Supervision of International Refugee Law (Oxford: Oxford University Press, 2013) 278.
[433] *Jones supra* note 51 at 76.
[434] *Ibid.*

[435] Thus, analyzing the UNCHR's acts and omissions in this area is more important than questioning states' duties and efficiency in fulfilling duties in this respect. If the UN cannot achieve unity and commitment to eradicate impunity among its agencies, how would it be possible to convince 193 member states to do the same thing?

The fragmentation of law should not be a cause for turmoil but rather an opportunity for constructive approaches. Hence, this thesis does not aim at criticizing the UNHCR's acts blindly or designating it as being the black sheep of the UN family. On the contrary, in a world where 60 millions of people are displaced and nearly 20 million people are refugees[436], the UNCHR's efforts in the humanitarian area are invaluable and necessary. The UN Agency is carefully working to help refugees at large with a very little budget and source. However, great power comes with great responsibilities. This paper concludes that due to its evolving functions, the UNHCR is concurrently liable for the failure of the prosecution of excluded persons, together with host states where the RSD process is conducted by the organization and where it is a legal obligation for the host state to extradite or prosecute alleged offenders of Article 1 F crimes. On the other hand, putting all responsibility on the UNHCR is far too much for a humanitarian agency to carry. The global community should find a solution to prevent this situation. Unless such a solution is found, it is clear that the organization will continue to cause the impunity regardless of meaning to cause it and subsequently, will be concurrently liable because of it.

As to the case study of the Syrian refugee crisis in Turkey, I conclude that the UNHCR does not have any liability as it does not have an authoritative role in the RSD process of Syrians. However, the UNHCR continues to carry out RSD procedure for non-Syrian asylum-seekers in Turkey. As of end of April 2014, there are 86,927 non-Syrian

[435] *Enache-Brown&Fried supra* note 297.
[436] UNHCR, Press Release, "UNHCR warns of dangerous new era in worlwide displacement as report shows almost 60 million people forced to flee their home", (18 June 2015) online < www.unhcr.org/55813f0e6.html >

persons of concern including Iraqis, Afghans and Iranians in Turkey registered with the UNHCR. [437] This statistic shows that the UNHCR still has a decisive role for the considerable amount of asylum-seekers in Turkey. Therefore, in case UNHCR-Turkey does not share the profile of excluded persons with the Turkish authorities, the UNHCR is liable under the concurrent liability model for the Article 1 F crimes triggering Turkey's obligation to extradite or prosecute.

This thesis also shows that there is no transparency in (i) numbers of how many people are excluded by the decision of the UNHCR, (ii) the way that the exclusion process is carried out by the organization, (iii) processes as to what happens to those who are excluded and (iv) an agreement between host state and the UNHCR in terms of the exclusion process. As questioned by Reijven and Wijk, are there a few hundred or thousands of people excluded? "Are they allegedly low-level, hands-on perpetrators, or high level bureaucrats who orchestrated crimes against humanity, or genocide? As it stands, we simply do not know." [438] Therefore, the first step should be ensuring transparency and accountability in the exclusion processes. The UNHCR should review its internal policies with regard to transparency and the confidentiality rules. The second step can be a finding a global solution for excluded persons. In order to ensure objectivity and due process rights, the establishment of an independent international commission that will have a responsibility and decision-making capacity over these individuals might be a feasible option. This commission can assign cases to states which have the resources and respect due process rights, are eager to prosecute excluded persons or the commission could work with host states which will prosecute excluded persons, for capacity-building. Alternatively, such a commission can cooperate with the International Criminal Court.

[437] UNHCR. *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report –Universal Periodic Review: Republic of Turkey* (2014).
[438] *Reijven&Wijk-Caught in Limbo supra* note 271.

All in all, this thesis points out that there is an impunity problem resulting from the governance of international refugee regime and to date, none of the institutions are held accountable for this situation. This is an urgent matter, in dire need of examination by the global community: ignoring it will only hurt the international justice systems' nascent reputation.

Appendices

Jurisdiction over crimes and acts to Article 1F CSR51	Permissive	Mandatory by convention	Mandatory by Customary International Law (mandatory to non-parties)
Article IF(a)			
Crimes against peace	*no?*	*no*	*no*
War Crimes			
- *grave breaches*	*yes*	*yes*	*no?*
- *Hague law, Common Article 3, APII*	*Yes**	*No*	*no?*
'Crimes against humanity'	*Yes**	*No*	*no*
- Torture	*Yes*	*Yes*	*?*
Article IF(b)			
'Common crimes'	*Yes?*	*No*	*no*
- Terrorism**	*Yes*	*Yes*	*?*
- Hijacking	*Yes*	*Yes*	*?*
- Drug-Trafficking	*Yes*	*Yes*	*?*
- Hostage-Taking	*Yes*	*Yes*	*?*
Article IF(c)			
Acts contrary to **UN** purpose and principles			
- Terrorism**	*Yes*	*Yes*	*?*

(*) As a matter of customary law
(**) Relating to the specific acts prohibited **by** conventions
(?) Uncertainty regarding a possibly emerging customary obligation

Chart I- Larseaus, *supra* note 69 at 92.

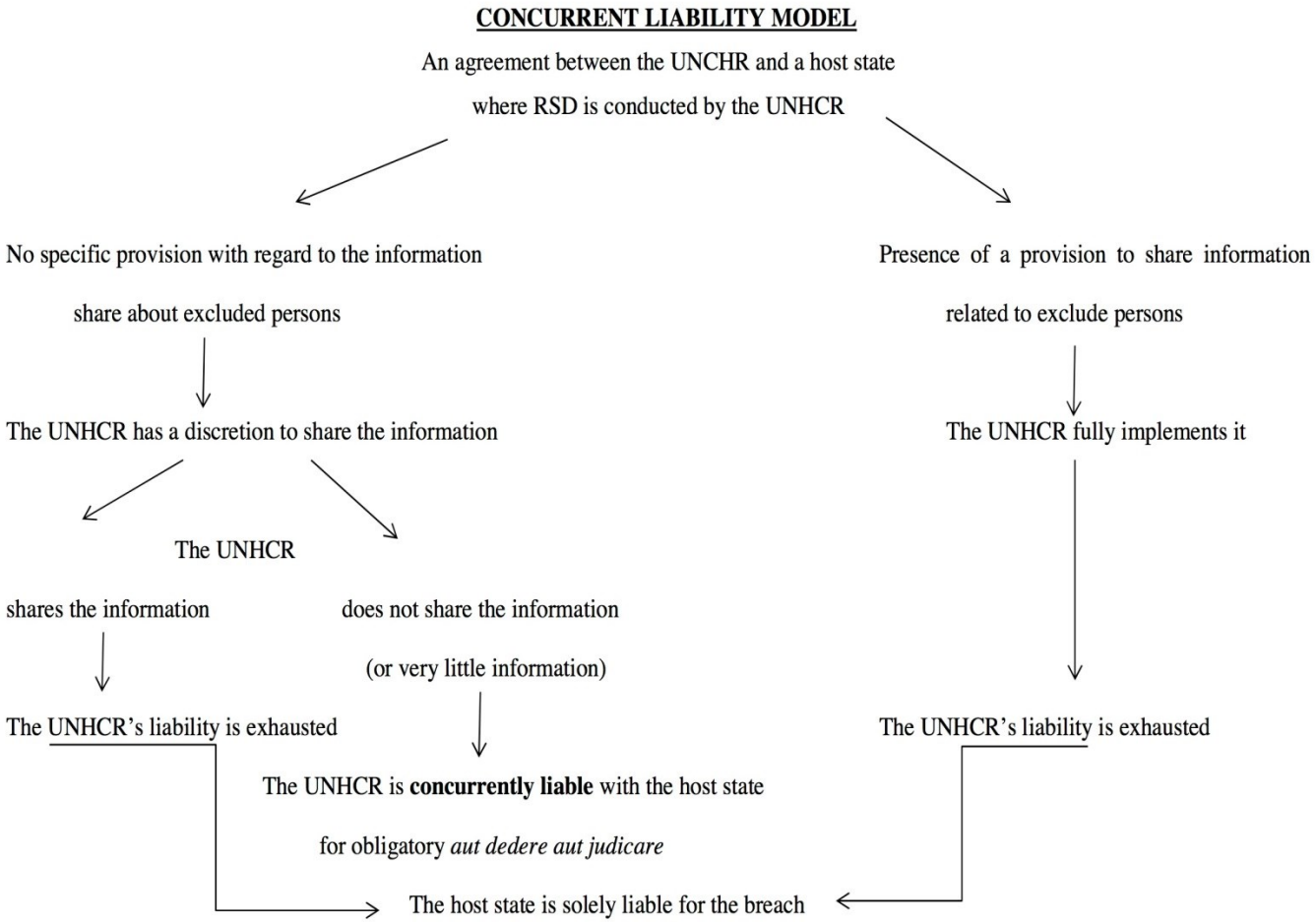

Chart II- The Concurrent Liability Model

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