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*Abstract*

The fight against international crimes takes place at many levels, not just before the *ad hoc* tribunals and the International Criminal Court. Nor is the subject limited to the crimes prosecuted before those courts. This paper considers how extradition and other forms of rendition might be utilized to rid a state of an undesirable alien, particularly one who is excluded from refugee status, whether that be to the ICC or, more likely, to another state with jurisdiction. However, in undertaking this framework of analysis, the paper also has regard to those cases where the undesirability only comes to light through an extradition request subsequent to refugee status being granted. In this context, states have three sets of obligations that overlap. The Rome statute or extradition treaties require states to surrender persons requested by the ICC or other states where the various requirements are met: international refugee law and international human rights law require states to protect those within their jurisdiction from *refoulement*; international refugee law also imposes an obligation to exclude from the protection that *non-refoulement* accords, those who are deemed unworthy based on criminal activity. The undesirability of the alien is but a side factor in balancing these competing claims on the state.

**1. Introduction**

Protection should not equate to impunity. Most of the articles arising from this symposium are to do with the inability of the state of protection to remove someone who is undesirable, usually as a consequence of prior criminal activity, either because of international refugee law or guarantees in international human rights law. In this paper, however, the position is further complicated by the potential involvement of some third state or even the ICC that may want to prosecute the individual and who seeks their surrender from the state of protection. To set the scale of the problem in context, the ICTY issued around 160 indictments, the ICTR just under 100 and, as of October 2016, the ICC has issued 32. Yet, many more persons have committed war crimes, crimes against humanity, genocide and crimes against peace/aggression – and the fight against international crime is not confined to those crimes. The UN has multifarious, multilateral treaties combatting serious crimes such as hijacking, terrorist bombings, the financing of terrorism and hostage taking, to name but a few.<sup>1</sup> As will be discussed below, from the outset of modern refugee law in 1951, those with respect to whom there are serious for considering that they have committed war crimes, crimes against

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<sup>1</sup>Convention for the Suppression of the Unlawful Seizure of Aircraft, done at the Hague, 16 December 1970, 10 ILM 133 (1971); Montreal Convention of 1971 on Unlawful Acts Against the Safety of Aircraft, 10 ILM 1151 (1971); International Convention Against the Taking of Hostages, UNGA Res 146 (XXXIV), UNGAOR, 34th Sess, Supp No.46, at 245, UN Doc. A/34/46 (1979), 18 ILM1456 (1979); International Convention for the Suppression of Terrorist Bombing, UNGA Res. 164, UNGAOR, 52nd Sess, Supp No.49, at 389, UN Doc. A/52/49 (1998), 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism, UNGA Res. 109, UNGAOR, 54th Sess, Supp No. 49, UN Doc. A/54/49 (vol. I) (1999), S Treaty Doc No. 106-49 (2000), 39 ILM 270 (2000)

humanity, crimes against peace, serious non-political crimes or are guilty of acts contrary to the purposes and principles of the United Nations, have been excluded and states have an obligation not to protect these applicants for refugee status. Nowadays, they can combat some of the potential impunity by transfer to the ICC, but it is more likely that either that state will have to assert jurisdiction or rely on that other international obligation, extradition to a state with jurisdiction over the international or transnational crime.

As such, this article focuses on the ability of the state of protection to utilize its laws on surrender and extradition or other forms of rendition to ensure that, if granted protection with the consequence that s/he is rendered *prima facie* unreturnable, the alleged fugitive nevertheless does not escape prosecution. In addition to extradition to a third state, transfer to some international court or tribunal may be available or, where the applicant for refugee status is excluded, international law may permit the person to be deported to a state where jurisdiction to prosecute can be asserted, so-called 'disguised extradition'. The interplay of international refugee law, international human rights law and international criminal law render this a complex problem even before one then takes into account the domestic laws, procedures and rules of evidence that will also have to be applied.

This article responds to all the different branches of international law that impinge on the surrender of an alien who would be at risk in her/ his country of nationality, but whose conduct makes them undesirable in the state where they now find themselves. In an age of mass movements of peoples, often from conflict zones or fragmented, collapsed, dysfunctional states, there is an increasing need to uphold the fundamental guarantee of *non-refoulement*, yet ensure non-impunity at the same time, and extradition and other lawful means of rendition provide one avenue to secure those twin goals, goals that could never be met simply by relying on the International Criminal Court with its very limited jurisdictional competence.

## 2. First Principles

Before looking at the laws pertaining to extradition and other forms of rendition, it is necessary to set out how international refugee law, international human rights law and international criminal law interact in various scenarios.

### A. *Unreturnable and unwanted*

As the media consistently shows, in an ever less welcoming world for displaced persons, even the most vulnerable refugees from the most egregious conflicts have their avenues of escape closed off. It seems that compassion fatigue, at least amongst the politicians of the global north, has rendered nearly every person moving to protect her/himself and their family as a potential threat.

The focus of this research symposium is on the *undesirable* person who cannot be returned to her/ his country of nationality or, if stateless, her/ his country of habitual residence. However, it may be easier to perceive the state of refuge's perspective in this context if all non-returnable persons, no matter what the reason and how valid their claim to protection is, in fact, seen as undesirable. There will be many people who are unreturnable of whom the undesirable on the basis of prior criminal activities constitute but a small subset. For instance, the person who qualifies as a refugee under the Convention Relating to the Status of Refugees, 1951, or some regional mechanism is unreturnable.<sup>2</sup> Alternatively, someone may

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<sup>2</sup>1951 Convention, 189 UNTS 137. See also, its 1967 Protocol, 606 UNTS 267, and see the then OAU

not qualify as a refugee, but is still unreturnable as a consequence of international human rights law or the international law of armed conflict. These persons are unreturnable, but they are not so much undesirable as simply unwanted. Of course, this second category also incorporates those who have been excluded from refugee status, those who might properly be described as undesirable – as is discussed further below, someone might well have a well-founded fear of persecution for one of the five grounds set out in the aforementioned 1951 Convention and so would ordinarily qualify as a refugee in international law, but if there are serious reasons for considering that they have committed a war crime, crime against peace, crime against humanity or serious non-political crime, or that they are guilty of acts contrary to the purposes and principles of the UN, then, under Article 1F they are excluded from all guarantees in the Convention, although international human rights law still offers a path to protection.

The scope of undesirability is broad, and the London Symposium on *Undesirable but Unreturnable* embraced broader understandings, but this paper discusses the extradition of refugees as well as rendition or some other form of surrender only in relation to those who have been excluded, and will consider whether there might be different responses in relation to persons who pose a real threat to the state of protection in comparison to those who are merely technically excludable, such as those who could be deemed to have expiated their crime.<sup>3</sup>

### **B. Removing Protection**

As will be seen, the law relating to extradition and rendition is complicated in its own right and that is multiplied if the fugitive qualifies as a refugee or is an asylum-seeker who benefits from *non-refoulement*. Thus, removing such humanitarian protection makes transfer to stand trial more viable. This section discusses exclusion under Articles 1F and 33.2 as it particularly pertains to extradition or other forms of surrender.

#### **1. Article 1F(a) and (b) vs. 1F(c) of the 1951 Convention**

Article 1F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The first two subparagraphs of Article 1F refer to there being serious reasons for considering that the applicant for refugee status has committed serious crimes, international crimes, even, whereas Article 1F(c) refers to her/him being “guilty of *acts* contrary to the purposes and principles of the United Nations”. Nevertheless, just because it refers to ‘acts’ does not mean that criminality is necessarily irrelevant since the refugee status determination (RSD) process must be able to deem the applicant “guilty”. Thus, there could be an interface between Article

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Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, 1001 UNTS 451, and the European Council Qualification Directive, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12, recast 13 December 2011, 2011/95/EU, OJ L 337 p.9 (‘ECQD’) - the Directive also provides for subsidiary protection for those who are not refugees and that too is subject to exclusion under Article 17.

<sup>3</sup>Cf. *Febles v Canada (Citizenship and Immigration)*, [2014] SCC 68.

1F(c) and extradition law. That being said, Article 1F(c) is problematic: it is derived from Article 14.2 of the Universal Declaration of Human Rights 1948 and was originally believed to be dealing with human rights violations that did not amount to crimes against humanity, although that interpretation is clearly inadequate now.<sup>4</sup> Although many states are known to use Article 1F(c) only in conjunction with subparagraphs (a) and (b), the UK Supreme Court applied it in the case of *Al-Sirri and DD v SSHD*<sup>5</sup> so as to exclude a person who mounted an armed insurrection against a Security Council mandated intervention force in Afghanistan, ISAF, without making clear that war crimes contrary to Article 1F(a) were a necessary component of the decision; it was enough that ISAF was mandated to maintain international peace and security. The link between Article 1F(c) acts and extraditable crimes may not always be straightforward, although prosecution before the International Criminal Court may be possible.<sup>6</sup>

## 2. Article 33.2 (both limbs)

Article 33.2 allows for *non-refoulement* protection to be withdrawn from an Article 1A.2 refugee if there are reasonable grounds for regarding her/him

... as a danger to the security of the country in which s/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.

The first limb, dealing with “danger to the security of the country”, is sufficiently wide to allow the *non-refoulement* protection in Article 33.1 to be disappplied based on criminality abroad post-refugee status, with extradition available as a means by which to ensure prosecution, but the criminality must pose a danger to the security of the protecting state. Given that Article 32 deals with expulsion on grounds of national security or public order and there is no loss of the guarantees provided by Article 33.1, then the “danger to the security of the country” in Article 33.2 must be extremely serious if there is to be an interference in the fundamental humanitarian protection offered by *non-refoulement*. As for the second limb, particularly serious crime, the refugee needs to have been convicted by a final judgment, which suggests jurisdiction would have to exist in the protecting state, although the crime may have occurred outside and either universal or representative jurisdiction has been asserted.

## 3. Paragraph 7 of the 1950 Statute

Subparagraph (d) is worded completely differently from Article 1F. UNHCR’s own documentation states, however, that since Article 1F is subsequent to the 1950 Statute, the organisation should use that definition of exclusion.<sup>7</sup>

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<sup>4</sup>See UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (4 September 2003) at paragraph 17, and associated Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. NB. Given that Article 14(2) of the Universal Declaration of Human Rights (UDHR), 1948, includes a similar phrase, there is some merit in this argument. See also, *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at 983, which suggests that the purpose of Art. 1F(c) “is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting”. See also, J. Rikhof, ‘Purposes, Principles and *Pushpanathan*: The Parameters of Exclusion Ground 1F(c) of the 1951 Convention as seen by the Supreme Court of Canada’, paper submitted as part of the responses to the UNHCR Global Consultations on Refugee Protection, 2001.

<sup>5</sup>[2012] UKSC 54 at paragraphs 65 and 68.

<sup>6</sup>Rome Statute of the ICC circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, Article 8(2)(b)(iii)/ (e)(iii).

<sup>7</sup>Guidance Note on Extradition and International Refugee Protection, April 2008, paragraph 78, fn 108, available at RefWorld website <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain>>. See also, S. Kapferer, The Interface Between Extradition and Asylum, November 2003, PPLA/2003/05, available at:

#### 4. Participation<sup>8</sup>

Article 1F refers to there being serious reasons for considering that the person seeking refugee status as having ‘committed’ the relevant crime or being guilty of the act. There is not space here to delve into the intricacies of participation for criminal prosecution (to which extradition or surrender lead and, as a consequence, with respect to which the requirement of double criminality would present further problems), whether that be before some international court or tribunal or at a domestic trial.<sup>9</sup> The question is whether there ought to be a separate test for participation for the purposes of excluding someone.<sup>10</sup> Does participation in that context require an autonomous, narrower meaning separate from that used in criminal proceedings because Article 1F is a limitation on a humanitarian provision, *non-refoulement*, that is customary international law?<sup>11</sup>

#### C. Extraditable ≠ Excludable and vice versa?

Unlike Paragraph 7(d) of the 1950 Statute, Article 1F makes no reference to extradition, although Article 1F(b) clearly draws on an extradition law concept, the political offence exemption.<sup>12</sup> In terms of distinctions between the two regimes, extradition law and refugee law, at its most basic level it has to be a *serious* non-political crime to fall within Article 1F(b). However, what are the criteria by which to determine seriousness? The potential sentence for the extradition crime, the threat to the protecting state *à la* Article 33.2, something that renders the non-political crime one equivalent to the crimes listed in Article 1F(a) such that 1F is consistent, or serious *vis-à-vis* the victim? And is it arguable that the degree of seriousness should be taken into account at some stage in the exclusion process, for it needs to be borne in mind that even where courts determine a fugitive to be extraditable because the offence is not of a political character, the government of the requested state

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<<http://www.refworld.org/docid/3fe846da4.html>>, accessed 31 March 2015.

It could be argued, based on Paragraph 1's mandate of providing international protection to refugees, that if applying Paragraph 7(d) would be less restrictive of international protection for someone who would otherwise qualify as a refugee, that is the test that ought to be applied when UNHCR is carrying out RSD. On the other hand, whenever the organisation is acting on behalf of a state party it should use Article 1F and even where not, on the basis that this is a process that might lead to resettlement in a third state which is party to the 1951 Convention, then it will be necessary to show to that state that the applicant is not excluded under Article 1F to the knowledge of UNHCR - it needs to be borne in mind that UNHCR does not have the resources to carry out background checks like a state would have and that states do not share their intelligence on specific individuals with UNHCR.

<sup>8</sup>The question of excluding applicants for refugee status for crimes committed as a minor will not be addressed. Please note, though, that the Special Court for Sierra Leone had jurisdiction to prosecute anyone over the age of 15 - Article 7 (available at: <<http://www1.umn.edu/humanrts/instree/SCSL/statute-sierraleone.html>>).

<sup>9</sup>For a mere *amuse-guele* of the problems, see G. Gilbert, ‘International Criminal Law is not a Panacea - Why Proposed Climate Change ‘Crimes’ Are Just Another Passenger on an Overcrowded Bandwagon’, 14 *International Criminal Law Review* 551 at pp.570-74 (2014). Compare and contrast joint criminal enterprise before the ICTY, most recently considered in *Prosecutor v Karadžić*, IT-95-5/18-T, 24 March 2016, with Article 25.3, Rome Statute, above note 6, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, and *R v Jogee* (Appellant) [2016] UKSC 8. When one turns to aiding and abetting, the ICTY alone has displayed a degree of confusion in *Prosecutor v Perišić*, IT-04-81-A, 28 February 2013, and *Prosecutor v Sainović*, IT-05-87-A, 23 January 2014.

<sup>10</sup>See *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)* [2010] UKSC 15; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40; and the Khad/WAD UNHCR letter to the Dutch MFA of 9 July 2009.

<sup>11</sup>See E. Lauterpacht and D. Bethlehem, ‘The scope and content of the principle of *non-refoulement*: opinion’, in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law*, (CUP, 2003).

<sup>12</sup>See generally, G. Gilbert, *Responding to International Crime*, (2006, Martinus Nijhoff), especially Chapters 5 and 8. See also, MP. Bolhuis and J. Van Wijk, ‘Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands’, 29 *Journal of Refugee Studies* 19 (2016).

retains a residual discretion to refuse extradition - should that be factored in via the criterion of seriousness in Article 1F(b)?

In addition, there are also different evidentiary requirements between extradition hearings and a determination that an applicant should be excluded from refugee status. Some extradition hearings only require evidence relating to the alleged participation by the fugitive, others a *prima facie* case, while Article 1F looks for “serious reasons for considering that” and Article 33.2, “reasonable grounds”. There may be different rules as to the admissibility of evidence in each type of hearing. More significantly, the two types of hearing, extradition and RSD, should not be fused: the former cannot deal with all the matters essential to deciding that someone who would otherwise qualify as a refugee should lose that protection of her/his fundamental right not to be returned to the frontiers of a territory where her/ his life or freedom would be threatened. Fewer problems should arise, though, where an extradition hearing has already decided that the requested crimes were non-political in character - only the strongest evidence that was not admissible at the extradition hearing but which can be presented in a refugee status determination hearing should reverse that finding for the purposes of Article 1F(b).<sup>13</sup> Otherwise, extradition and RSD are such different processes that one cannot superimpose one on to the other.<sup>14</sup>

#### ***D. Exclusion and international human rights law/ Customary non-refoulement in international law***

Exclusion from refugee status does not remove the protections that international human rights law provides. Such guarantees are easy to apply where there is an individualized risk of irreparable harm following return.<sup>15</sup> In the very recent *Rwanda Five* case,<sup>16</sup> the requested persons failed to show that conditions in Rwandan prisons were so bad that they amounted to inhuman or degrading treatment nor that there was a real risk they faced torture, inhuman or degrading treatment or punishment. On the other hand, the court refused extradition because of issues surrounding the fairness of the trial the *Rwanda Five* would face in Kigali.

631. I find that if extradited, as things presently stand, the defendants would be denied the effective representation of counsel in cases which so obviously call for effective and skilled representation by suitably experienced and re-sourced defence lawyers. It is too early to say that sufficient funding for defence investigations in relation to witnesses abroad will be provided. These defendants are legally aided in this country and will be indigent in Rwanda. I have seen in this case what the effective representation by counsel can achieve. Without such representation and funding, the High Court in Rwanda would be presented with the prosecution case and the [requested persons] would find it impossible to present their side of what happened. I find the [requested persons] would be exposed to a real risk of a flagrant denial of justice and a breach of Article 6.

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<sup>13</sup>See *T v SSHD* [1996] 2 All ER 865.

<sup>14</sup>*Cf. Folkerts v State Secretary of Justice*, 74 ILR 472 (Dutch Council of State, 1978), where it was held that if the extradition hearing had decided the applicant for refugee status would not face prosecution or punishment on grounds of race, religion, nationality or political opinion, then s/he would not qualify as a refugee - while it might be considered as persuasive evidence, an extradition hearing looking at the anti-discrimination clause is not deciding whether the person qualifies as a 1951 Convention refugee.

<sup>15</sup>*Soering v United Kingdom* Series A, Vol.161 (1989); *Chahal v United Kingdom* (70/1995/576/662), 15 November 1996, both European Court of Human Rights. See also, *Judge v Canada* Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003).

<sup>16</sup>*The Government of the Republic of Rwanda Requesting State v Vincent Brown (Aka Vincent Bajinya), Charles Mun-Yazeza, Emmanuel Nteziryayo, Celestin Ugirashebuja and Celestin Mutabaruka*, unreported, in the Westminster Magistrates' Court, 22 December 2015, at paragraphs 135-46.

More interesting, though, from the perspective of the non-returnability of undesirable persons is the decision in *NA v United Kingdom*,<sup>17</sup> where the Fourth Section of the European Court of Human Rights held that a general situation of violence might expose the claimant to a real risk of ill-treatment contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, more especially so if s/he is a member of a persecuted section of society. The *Rwanda Five* case is of a very particularized risk to these individuals, but *NA* prevents return of anyone because of a general situation in the requesting state. Both sorts of non-returnability might apply with respect to the extradition of undesirable persons in need of protection.

Whilst referring to international human rights law in this context, the applicant's right to confidentiality, especially as regards the country of nationality, must be preserved at all times for her/his safety and in relation to their associates still in that state. Thus, the process of obtaining evidence regarding the person's potential exclusion for the RSD hearing should not increase the threat they might face.<sup>18</sup> Moreover, nothing in the extradition hearing, where the country of nationality may be the requesting state, should reveal the fact the applicant is applying for refugee status or that s/he may be excluded therefrom. Where the government of the state of protection carries its own RSD, then evidence during that process might alert it to the possibility that the asylum-seeker has committed extradition crimes prior to her/ his application. As indicated, it is contrary to international human rights law guarantees regarding fairness of trial that evidence that emerges during refugee status determination, where the burden will be on the applicant to disclose information so as to prove her/ his well-founded fear of persecution, should be passed on to the country of nationality or any other country that might be able to prosecute so as to instigate an extradition request.<sup>19</sup> The only deviation from this stance might arise where the crimes disclosed are ones of universal jurisdiction and in those cases the state of protection will be under a treaty or customary obligation to prosecute or even surrender to some international tribunal. Where status determination is carried out by UNHCR on behalf of the state, the obligation not to disclose is stronger even though it has not ratified any international human rights law treaties.<sup>20</sup> UNHCR has a duty of international protection to all refugees and, at the time of disclosure by the asylum-seeker, s/he will have been treated as a refugee because status had not been determined up to that point. Equally, UNHCR needs to be seen by those seeking refugee status as not just an arm of the state if persons are to feel secure in approaching the organisation. Finally, status is determined by UNHCR's own staff and their personal security,

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<sup>17</sup>Application no. 25904/07, European Court of Human Rights (Fourth Section) 17 July 2008, at paragraphs 115-17.

<sup>18</sup>See UNHCR's Guidance Note, above note 7, at paragraphs 51, 57-58, 93 and 96.

<sup>19</sup>See Article 14 International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171, especially Article 14.2 and 14.3(g):

14.2 Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

14.3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

... (g) Not to be compelled to testify against himself or to confess guilt.

<sup>20</sup>*Quaere* the status of the Universal Declaration of Human Rights 1948 as constituting a set of obligations that all United Nations organs must uphold. Riedel, 'Article 55(c)' in B. Simma, *The Charter of the United Nations*, Volume II, (2nd edition, 2002), at pp.917-27, where it is argued that there is wide acceptance that Article 55(c) of the United Nations Charter is binding on the organization (pp.920 and 922-23) and that the UDHR represents the first step by UN organs to realize 'the programme enshrined in Article 55(c)' (p.925). See also, G. Verdrame, *The UN and Human Rights: Who Guards the Guardians?*, (2011), and Gilbert, 'Implementing Protection: what refugee law can learn from IDP law ... and vice versa' in G. Gilbert, F. Hampson and C. Sandoval, *The Delivery of Human Rights* (2011).

given the organization does not have its own police force or prison system unlike states, depends on confidentiality and non-disclosure, a true separation, *vis-a-vis* the state, especially in cases of exclusion: if it were ever to reveal information gleaned from status determination, then it compromises for all time its status as an international organisation with immunity - UNHCR is never to be seen as some private investigator for the state. As regards disclosure of crimes that would fall within the competence of the ICC, simply to guarantee accessibility to displaced persons in need of protection and the primacy of the protection of refugees, UNHCR should have the same status as the ICRC in these circumstances.<sup>21</sup>

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Therefore, on the basis of the above, it is now possible to have regard to the role, if any, of extradition law in dealing with the undesirable but unreturnable alien.

### 3. Substantive Issues

#### A. Extradition Requests and Exclusion from Refugee Status

This topic may seem to contradict to two of the first principles described above: that extraditable does not equal excludable and that international human rights law requires confidentiality as between the hearings on RSD and extradition. To deal with the latter first, it does not apply *vice versa* - information that comes to light in the extradition hearing that is admissible in the RSD hearing can and should be available so that any decision to exclude is based on the most complete picture.

The former principle, that extraditability does not automatically entail that the person is excludable, is more complicated. The existence of an extradition request must put the adjudicators on notice that the applicant for refugee status might need to be investigated *vis-à-vis* Article 1F, much more so if it is a request to surrender issued by the International Criminal Court: under Article 58 of the Rome Statute,<sup>22</sup> warrants are only issued by the Pre-

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<sup>21</sup>See, G. Rona, 'The ICRC privilege not to testify: confidentiality in action', 28-02-2004 Article, available at <https://www.icrc.org/eng/resources/documents/misc/5wsd9q.htm>, accessed 26 December 2015.

<sup>22</sup>Above, note 6.

#### Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) *There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court;* and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) *A concise statement of the facts which are alleged to constitute those crimes;*

(d) *A summary of the evidence and any other information which establish reasonable grounds*



Trial Chamber once the Office of the Prosecutor provides “(d) [a] summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes”. However, on its own, even an ICC indictment or arrest warrant cannot lead to automatic exclusion. “Serious reasons” is a higher standard of proof than “reasonable grounds for suspecting” or “mere suspicion”.<sup>23</sup> All that being said, if the extradition request is for someone to serve out a sentence post-conviction in the requesting state, that might be a serious reason for considering that s/he should be excluded for an Article 1F crime, but that is because there has been a conviction and even that would have to be reviewed to ensure it had not been imposed as a form of persecution.

### ***B. Article 1A.2 is no bar to extradition, if safe***

When would extradition of a refugee or asylum-seeker be safe? If the fugitive is a refugee and the request is from her/his country of nationality, the obligation in Article 33.1 to respect *non-refoulement* will render surrender impossible. Even if the fugitive is still only applying for refugee status, given that status is declaratory in character, only once the RSD process is complete could a proper decision be taken as regards surrender to the country of nationality. If the request is made by a third state, though, the dangers are reduced, but the requested state, the protecting state, still has to be satisfied that extradition will not make the fugitive less protected against *refoulement* whether s/he be a refugee or an asylum-seeker. Transfer to the ICC would present the fewest problems, but only given that one can rely on The Netherlands offering protection on an acquittal and that the ICC itself will choose a place for incarceration if the refugee is convicted that did not risk *refoulement* on release. In practice, one could imagine that an extradition request for someone accused of bank robbery, a serious non-political crime in most cases,<sup>24</sup> will be more readily granted than one that falls within Article 1F(a) or where the political motivation for, but not the political character of, the crime is more prominent, such as disproportionate acts of terrorism. One can imagine the requesting state acting solely to prosecute the common elements of the crime if it were bank robbery, whereas war crimes, crimes against humanity and some types of serious non-political crime would more readily raise concerns about the potential lack of impartiality.

Of course, an extradition request may alert the state to crimes that, once dealt with as part of the RSD process, would exclude the refugee<sup>25</sup> or asylum-seeker. Then international human rights law needs to be taken into account.<sup>26</sup> Even if international human rights law would not prevent extradition, there are still a plethora of remedies available in extradition law that could protect an excluded refugee. There is no possibility to accord them a complete analysis in this limited space,<sup>27</sup> but these additional forms of protection complement those available under international refugee law and international human rights law and call into doubt the propriety of simply deporting someone excluded:

#### *1. Non-extradition of nationals*

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*to believe that the person committed those crimes; and*

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

(Emphasis added).

<sup>23</sup>*JS (Sri Lanka)*, above note 10, at paragraph 39. More jurisprudence from the ICC on the issuance of arrest warrants is needed before one can be categorical in these matters.

<sup>24</sup>*Cf. In re Ezeta*, 62 F.972 (1894) N.D. Cal. *Quinn v Wren*, [1985] ILRM 410. Quinn had been carrying out frauds in order to raise funds to purchase arms for the Irish National Liberation Army – a *délit connexe*.

<sup>25</sup>Article 1F(a) or (c).

<sup>26</sup>See cases cited above, note 15, and *Agiza v Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 20 May 2005.

<sup>27</sup>See Gilbert, above note 12, chapters 4 and 5.

This might seem completely inappropriate in the context of an application for refugee status, but some states, including The Netherlands, have held that refugees have the same rights as nationals in this regard and when ratifying the 1957 European Convention on Extradition the Nordic states made declarations that protect domiciled aliens.<sup>28</sup> However, France, Germany and Switzerland do not treat refugees as nationals.<sup>29</sup>

### 2. *The Political Offence Exemption*

This is possibly the most complex element of extradition law and there is no one accepted understanding of the exemption for political offences.<sup>30</sup> For certain, a political motive is a necessary but insufficient element. The approach of courts in the United States has been to look for a political uprising and then any offence that is part of or incidental to that uprising is one of a political character,<sup>31</sup> no matter how disproportionate.<sup>32</sup> The European approach to the political offence exemption looks only for a political disturbance rather than an uprising,<sup>33</sup> but the crime must be proximate to the ultimate goal of the fugitive's organisation<sup>34</sup> and proportionate.<sup>35</sup> While the exemption cannot, by definition, protect someone excluded under Article 1F(b) and is extremely unlikely to protect in a 1F(a) case,<sup>36</sup> it might be of relevance in relation to acts contrary to the purposes and principles of the United Nations and it complements the political opinion ground set out in Article 1A.2 of the 1951 Convention. Equally, where the request is for a common crime, but that request is politically motivated, then there is a direct overlap with persecutory prosecutions.<sup>37</sup>

### 3. *Non-Discrimination*

Related to the political offence exemption is the non-discrimination clause. Akin to Article 1A.2's grounds of race, religion, nationality, political opinion, it prevents extradition if the fugitive would be prosecuted or punished on those grounds - in many ways the direct correlative protection to the 1951 Convention's exclusion clause, although it does not usually include discrimination on grounds of membership of a particular social group. That it is even incorporated into most of the UN's anti-terrorism conventions<sup>38</sup> throws into even greater contrast the fact that outside RSD carried out by UNHCR, the RSD process undertaken by

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<sup>28</sup>See *MY v Public Prosecutor*, 100 ILR 401 and *KM v The Netherlands*, 100 ILR 430. See ETS 24.

<sup>29</sup>See B. Karle, 'Some Problems Concerning the Application of the European Convention on Extradition, in Council of Europe, *Legal Aspects of Extradition* at pp. 49 *et seq.* (1970); and *T v Swiss Federal Prosecutor's Office*, 72 ILR 632 at 635-36 (1966).

<sup>30</sup>See Chapter 5 of Gilbert, above note 12. This section will not deal with pure political offences, such as *lèse majesté*, although UNHCR has recently issued a Guidance Note to deal with that crime - Guidance Note on Refugee Claims Relating to Crimes of *Lèse Majesté* and Similar Criminal Offences, September 2015, pp.11-12, available at: <http://www.refworld.org/docid/55ee8a254.html> [accessed 25 January 2016].

<sup>31</sup>See *In re Ezeta*, above note 24; *Quinn v Robinson* 783 F.2d 504 (1981); *cf. Extradition of Atta, Ahmed v Wigen* 910 F.2d 1063 at 1066 (1990).

<sup>32</sup>The *Artukovic* cases 140 F.Supp 245 (1956); 247 F.2d 198 (1957); 355 US 393 (1958); 170 F.Supp 383 (1959). *Cf.* 784 F.2d 1354 (1986).

<sup>33</sup>*In re Castioni* [1891] 1 QB 149.

<sup>34</sup>*Cheng v Governor of Pentonville Prison* [1973] AC 931 at 945; *In re Nappi* 19 ILR 375 at 376 (Swiss Federal Tribunal, 1952).

<sup>35</sup>*In re Pavan* [1927-28] Ann.Dig. 347 at 349 (Swiss Federal Tribunal); *Watin v Ministère Public Fédéral* 72 ILR 614 at 617 (Swiss Federal Tribunal, 1964); *T*, above note 13; *McGlinchey v Wren* [1982] IR 154 at 159.

<sup>36</sup>It is hard to imagine when such crimes would be proportionate and genocide is expressly deemed non-political in Article VII of the Genocide Convention 1948, 78 UNTS 277.

<sup>37</sup>See *R v Governor of Brixton Prison, ex parte Kolczynski* [1955] 1 QB 540; see also, *In re Kavic, Bjelanovic and Arsenijevic* 19 ILR.371 (Swiss Federal Tribunal).

<sup>38</sup>See G. Gilbert and AM. Rüschi, 'Jurisdictional Competence Through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?' 12 JICJ 1093 at 1106-08 (2014).

states does not allow for a proportionality test.<sup>39</sup>

#### 4. *Double criminality*

Even if excluded, but particularly so if excluded under Article 1F(c), the extradition request must still be for a crime that is recognised as such in both the requesting state and requested state. There may well be further requirements as to the minimum potential sentence a fugitive would face. Double criminality is not difficult to show where a crime has been committed in person by the refugee or asylum-seeker in the requesting state - most states could prosecute in such circumstances, especially for the sorts of crimes set out in Article 1F.<sup>40</sup> As indicated above, the double criminality requirement adds a significant degree of complexity where the applicant for refugee status did not directly participate directly in the actual crime because of the scope of joint criminal enterprise in international and domestic law and as regards aiding and abetting.<sup>41</sup> Given that Article 1F is a limitation on a humanitarian provision and should therefore be interpreted restrictively, the understanding of having committed one of the crimes may be narrower than how that has been interpreted in the *ad hoc* tribunals and ICC.

#### 5. *Death penalty*

Many extradition treaties allow the requested state to refuse extradition if the person might face the death penalty in the requesting state, but would not in the requested state. Moreover, international human rights treaty bodies have held that an abolitionist state cannot surrender to a state that retains capital punishment without obtaining a guarantee that it will not be carried out on the fugitive.<sup>42</sup> This guarantee would apply as much to an excluded person as any other alleged fugitive.

#### 6. *Specialty*

Finally, extradition contains the so-called specialty principle. At its simplest, this requirement entails that a fugitive can only be dealt with for the crimes in the extradition request, so no persecution may be perpetrated through filing subsequent additional charges following surrender. However, it also means that ordinarily a fugitive cannot be transferred by the requesting state to a third state, even after any sentence has been served, without the consent of the state of protection, thus rendering chain *refoulement* via the extradition process contrary to inter-state obligations in the extradition treaty.

The above is a limited review of how extradition law may provide an alternative series of guarantees for the applicant for refugee status, even if s/he is excluded and international human rights law provides no complementary protection.<sup>43</sup>

### **C. *Post-status criminality and Article 1F(a) and (c)***

UNHCR's 2003 Guidelines on Exclusion<sup>44</sup> set out that 1F(a) crimes and 1F(c) acts can be used to revoke refugee status, so in this case the extradition request could be made with

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<sup>39</sup>See, for example, *Judgment of the Court (Grand Chamber) of 9 November 2010 (reference for a preliminary ruling from the Bundesverwaltungsgericht - Germany) - Bundesrepublik Deutschland v B (C-57/09), D (C-101/09)*, paragraph 3 of the operative part of the judgment. Cf. G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in Feller, Türk and Nicholson, above, note 11, pp.425-78 and 2003 Background Note at paragraph 76, especially the Swiss cases cited in footnote 71 - above, note 4.

<sup>40</sup>Cf. France's *Cour de Cassation* has overturned the extradition of three persons to Rwanda for genocide because genocide was only criminalised by Kigali in 1996 and 2004, after the genocide - see BBC News website, 26356286.stm, 26 February 2014. Rwandan General Karake, arrested in the United Kingdom on a Spanish European Arrest warrant on war crimes charges, could not be surrendered because, unlike Spain, the United Kingdom cannot prosecute war crimes occurring outside its territory except in the case of grave breaches - BBC News website 33846457.stm, 10 August 2015.

<sup>41</sup>See above, §2B.4.

<sup>42</sup>See *Judge and Soering*, above note 15.

<sup>43</sup>See below, note 46.

<sup>44</sup>Above, note 4, at paragraph 6.

respect to a recognised refugee who travelled abroad to commit a crime and that would permit the state of protection, the requested state, to exclude her/ him from the protections of the 1951 Convention, although that would have to be determined in a separate proceeding from the extradition hearing. International human rights law would still apply once revocation occurs, but it is possible that an extradition request would not result, in and of itself, in revocation under Article 1F(a) or (c). It is also very likely that if the request is for an Article 1F(a) crime, then the protecting state will have jurisdiction to prosecute and convict; once convicted of a particularly serious crime, then Article 33.2 could be applied, too.

#### **D. Diplomatic Assurances<sup>45</sup>**

Diplomatic assurances are sought in extradition cases as much as exclusion cases as a way of allowing the protecting state to rid itself of the fugitive. In the same way, however, their reliability is discounted by UNHCR and human rights treaty bodies in relation to states where the use of torture and ill-treatment is endemic.<sup>46</sup> As a solution to the issue of undesirable aliens who are, nevertheless, unreturnable, it is extremely limited and cannot be treated as the default by states trying to counter impunity whilst upholding human rights.

#### **E. Disguised Extradition post-Exclusion**

Subject to international human rights law concerns, an excluded person can be deported to their country of nationality. However, if deportation is being used to avoid the protections offered by extradition law where extradition arrangements exist between the country of nationality and the state where the person sought refugee status, then that might be deemed to be an *ultra vires* exercise of power by the relevant minister.<sup>47</sup> Nevertheless, the fact that the accused will be prosecuted on deportation is not sufficient on its own to deem the order invalid - there has to be a conscious attempt to disregard the proper extradition procedures. Although each case would have to be examined on its own facts, that disguised extradition is being utilised where an extradition treaty exists calls into question whether s/he is being afforded protection in line with international refugee law and international human rights law - disregard of the proper processes of extradition law raises concerns about whether fair trial will be guaranteed.

#### **F. *Aut dedere, Aut judicare***

The principle of *aut dedere, aut judicare*, extradite or prosecute, is not customary

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<sup>45</sup>See the paper 'Deporting Undesirable Migrants: Diplomatic Assurances and the Challenge of Human Rights' by Mariagiulia Giuffr , delivered at the 2016 London conference.

<sup>46</sup>See UNHCR Guidance Note, above note 7, at paragraphs 25 and 27-30; *Agiza*, above note 26, and *Saadi v Italy* Application no. 37201/06, European Court of Human Rights (Grand Chamber) 28 February 2008. See also, *Rrapo v Albania*, Application no. 58555/10, European Court of Human Rights (4<sup>th</sup> Section), 25 September 2012, at paragraphs 69-74, a case concerning a request from the United States:

72. The Court recognises that, in extradition matters, diplomatic notes are a standard means for the requesting State to provide any assurances which the requested State considers necessary for its consent to extradition. It also recognises that, in international relations, diplomatic notes carry a presumption of good faith. The Court considers that, in extradition cases, it is appropriate that that presumption be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States ....

See also, House of Lords Select Committee on Extradition Law, 2<sup>nd</sup> Report of Session 2014-15, paragraphs 78 *et seq.*, especially the recommendations at paragraphs 88-94.

<sup>47</sup>Compare and contrast *R v Brixton Prison (Governor), ex parte Soblen* [1962] 3 All ER 641 with *Schlieske v Minister for Immigration and Ethnic Affairs*, 84 ALR 719 (1988) and *Bennett v Horseferry Road Magistrates' Court* [1994] 1 AC 42.

international law.<sup>48</sup> It is often established in treaties providing for extradition as a means of combatting serious international crimes. Where the state where the person is found does not extradite, it is obliged to prosecute. However, if the state that excludes does not prosecute the Article 1F crime and cannot return them to the *locus delicti*, are there any circumstances in which third states have an obligation/ right to seek extradition in order that the person might not escape punishment? It is arguable that if the crime is genocide for the purposes of the 1948 Convention,<sup>49</sup> then all states parties are required under Article 1 “to prevent and punish” it. A similar obligation might be imposed as regards grave breaches of the Geneva Conventions of 1949 and Additional Protocol I, 1977, where the treaties require *aut judicare, aut dedere*.<sup>50</sup> It may even be said that the same ought to apply in cases of torture.<sup>51</sup> On the whole, however, relying on *aut dedere, aut judicare* in its current state of development will provide an inadequate response, apart from in a limited number situations, to ensuring that those excluded but who are unreturnable do not escape punishment. A more generic response by states asserting domestic jurisdiction to prosecute whenever protection is afforded, either under international refugee law or international human rights law, may be the only effective answer to the present situation of impunity, no matter how limited the success has been so far - diplomatic assurances are ineffective and the state of limbo for the failed applicant for refugee status is unacceptable. Extradition may play a part in that response, too, but trial in the protecting state needs to be re-considered and legislated for more fully and widely.<sup>52</sup>

#### 4. Conclusion

International criminal is part of the fight against impunity. The ICC forms part of a network designed to ensure that the most egregious criminals do not escape punishment. Equally, however, other branches of international law provide guarantees of protection to those who have committed some of the worst crimes. Transferring anyone who has sought refugee status to another state, whether their application was successful or not, raises a plethora of issues beyond those that ordinarily beset extradition law. Whenever one is dealing with someone who is unreturnable, transferring them to any other state or even the ICC raises issues about how far the guarantee of *non-refoulement* will be respected in the requesting state or, in the case of international courts and tribunals, the state where the convicted person serves her/his sentence: extradition also entails that the requested state is prepared to re-admit the refugee after s/he has served any punishment in the requesting state, even though s/he now has a conviction. It may even be that once re-admitted, the refugee may lose her/ his status through the application of Article 1F(a) or (c) or, if s/he now poses a threat to the community of the protecting state, that the second limb of Article 33.2 might apply because they might have been convicted in the requesting state of a particularly serious crime. Nevertheless, international human rights law may still render them unreturnable.

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<sup>48</sup>See the Final Report of the Working 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, M.C. Bassiouni and E. Wise, *Aut Dedere, Aut Judicare: the Duty to Extradite or Prosecute in International Law*, (Martinus Nijhoff, 1995). See generally, Gilbert and Rüschi, above note 38, at pp.1105-10.

<sup>49</sup>Above note 3635.

<sup>50</sup>75 UNTS 31-417 and 1125 UNTS 3-608.

<sup>51</sup>See *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)* [1999] 2 WLR 827; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Judgment of 20 July 2012.

<sup>52</sup>Gilbert and Rüschi, above note 38, for a comprehensive review of ensuring that there is no impunity gap through protection of the individual.

That extradition and surrender are part of the response to dealing with undesirable yet unreturnable aliens cannot be gainsaid, but they offer no comprehensive solution to this situation. States cannot try and pass on their responsibility to prevent impunity in the face of serious reasons for considering that the applicant for refugee status has committed an Article 1F crime or act to other states, whether that be through a fruitless search for diplomatic assurances, rendition or the “long dark night of limbo” that the failed refugee presently faces. As has been shown, those who have been accorded refugee status under the 1951 Convention may well be extraditable, but extradition cannot provide a means to avoid the customary obligation not to *refouler*, even where the person in question has been excluded under Article 1F if s/he must still be protected under international human rights law. States need to develop means by which to prosecute the very serious crimes set out in Article 1F in places other than the country of nationality and, while the ICC, is part of that response, it will never be a comprehensive solution to undesirable but unreturnable aliens.