



## **GUIDANCE NOTE ON EXTRADITION AND INTERNATIONAL REFUGEE PROTECTION**

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Protection Policy and Legal Advice Section  
Division of International Protection Services  
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The Office of the United Nations High Commissioner for Refugees (UNHCR) issues Guidance Notes pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 *Protocol*.

Through analysing international legal principles and related materials, Guidance Notes seek to clarify applicable law and legal standards relating to specific thematic issues with the aim of providing guidance in the particular area concerned. The ultimate purpose is to enhance the delivery of protection to refugees and asylum-seekers through adherence to international standards in refugee protection. .

Guidance Notes are public domain documents and intended for governments, in particular policy makers and legislators; the judiciary; legal practitioners; asylum decision-makers and other interlocutors and external partners dealing with matters relating to the protection of refugees and asylum-seekers. They also serve as guidance for UNHCR's protection interventions in the field. UNHCR encourages States to incorporate the principles and standards set out in the Guidance Notes into their domestic legal frameworks.

Any questions relating to specific aspects of the Guidance Notes should be addressed to the Protection Policy and Legal Advice Section (PPLAS) of the Division of International Protection Services, UNHCR, Geneva.

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## **I. BACKGROUND AND CONTEXT**

1. Extradition is a formal process involving the surrender of a person by one State (the “requested State”) to the authorities of another State (the “requesting State”) for the purpose of criminal prosecution or the enforcement of a sentence. As an instrument enabling States to ensure that persons responsible for serious criminal offences can be held accountable, extradition is an important tool in the fight against impunity, including in cases involving, for example, violations of international human rights and humanitarian law, which are often a form of persecution and a cause of displacement. As such, extradition is also a key instrument in States’ efforts to fight terrorism and other forms of transnational crime.

2. International refugee protection and criminal law enforcement are not mutually exclusive. The 1951 Convention relating to the Status of Refugees (the “1951 Convention”) and its 1967 Protocol do not shield refugees or asylum-seekers who have engaged in criminal conduct from prosecution for their acts, nor does international refugee law preclude their extradition in all circumstances.<sup>1</sup> However, where the person whose extradition is sought (the “wanted person”) is a refugee or asylum-seeker, his or her special protection needs must be taken into consideration.

3. The interplay between extradition and questions related to international refugee protection must be examined against the background of extradition law and practice as it evolves over time. Extradition relations between States were traditionally governed primarily by bilateral and multilateral extradition treaties as well as national legislation.<sup>2</sup> As a body of rules which, for the most part, reflects consensus among States, extradition law has over time changed substantially in response to new types of crimes and security concerns, including, in recent decades, threats related to international terrorism. However, other developments in international law since 1945 have had a significant impact on the legal framework for extradition.

4. A number of international human rights treaties, anti-terrorism conventions and other instruments dealing with transnational crime contain provisions which establish a duty to extradite those suspected of being responsible for certain crimes. Such instruments typically require States Parties to ensure that the acts in question are offences under their criminal law and may form the basis for extradition even in the absence of existing extradition treaties

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<sup>1</sup> This also applies in relation to regional refugee instruments such as, in particular, the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa (“OAU Convention”) (available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36018>) and the 1984 Cartagena Declaration on Refugees (available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36ec>), as well as the 1950 Statute of the United Nations High Commissioner for Refugees (annexed to General Assembly resolution 428 (V) of 14 December 1950) (available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628>).

<sup>2</sup> The legal criteria for granting or refusing an extradition request are determined by bilateral or multilateral extradition treaties applicable to the two States concerned, as well as the national law of the requested State. Extradition treaties and applicable provisions in national legislation typically define the offences in relation to which extradition may be granted (“extraditable offences”); reasons for denying an extradition request (“refusal grounds”); and requirements with regard to supporting documentation and/or evidence to be submitted by the requesting State. The procedures for examining an extradition request are normally determined by the national law of the requested State. For a more detailed overview of extradition law generally as well as its linkages with asylum, see S. Kapferer, *The Interface between Extradition and Asylum* (hereafter: “*Extradition and Asylum*”), UNHCR, Legal and Protection Policy Research Series, PPLA/2003/05, November 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3fe846da4>.

between the States concerned.<sup>3</sup> Yet *non-refoulement* obligations deriving from international human rights law impose bars to extradition under certain circumstances, in addition to those based in international refugee law.

5. In extradition cases concerning a refugee or an asylum-seeker, certain principles and provisions in extradition law offer legal safeguards to the individual concerned. The wanted person may benefit, for example, from the application of the principle of speciality; restrictions on re-extradition from the requesting State to a third State; the possibility of granting extradition upon condition of the wanted person's return to the requested State after the conclusion of criminal proceedings or the serving of a sentence; the rule of non-extradition for political offences; or other traditional refusal grounds, notably those related to capital punishment and notions of justice and fairness. So-called "discrimination clauses", whereby extradition may, or must, be refused if it was sought for political motives or with persecutory or discriminatory intent, are a more recent development in extradition law.<sup>4</sup> These safeguards in extradition law overlap to some extent with the requested State's *non-refoulement* obligations under international refugee and human rights law.

6. This Guidance Note sets out UNHCR's position on substantive and procedural issues which arise where an extradition request concerns a refugee or asylum-seeker. Part II of the Note provides a detailed examination of the requested State's *non-refoulement* obligations under international refugee and human rights law in the context of extradition proceedings concerning a refugee or an asylum-seeker. It also explores the extent to which existing principles and provisions of extradition law correlate with the principle of *non-refoulement*. In Part III, questions related to extradition procedures are addressed, including the safeguards required to ensure full consideration of the special situation of refugees and asylum-seekers and the appropriate relationship between extradition and asylum procedures. This part of the Note also examines the role of UNHCR in extradition proceedings affecting persons of concern to it. Part IV considers the ways in which information related to an extradition request may affect eligibility for international refugee protection and highlights procedural safeguards in asylum procedures which are relevant where an asylum-seeker is also the subject of an extradition request. Part V of the Note presents concluding observations on the interrelation between extradition and asylum and the need to ensure that the extradition practice of States is consistent with their obligations under international law.

## **II. EXTRADITION AND THE PRINCIPLE OF NON-REFOULEMENT**

7. This Part of the Guidance Note examines the scope and content of the requested State's *non-refoulement* obligations under international refugee and human rights law, as well as their operation in the context of requests for the extradition of a refugee or an asylum-seeker. It also explores how protection against *refoulement* may be given effect in the extradition process of the requested State.

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<sup>3</sup> In many cases, such instruments establish an obligation to extradite or prosecute ("*aut dedere aut judicare*"). It should be noted, however, that there is no general obligation to extradite under international law. For more details see S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 21–32.

<sup>4</sup> For a more detailed discussion of these provisions and principles of extradition law, see below at paras. 38–45.

## A. Scope and content of the principle of *non-refoulement* in international refugee and human rights law

### 1. Protection against *refoulement* under international refugee law

8. The principle of *non-refoulement*, which prohibits the forcible removal of refugees to a risk of persecution, is the cornerstone of the international refugee protection regime.<sup>5</sup> Enshrined in Article 33 of the 1951 Convention,<sup>6</sup> it constitutes a fundamental principle from which no derogation is permitted.<sup>7</sup> The principle of *non-refoulement* as provided for under Article 33 of the 1951 Convention also forms part of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.<sup>8</sup>

9. Article 33(1) of the 1951 Convention provides that:

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

10. This provision is fully applicable in the context of extradition. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return “in any manner whatsoever”. Addressing various problems of extradition affecting refugees, the Executive Committee of the UNHCR’s Programme *inter alia*

“(b) reaffirmed the fundamental character of the generally recognized principle of *non-refoulement*;

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<sup>5</sup> For a detailed analysis, 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 (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), at pp. 87–177. See also UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4>.

<sup>6</sup> Regional refugee instruments also contain *non-refoulement* provisions, notably Article II(3) of the 1969 OAU Convention and section III(5) of the 1984 Cartagena Declaration on Refugees. While not legally binding, the provisions of the Cartagena Declaration have been incorporated into the legislation of numerous States in Latin America.

<sup>7</sup> Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted.

<sup>8</sup> See UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=437b6db64>; UNHCR, *Note on the Principle of Non-Refoulement (EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures)*, 1 November 1997, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=438c6d972>. See also the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, at preambular para. 4, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3d60f5557>; New Zealand Court of Appeal, *Zaoui v. Attorney General* (No 2) [2005] 1 NZLR 690, 30 September 2004, paras. 34 and 136, available at <http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZCA/2004/244.html>. For an in-depth examination of the scope and content of the principle of *non-refoulement* under customary international law, see also E. Lauterpacht and D. Bethlehem, above footnote 5, at paras. 193–219.

- (c) recognized that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1A(2) of the 1951 Convention;
- (d) called upon States “to ensure that the principle of *non-refoulement* is duly taken into account in treaties relating to extradition and as appropriate in national legislation;
- (e) expressed the hope that due regard be had to the principle of *non-refoulement* in the application of existing treaties relating to extradition.”<sup>9</sup>

11. The protection of Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the “inclusion criteria”)<sup>10</sup> and does not come within the scope of one of its exclusion provisions.<sup>11</sup> The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention also applies to persons who meet the eligibility criteria set out in Article 1 of the 1951 Convention but have not had their refugee status formally recognized.<sup>12</sup> This is of particular relevance to asylum-seekers. As they may be refugees, asylum-seekers should not be returned or expelled pending a final determination of their status.<sup>13</sup>

12. The principle of *non-refoulement* applies not only with regard to a refugee’s country of origin, but also any other country where he or she has reason to fear persecution related to one or more of the grounds set out in Article 1A(2) of the 1951 Convention, or from where he or she could be sent to a country where there is a risk of persecution linked to a Convention ground.<sup>14</sup>

<sup>9</sup> See UNHCR, Executive Committee, Conclusion No. 17 (XXXI) – 1980 on Problems of Extradition affecting Refugees, at paras. (b)–(e), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c4423>.

<sup>10</sup> Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term “refugee” shall apply to any person who “owing to a 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 [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it”.

<sup>11</sup> The exclusion provisions contained in the 1951 Convention are: the first paragraph of Article 1D (which applies to persons who are receiving protection or assistance from a UN agency other than UNHCR); Article 1E (which applies to those recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality); and Article 1F (which applies to those for whom there are serious reasons for considering that they have committed certain serious crimes or acts). Exclusion provisions are also contained in the 1969 OAU Convention and in the 1950 Statute of the Office of the High Commissioner for Refugees annexed to General Assembly resolution 428 (V) of 14 December 1950). See also below at para. 78.

<sup>12</sup> See UNHCR, Executive Committee Conclusion No. 6 (XXVIII) – 1977 on Non-refoulement, at para. (c), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c43ac>; Conclusion No. 79 (XLVII) – 1996 on International Protection, at para. (j), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c430>; and Conclusion No. 81 (XLVIII) – 1997 on International Protection, at para. (i), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c690>.

<sup>13</sup> See, for example, UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (hereinafter: “*Asylum Processes*”), EC/GC/01/12, 31 May 2001, at paras. 4, 8, 13 and 50(c), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b36f2fca>. See also E. Lauterpacht and D. Bethlehem, above footnote 5, at paras. 87–99, with further references.

<sup>14</sup> See UNHCR, *Note on Non-Refoulement*, EC/SCP/2, 1977, at para. 4, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68ccd10>. See also Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis*, Cambridge University Press Cambridge (1995), at p. 341.

13. Exceptions to the principle of *non-refoulement* are permitted under international refugee law only in the circumstances provided for in Article 33(2), which states that:

“The benefit of [Article 33(1)] 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.”

14. The application of this provision requires an individualized determination by the country of asylum that the following criteria in relation to the exceptions to the principle of *non-refoulement* are met:

- (i) For the “security of the country” exception to apply, it must be established that the refugee poses a current or future danger to the host country. The danger must be very serious, rather than of a lesser order, and must constitute a threat to the national security of the host country.<sup>15</sup>
- (ii) For the danger to the community exception to apply, not only must the refugee in question have been convicted of a crime of a very grave nature, but it must also be established that, in light of the crime and conviction, the refugee constitutes a very serious present or future danger to the community of the host country. The fact that a person has been convicted of a particularly serious crime does not of itself mean that he or she also meets the “danger to the community” requirement. Whether or not this is the case will depend on the nature and circumstances of the particular crime and other relevant factors (e.g. evidence or likelihood of recidivism).<sup>16</sup>

15. As exceptions to the *non-refoulement* protection of the 1951 Convention, a restrictive application requires that there be a rational connection between the removal of the refugee and the elimination of the danger resulting from his or her presence for the security or community of the host country. A restrictive application also means that *refoulement* should be the last possible resort for eliminating the danger to the security or community of the host country.<sup>17</sup> Additionally, the danger for the host country must outweigh the risk of harm to the wanted person as a result of *refoulement*.<sup>18</sup> Moreover, the determination of whether or not one of the exceptions provided for in Article 33(2) is applicable must be made in a procedure

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<sup>15</sup> See UNHCR, *Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada*, SCC No. 27790, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e71bbe24> (hereinafter: “UNHCR, *Suresh Factum*”), in 14:1 *International Journal of Refugee Law* (2002), at paras. 68–73. See also E. Lauterpacht and D. Bethlehem, above footnote 5, at paras. 164–166; and A. Grahl-Madsen, *Commentary on the Refugee Convention, Articles 2–11, 13–37*, published by UNHCR (1997) and available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4785ee9d2>, commentary to Article 33, para. (8), where the discussions of the drafters of the 1951 Convention on this point are summarized as follows: “Generally speaking, the ‘security of the country’ exception may be invoked against acts of a rather serious nature, endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.”

<sup>16</sup> See E. Lauterpacht and D. Bethlehem, above footnote 5, at paras. 190–192.

<sup>17</sup> If less serious measures would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, *refoulement* cannot be justified under Article 33(2) of the 1951 Convention.

<sup>18</sup> See UNHCR, *Suresh Factum*, above footnote 15, at paras. 74–84; see also E. Lauterpacht and D. Bethlehem, above footnote 5, at paras. 177–179.

which offers adequate safeguards.<sup>19</sup> Where the applicability of Article 33(2) is determined as part of the extradition process, the requested State must ensure that both the substantive and the procedural requirements are fully observed.<sup>20</sup>

16. The provisions of Article 33(2) of the 1951 Convention do not however affect the requested State's *non-refoulement* obligations under international human rights law, which permit no exceptions. Thus, the requested State would be barred from extraditing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture.<sup>21</sup> Similar considerations apply with regard to the prohibition of *refoulement* to other forms of irreparable harm.

## 2. Protection against *refoulement* under international human rights law

17. The requested State's *non-refoulement* obligations under international human rights law establish a mandatory bar to extradition where the surrender of the wanted person would result in exposing him or her to a risk of torture or other serious human rights violations.

18. Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly provides that "[n]o State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." As an inherent part of the prohibition of torture under customary international law, which has attained the rank of *jus cogens*, the prohibition of *refoulement* to a danger of such treatment is binding on all States, including those which have not yet become party to the relevant treaties.<sup>22</sup>

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<sup>19</sup> At a minimum, in UNHCR's view, these should be the same as the procedural safeguards required for expulsion under Article 32 of the 1951 Convention. Article 32(1) permits the expulsion of a refugee to a country other than that where he or she fears persecution on national security and public order grounds. Article 32(2) and (3) provide for minimum safeguards, including, in particular, the right to be heard and the right to appeal, as well as the right to be allowed a reasonable time within which to seek legal admission to another country. See also E. Lauterpacht and D. Bethlehem, above footnote 5, at para. 159.

<sup>20</sup> See also below at paras. 52–53.

<sup>21</sup> See UNHCR, *Suresh Factum*, above footnote 15, paras. 18–50; E. Lauterpacht and D. Bethlehem, above footnote 5, para. 159(ii), 166 and 179.

<sup>22</sup> See, for example, Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 11, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453883fd1f>; see also the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Delalic and Others*, Trial Chamber judgement of 16 November 1998, at para. 454, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=41482bde4>; *Prosecutor v. Furundzija*, Trial Chamber judgement of 10 December 1998, at paras. 134–164, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=40276a8a4>; *Prosecutor v. Kunarac and Others*, Trial Chamber judgement of 22 February 2001, at para. 466, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7560>; and the judgement of the House of Lords in *Pinochet, re.* [1999] 2 All ER 97, at paras. 108–109, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>. Pursuant to Article 53 of the 1969 Vienna Convention on the Law of Treaties, *jus cogens*, or a peremptory norm of international law, "is a norm accepted and recognized by the international community of States 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." See also UNHCR, *Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e71bbe24> (hereinafter: "UNHCR, *Suresh Factum*"), in 14:1 *International Journal of Refugee Law* (2002), at paras. 42-50. See also E. Lauterpacht and D. Bethlehem, above footnote 5, at paras. 222-237.

19. The prohibition of arbitrary deprivation of life and of torture and other cruel, inhuman or degrading treatment or punishment under Article 6 and 7, respectively, of the 1966 International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, also encompasses a prohibition of *refoulement* to a risk of such treatment.<sup>23</sup> The prohibition under international human rights law of *refoulement* to a real risk of “irreparable harm” extends to all persons who may be within a State’s territory or subject to its jurisdiction.<sup>24</sup> This includes refugees and asylum-seekers. It also applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed.<sup>25</sup> It is non-derogable and not subject to exceptions.<sup>26</sup>

20. *Non-refoulement* obligations which establish a bar to extradition in cases involving a risk to the life or physical integrity of the wanted person also exist under regional human rights treaties. In the Americas, for example, Article 22(8) of the 1969 American Convention on Human Rights provides that “[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his [or her] country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his [or her] race, nationality, religion, social status, or political opinions.” Pursuant to Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture, “[e]xtradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his [or her] life is in danger, that he [or she] will be subjected to torture or to cruel, inhuman or degrading treatment, or that he [or she] will be tried by special or ad hoc courts in the requesting State.” The European Court of Human Rights has held in consistent jurisprudence that a *non-refoulement* obligation is inherent in the obligation not to subject any person to torture or to inhuman or degrading treatment or punishment under Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and that this obligations is engaged whenever there is a real risk of exposure to such treatment as a result of forcible removal, including extradition.<sup>27</sup>

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<sup>23</sup> See Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, at para. 9, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453883fb0>; and *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 21 April 2004, at para. 12, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=478b26ae2>. See also Committee on the Rights of the Child, *General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6, 3 June 2005, at para. 27, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42dd174b4>.

<sup>24</sup> For States Party to the 1966 International Covenant on Civil and Political Rights (ICCPR), this has been made explicit by the Human Rights Committee in its *General Comment No. 31*, above footnote 23, at para. 10.

<sup>25</sup> See Human Rights Committee, *General Comment No. 31*, above footnote 23, at para. 12.

<sup>26</sup> For a more detailed discussion and further references see UNHCR, *Note on Diplomatic Assurances and International Refugee Protection* (hereafter: “*Note on Diplomatic Assurances*”), 10 August 2006, at paras. 16–19, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164>, and UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at paras. 17–22, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4>.

<sup>27</sup> See, for example, *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6fec>, and subsequent cases, including *Cruz Varas v. Sweden*, Application No. 15567/89, 20 March 1991, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6fe14>; *Vilvarajah et al. v. United Kingdom*, Application No. 13163/87 et al., 30 October 1991, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7008>; *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b69920>; *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?>

### 3. Hierarchy of obligations

21. When determining whether or not to grant extradition, the requested State may find itself in a conflict of obligations. On the one hand, a duty to extradite may arise from a bilateral or multilateral extradition agreement to which both the requesting and the requested States are party, or under provisions in international or regional instruments which establish a duty to extradite or prosecute. On the other hand, the requested State is bound by its *non-refoulement* obligations under international refugee and human rights law, which preclude the extradition of a refugee or an asylum-seeker to the requesting State under the conditions examined already. In such situations, bars to the surrender of an individual under international refugee and human rights law prevail over any obligation to extradite.

22. The precedence of human rights obligations does not depend on the existence of specific provisions to this effect in the treaty which establishes a duty to extradite.<sup>28</sup> Rather, the primacy of such obligations over those contained in extradition treaties is due to their nature<sup>29</sup> and their place within the hierarchies in the international legal order. It derives from Article 103, in conjunction with Articles 55(c) and 56, of the Charter of the United Nations. Article 103 of the Charter of the United Nations establishes the prevalence of Charter obligations over those stemming from other international agreements.<sup>30</sup> In addition, under Articles 55(c) and 56 of the Charter, Member States of the United Nations are bound to work towards the achievement of the purposes of the United Nations, which include universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>31</sup>

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[docid=3ae6b62f2c](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b62f2c); *TI v. United Kingdom*, Application No. 43844/98 (Admissibility), 7 March 2000, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6dfc>. In *Saadi v. Italy*, Application No. 37201/06, 28 February 2008, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47c6882e2>, the European Court of Human Rights reaffirmed its earlier jurisprudence according to which the prohibition of torture and of inhuman or degrading treatment or punishment in Article 3 ECHR, including the *non-refoulement* obligation inherent in it, is absolute and applies irrespective of the conduct of the individual concerned, however undesirable or dangerous, and the nature of the offence allegedly committed by him or her. The Court also reiterated its earlier finding that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3 ECHR.

<sup>28</sup> See, for example, Article 6 of the Inter-American Convention on Extradition (1981), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b38510>, which provides that “[n]o provision of this Convention may be interpreted as a limitation on the right of asylum when its exercise is appropriate.”

<sup>29</sup> In contrast to treaties which create merely subjective, reciprocal rights and duties between States, human rights and refugee protection instruments establish “particular legal orders involving objective obligations to protect human rights.” See M.N. Shaw, *International law*, 4<sup>th</sup> edn., Cambridge University Press, Cambridge (1997), at p. 696.

<sup>30</sup> Article 103 of the Charter of the United Nations, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3930>, states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

<sup>31</sup> Article 55(c) of the Charter of the United Nations states: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 56 of the Charter provides: “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”

23. Obligations under international refugee and human rights law take precedence over those derived from other international treaties also in the context of States' efforts to suppress and prevent terrorism.<sup>32</sup> In this regard, the United Nations Security Council and General Assembly have stated repeatedly that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law.<sup>33</sup> Both organs have made express reference to States' obligations under the 1951 Convention and the 1967 Protocol, including the principle of *non-refoulement*.<sup>34</sup> The need for full compliance by States with their obligations international law, in particular international human rights law, refugee and humanitarian law, was reaffirmed specifically with regard to extradition in the Plan of Action annexed to the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly on 6 September 2006.

## **B. Application of the principle of *non-refoulement* in extradition cases concerning refugees or asylum-seekers**

### **1. Refugees**

#### *Extradition request from the refugee's country of origin*<sup>35</sup>

24. If the extradition of a refugee has been sought by his or her country of origin, the requested State is precluded under Article 33(1) of the 1951 Convention or customary international law from extraditing the wanted person. In such cases, the principle of *non-refoulement* in international refugee law establishes a mandatory bar to extradition, unless it has been established by the authorities of the requested State that the wanted person comes within one of the exceptions provided for in Article 33(2) of the 1951 Convention.<sup>36</sup> Even if

<sup>32</sup> See Security Council Resolution S/RES/1624(2005) of 14 September 2005, at preambular paras. 2 and 7, and operative para. 4 (also recalling the right to seek and enjoy asylum as reflected in Article 14 of the Universal Declaration of Human Rights). See also the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed to General Assembly Resolution A/RES/51/210 of 16 January 1997, at preambular para. 8; A/RES/60/158 of 28 February 2006 on Protection of human rights and fundamental freedoms while countering terrorism, at preambular para. 7 and operative para. 5.

<sup>33</sup> See Security Council Resolutions SC/RES/1269 (1999) of 19 October 1999, para. 4(iv); SC/RES/1373 (2001) of 28 September 2001, at para. 3(f) and 3(g); S/RES/1456(2003) of 20 January 2003, Annex, at para. 6; S/RES/1535(2004) of 26 March 2004, Annex, at preambular para. 6; S/RES/1566(2004) of 8 October 2004, at preambular para. 4; SC/RES/1617 (2005) of 29 July 2005, at preambular para. 4; S/RES/1624 (2005) of 14 September 2005, at preambular para. 2 and operative para. 4. See also General Assembly Resolutions A/RES/49/60 of 9 December 1994, Annex, at para. 5; A/RES/51/210 of 17 December 1996, Annex, at preambular paras. 6 (with specific reference to Articles 1, 2, 32 and 33 of the 1951 Convention) and 7; A/RES/57/219 of 27 February 2003 on Protection of human rights and fundamental freedoms while countering terrorism, at para. 1; A/RES/58/187 of 22 March 2004 on Protection of human rights and fundamental freedoms while countering terrorism, at para. 1; A/RES/60/1 of 24 October 2005 on the 2005 World Summit Outcome, at para. 85; A/60/43 of 6 January 2006, preambular paras. 11 and 19, op. para. 3; A/RES/60/158 of 28 February 2006 on Protection of human rights and fundamental freedoms while countering terrorism, at preambular paras. 7 and 13, op. paras. 1 and 5; A/RES/62/71 of 8 January 2008 on Measures to eliminate international terrorism, at preambular paras. 12 and 20; and in particular, A/RES/62/159 of 11 March 2008 on Protection of human rights and fundamental freedoms while countering terrorism.

<sup>34</sup> See General Assembly Resolution A/60/288 of 6 September 2006 on the United Nations Global Counter-Terrorism Strategy, Annex, at II.3.

<sup>35</sup> The term "country of origin", as used throughout this Note, refers to the country of nationality or, in the case of a stateless refugee or asylum-seeker, the country of former habitual residence.

<sup>36</sup> See above at paras. 13–15.

this is the case, however, the requested State would nevertheless need to abide by its *non-refoulement* obligations under human rights law.<sup>37</sup>

25. This fully applies also in cases where the requesting State has given assurances to the effect that the person concerned will not be subjected to persecution or other forms of harm upon surrender. In UNHCR's view, undertakings of this kind, which are commonly referred to as "diplomatic assurances", should be given no weight when a refugee who enjoys the protection of Article 33(1) of the 1951 Convention is being returned, directly or indirectly, to the country of origin.<sup>38</sup> The reason for this is that the country of refuge has already made a determination in the individual case and has recognized the refugee to have a well-founded fear of being persecuted in the country of origin. Once the country of refuge has made this finding, it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending State to look to the very agent of persecution for assurance that the refugee will be well-treated upon return.<sup>39</sup>

*Extradition request from a country other than the refugee's country of origin*

26. If the country seeking extradition is a country other than the refugee's country of origin, the requested State must nonetheless examine whether the surrender of the refugee would be consistent with its *non-refoulement* obligations under international refugee and human rights law.<sup>40</sup> For this to be the case, the requested State would need to ascertain that extradition would not expose the refugee to a risk of persecution, torture or other irreparable harm in that country, or of subsequent removal to the country of origin or to a third country where such a risk exists.

27. In determining the above, the requested State must assess the situation facing the wanted person if he or she is extradited to the requesting State. If diplomatic assurances have been given with regard to the refugee's treatment upon surrender, these would need to be examined in light of all relevant circumstances.

28. Under international human rights law, a State is permitted to remove a person to another country on the basis of diplomatic assurances only if such assurances effectively remove the risk that the individual concerned will be subjected to serious human rights violations. For this to be the case, it would need to be established that the assurances are

- (i) a *suitable* means to eliminate the danger to the individual concerned, and that
- (ii) the requested State may, in good faith, consider them *reliable*.<sup>41</sup>

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<sup>37</sup> See above at paras. 17–20. See also UNHCR, *Suresh Factum*, above footnote 15, pp. 141–157; UNHCR, *Note on Diplomatic Assurances*, above footnote 26, at para. 31; and the discussion in E. Lauterpacht and D. Bethlehem, above footnote 5, at paras. 159(ii), 166 and 179.

<sup>38</sup> See UNHCR, *Suresh Factum*, above footnote 15, at para. 51.

<sup>39</sup> See UNHCR, *Suresh Factum*, above footnote 15, at para. 52.

<sup>40</sup> See above at paras. 8–20.

<sup>41</sup> These criteria have been developed in the jurisprudence of international, regional and national courts in cases involving extradition to a risk of capital punishment or serious violations of fair trial as well as expulsion or deportation to a danger of torture or other forms of ill-treatment. The issue has also been addressed by human rights treaty bodies and experts mandated by the United Nations Commission on Human Rights, among others. For a more detailed discussion, see UNHCR, *Note on Diplomatic Assurances*, above footnote 26, at paras. 20–26.

29. While determining the suitability and reliability of diplomatic assurances in cases involving the death penalty is relatively straightforward, their use in cases involving a risk of torture or other forms of ill-treatment is often more problematic.<sup>42</sup> In a report which addressed *inter alia* examples of State practice in cases involving diplomatic assurances, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment of Punishment has expressed the view that “assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.”<sup>43</sup>

30. In UNHCR’s view, diplomatic assurances given in the context of an extradition request concerning a refugee submitted by a country other than his or her country of origin should be examined along similar lines. In order to comply with its *non-refoulement* obligations under international refugee law, the requested State would need to consider whether such assurances could be a suitable and reliable safeguard against a risk of persecution in the requesting State, or a danger of onward transfer to the country of origin or any other country where the wanted person would be persecuted.<sup>44</sup>

## 2. Asylum-seekers

### *Extradition request from the asylum-seeker’s country of origin*

31. Asylum-seekers are protected against *refoulement* by virtue of Article 33(1) of the 1951 Convention and customary international law for the entire duration of the asylum proceedings. The requested State may not extradite an asylum-seeker to his or her country of origin while his or her refugee claim is being considered, including at the appeal stage.<sup>45</sup>

32. This also applies if the requesting State has given diplomatic assurances regarding the treatment of the asylum-seeker in the event of return. UNHCR’s view is that in such cases,

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<sup>42</sup> The issue has been addressed, for example, by the Supreme Court of Canada in its decision *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002, SCC 1, at para. 124, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c42bdfa0>: “It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.”

<sup>43</sup> See Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, *Interim Report to the General Assembly*, U.N. Doc. A/60/316, 30 August 2005, at para. 51, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43f30fb40>.

<sup>44</sup> For a more detailed discussion see UNHCR, *Note on Diplomatic Assurances*, above footnote 26, at paras. 20–26 and 48–55. See also below at para. 32.

<sup>45</sup> See above at para. 11. See also below at paras. 61–68 for a discussion of the appropriate relationship between extradition and asylum procedures.

any diplomatic assurances given by the requesting State would be an element to be considered by the asylum authorities of the requested State as part of their determination of whether the person concerned has a well-founded fear of persecution. In assessing the significance of diplomatic assurances in such cases, the requested State would need to examine them in light of the criteria set out at paragraph 28 above. To meet the suitability criterion, diplomatic assurances must effectively remove all reasonably possible manifestations of persecution in the individual case. This assessment would need to take into consideration the fact that the notion of “persecution” in the context of international refugee law encompasses, but is not limited to, serious human rights violations such as arbitrary deprivation of life or liberty, torture or other cruel, inhuman or degrading treatment or punishment.<sup>46</sup> When determining the reliability of the assurances provided, the requested State must consider the circumstances in the country concerned, including any past experience of compliance with such assurances, as well as the existence or otherwise of effective monitoring mechanisms.<sup>47</sup>

33. If the asylum-seeker is determined to meet the eligibility criteria for refugee status, the principle of *non-refoulement* as enshrined in Article 33(1) of the 1951 Convention constitutes a mandatory bar to his or her extradition, unless the individual concerned comes within one of the exceptions provided for under Article 33(2) of the 1951 Convention.<sup>48</sup> As noted above, bars to extradition under international human rights law continue to apply and may preclude the surrender of the wanted person.<sup>49</sup>

34. If the asylum-seeker is found not to meet the inclusion criteria of the refugee definition, or if it is established that an exclusion clause is applicable, the person concerned does not benefit from protection under international refugee law. The requested State may, however, be barred from extraditing the wanted person on account of its *non-refoulement* obligations under international human rights law.<sup>50</sup>

#### *Extradition request from a country other than the asylum-seeker’s country of origin*

35. Where the country seeking the extradition of an asylum-seeker is not the country of origin, the requested State is required under international refugee and human rights law to evaluate any risks resulting from the person’s surrender to that country. Any diplomatic assurances with regard to the asylum-seeker’s treatment in the event of his or her surrender would need to be examined by the requested State as part of the process of determining

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<sup>46</sup> Persecution may manifest itself in many different ways, also including, for example, discriminatory measures which, either of themselves or cumulatively, result in consequences of a substantially prejudicial nature. Restrictions of a person’s social and economic rights may also amount to persecution if they result in depriving those affected of their ability to provide for their livelihood. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (“*Handbook*”), Geneva 1979, re-edited 1992, at paras. 51–64, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3314>.

<sup>47</sup> For a more detailed discussion see UNHCR, *Note on Diplomatic Assurances*, above footnote 26, at paras. 36 and 44–55.

<sup>48</sup> It should be noted that the requirements set out in Article 33(2) of the 1951 Convention do not form part of the eligibility criteria for refugee status and should not be considered when determining whether or not an asylum-seeker qualifies for refugee status. Rather, the application of an exception provided for in Article 33(2) of the 1951 Convention means that the person concerned loses protection against *refoulement*, even though his or her refugee status remains in place.

<sup>49</sup> See above at paras. 16–20 and 24.

<sup>50</sup> See above at paras. 17–20.

whether extradition would expose the wanted person to a threat of persecution, torture or other irreparable harm.<sup>51</sup>

36. If the wanted person were to be at risk of persecution related to a 1951 Convention reason in the requesting State or of being returned from there to the country of origin, the requested State's obligations under Article 33(1) of the 1951 Convention or customary international law would preclude the extradition of the asylum-seeker.<sup>52</sup> The requested State is also bound to ascertain that extradition to the requesting State would be consistent with its *non-refoulement* obligations under international human rights law.<sup>53</sup>

37. If it is established that surrender to the requesting State would not amount to a breach of the requested State's *non-refoulement* obligations under international law, the asylum-seeker may be extradited. However, the States involved would need to ensure that he or she will have access to a fair and efficient asylum procedure, either in the requested or in the requesting State.<sup>54</sup>

### **C. Giving effect to *non-refoulement* obligations in extradition cases concerning refugees or asylum-seekers**

#### **1. *Non-refoulement* provisions in the context of extradition**

38. In many States, national legislation provides for refusal of extradition if the wanted person is a refugee,<sup>55</sup> and/or if there would be a risk of torture or other serious human rights violations upon surrender.<sup>56</sup> The extradition of asylum-seekers is also explicitly prohibited in some countries.<sup>57</sup> In others, the application of *non-refoulement* provisions concerning recognized refugees is extended to asylum-seekers. *Non-refoulement* clauses in extradition or aliens legislation which impose a general bar to the removal, including by way of extradition, of anyone whose life or freedom would be at risk in the requesting country, may also be applied to refugees and asylum-seekers.

39. UNHCR is of the view that explicit provisions should be enacted in national legislation to obligate the concerned authorities to refuse the extradition of a refugee or asylum-seeker if it would be inconsistent with the State's *non-refoulement* obligations under international refugee and human rights law. As a clear expression of international legal requirements which must be taken into account in the context of extradition proceedings in cases concerning refugees and asylum-seekers, such provisions constitute an important safeguard. However, the obligation not to extradite the wanted person if this would amount to

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<sup>51</sup> This assessment would need to consider the suitability and reliability of the assurances given. See above at paras. 28 and 32 and, for a more detailed discussion, UNHCR, *Note on Diplomatic Assurances*, above footnote 26, at para. 37.

<sup>52</sup> See also above at paras. 11, 31 and 33.

<sup>53</sup> See above at paras. 17–20.

<sup>54</sup> See below at paras. 67–68 and 88–89.

<sup>55</sup> Such provisions may be found in national extradition laws, criminal (procedure) law and/or constitutional law. Asylum legislation may also contain provisions which are relevant to extradition requests concerning refugees and/or asylum-seekers. For a non-exhaustive list, see S. Kapferer, *Extradition and Asylum*, above footnote 2, at footnote 401.

<sup>56</sup> For some examples of provisions prohibiting extradition in case of a risk of torture, see S. Kapferer, *Extradition and Asylum*, above footnote 1, at paras. 132–133.

<sup>57</sup> See, for example, s. 415(1)(b) of the Criminal Procedure Code of Bosnia and Herzegovina; s. 501 (b) of the Code of Criminal Procedure of the Slovak Republic.

a breach of the principle of *non-refoulement* under international refugee and/or human rights law is binding on the requested State even if national legislation does not expressly provide for a bar to extradition on this basis.<sup>58</sup>

## 2. Other relevant provisions and principles of extradition law and their correlation with the principle of *non-refoulement*

### *Discrimination clauses*

40. A number of extradition treaties, international instruments concerning the suppression, prevention and punishment of acts of terrorism and other types of transnational crime, as well as national extradition laws contain provisions according to which the requested State may, or shall, refuse extradition if it considers that a request for extradition for an ordinary criminal offence has been made with persecutory and/or discriminatory intent. This ground for refusal to extradite – often referred to in extradition law as the “discrimination clause” – is closely related to the *non-refoulement* provision in Article 33(1) of the 1951 Convention.<sup>59</sup>

41. In order to ensure compliance with the requested State’s *non-refoulement* obligations under international refugee law, UNHCR is of the view that it would be preferable for this safeguard in extradition law to be mandatory rather than left to the discretion of the requested State.<sup>60</sup> It should be noted, however, that the scope of discriminatory clauses in extradition law is more limited and differs in crucial aspects from that of the principle of *non-refoulement* in international refugee law. Discriminatory clauses should not, therefore, be relied upon as the sole means of ensuring the non-refoulement of refugees or asylum-seekers in extradition procedures.<sup>61</sup> Thus, in regard to the extradition of refugees or asylum-seekers,

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<sup>58</sup> The principle that a State is responsible for any conduct in breach of its obligations under international law, and that this applies to the acts, or omissions, of all organs, sub-divisions and persons exercising governmental authority in legislative, judicial or executive functions, and acting in that capacity in the particular instance, is well established in international law. The same applies for the principle that a State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under international law. See, for example, Articles 4 and 32, *Articles on State Responsibility*, annexed to General Assembly annexed the Articles on State Responsibility to its resolution 56/83 of 12 December 2001 on Responsibility of States for Internationally Wrongful Acts; and the commentary to these Articles in International Law Commission, *Annual Report 2001*, Chapter IV, available at <http://untreaty.un.org/ilc/reports/2001/2001report.htm>.

<sup>59</sup> See, for example, Article 3(2) of the 1957 European Convention on Extradition, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36b0>, which provides that extradition shall not be granted “if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons.” The Swiss Federal Tribunal referred to this provision as the concrete expression of the refugee law principle of *non-refoulement* in the context of extradition law (see the decisions of 18 December 1990, 1A.127/1990/tg, case abstract No. *IJRL/0152*, 5:2 *International Journal of Refugee Law* (1993), at pp. 271–273; 11 September 1996, BGE 122 II 373, at pp. 380–382; and 14 December 2005, 1A.267/2005/gji, at 3.1). For further details on the content and scope of discrimination clauses in extradition law, see S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 88–104 and 249–252.

<sup>60</sup> See also Article 3(b) of the Model Treaty on Extradition adopted by the General Assembly in 1990 (A/RES/45/116 of 14 December 1990, Annex), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b00f18618>, and Article 5 of the Model Law on Extradition (2004) developed by the United Nations Office on Drugs and Crime (UNODC), which recommend the inclusion of “discrimination clauses” as a mandatory ground for refusing extradition.

<sup>61</sup> Most extradition treaties and national laws do not include membership of a particular social group among the grounds on which a person may claim to be prejudiced if extradited, and therefore to fall within the scope of

the requested State remains bound by its obligations of *non-refoulement* under international refugee law, apart from international human rights law.

#### *Other refusal grounds in extradition law*

42. Other refusal grounds in extradition law may also be applied to a refugee or an asylum-seeker. The requested State may refuse extradition if it considers that the offence for which it was sought is of a political nature (“political offence exemption”).<sup>62</sup> Since the 1970s, the scope of this refusal ground has been reduced significantly, as an increasing number of crimes have been designated as non-political for the purposes of extradition in extradition treaties and other international instruments, including a number of conventions and protocols pertaining to aspects of terrorism. To the extent that it is incorporated in domestic legislations, the political offence exemption may nevertheless be relevant in cases concerning a refugee or an asylum-seeker.<sup>63</sup>

43. Depending on the circumstances, extradition may also be refused if there is a risk of capital punishment in the requesting State;<sup>64</sup> on the basis of the requested State’s fundamental notions of justice and fairness;<sup>65</sup> or for humanitarian reasons.<sup>66</sup> In cases involving the death penalty, in particular, obstacles to extradition may be overcome if the requesting State provides reliable assurances to the effect that the death penalty will not be sought, or imposed, in the case of the wanted person. Assurances are also sometimes given in cases which raise fair trial concerns. It is important to note, however, that such assurances cannot override the requested State’s obligation not to return a refugee or an asylum-seeker to a risk

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this refusal ground, although the discrimination clauses in some more recent extradition instruments contain at least some of the elements covered by the notion of membership of a particular social group. Moreover, discrimination clauses are primarily concerned with the risk of persecution or prejudice in the context of the criminal prosecution or punishment awaiting the fugitive upon surrender and, in some cases, explicitly refer to a danger of prejudice “at trial”. They do not necessarily apply where the person concerned may be at risk of other forms of persecution. For refugees and asylum-seekers, the principle of *non-refoulement* may provide broader protection, as it applies in relation to any kind of treatment which amounts to persecution if there is a link to their race, religion, nationality, membership of a particular social group or political opinion. On the other hand, the personal scope of the discrimination clause is not confined to refugees or asylum-seekers. Provided there is a risk of persecution for political motives or prejudice for a relevant reason, the refusal ground under extradition law applies even if a person has been excluded from refugee protection under the 1951 Convention. See also S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 249–252.

<sup>62</sup> From the mid-19<sup>th</sup> century onward, extradition agreements and national legislation have regularly incorporated the notion that extradition shall be refused if the requested State considers that the offence for which it is sought is of a political nature.

<sup>63</sup> For example, in cases involving acts such as treason, sedition, *lèse-majesté*, espionage, subversive propaganda, founding of or membership in a prohibited political party or election fraud, which have traditionally been deemed to be political offences which give rise to the refusal of extradition. For a more detailed discussion of this refusal ground in extradition law, see S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 72–85 and 244–248. See also below at para. 81.

<sup>64</sup> An increasing number of States are bound to refuse surrender to a risk of capital punishment on the basis of their obligations under international human rights instruments and/or provisions in national (constitutional) law. See S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 109 and 143–147.

<sup>65</sup> This could apply, for example, where the prosecution of the wanted person would be in breach of the principle *ne bis in idem* (also known as “double jeopardy”); in cases involving prosecution *in absentia* or by a special court in violation of the right to a fair trial. See S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 107–108 and 253.

<sup>66</sup> For example, due to the advanced age, or illness, of the wanted person. See S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 112 and 253.

of persecution, torture or other irreparable harm, as provided for under international refugee and human rights law.<sup>67</sup>

*Other relevant principles of extradition law*

44. Other principles of extradition law may also be applicable to a refugee under the relevant extradition treaty and/or legislation:

- Under the rule of “speciality”, the requesting State may not prosecute an extradited individual for offences other than those for which extradition was granted in the first place, unless the requested State gives its consent.
- Extradition law may also require the consent of the requested State as a precondition for the subsequent re-extradition of the wanted person from the requesting State to a third country for offences which predate his or her extradition from the requested State.
- Moreover, extradition law traditionally enables the requested State to grant extradition on the condition that the wanted person will be returned to it after the trial to serve his or her sentence.

45. These traditional principles of extradition law offer important legal safeguards to the wanted person. However, given their specific and clearly defined scope, they do not in themselves in the refugee context, offer refugees and asylum-seekers sufficient protection against return to a risk of persecution, torture or other irreparable harm. The requested State remains bound to ensure that the surrender of the wanted person is consistent with its *non-refoulement* obligations under international refugee and human rights law. More specifically, neither the rule of speciality nor an undertaking by the requesting State with regard to re-extradition or return following criminal proceedings could be invoked as justification to the extradition of a refugee or an asylum-seeker to the country of origin or any other country where the wanted person would be at risk of persecution.<sup>68</sup> In an extradition case of a refugee where the circumstances exceptionally justify the application of Article 33(2) of the 1951 Convention, *non-refoulement* provisions in international human rights law may nevertheless be applicable so as to preclude his or her extradition. If the State requesting the extradition of a refugee or an asylum-seeker is a country other than the country of origin, the requested State would need to examine whether in surrendering the wanted person, it would expose him or her to a risk of persecution, torture or other irreparable harm.<sup>69</sup>

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<sup>67</sup> See above at paras. 17–20.

<sup>68</sup> The German Federal Constitutional Court has held that assurances by the requesting State that the speciality principle will be respected may be a sufficient guarantee against political persecution with regard to countries where there is respect for democracy and the rule of law, but not as a general rule (1 BvR 1457/81, 4 May 1982). The Swiss Federal Court held that the principle of speciality and the principle of good faith do not sufficiently protect the person concerned against persecution and that speciality cannot be considered to constitute an alternative to protection by non-extradition (1A.127/1990/tg, 18 December 1991, case abstract No. IRJL/0152, 5:2 *International Journal of Refugee Law* (1993), at pp. 271–273). See also the decision of the French Conseil d’Etat: *CE, 10 April 1991, Kilic*, in which a decision to extradite a recognized refugee to another European country was upheld, among other reasons, because extradition was granted only under the condition that he would not be surrendered to his country of origin, in accordance with general principles of extradition law. See also S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 65–68 and 122.

<sup>69</sup> See above at para. 26.

### **III. EXTRADITION PROCEDURES AND INTERNATIONAL REFUGEE PROTECTION**

#### **A. General considerations**

46. Traditionally, extradition was viewed as a matter solely between States, and the wanted person was deemed to have standing to oppose his or her surrender to the requesting State only on the grounds that it would be in breach of the applicable inter-State agreement. Developments in international refugee and human rights law have fundamentally changed the position of the individual in the extradition process. A determination by the requested State on a request for extradition clearly has a significant impact on the situation of the individual concerned. Given the potential consequences, procedural safeguards need to be in place to ensure that issues pertaining to the wanted person's circumstances and any risks which may result from his or her surrender to the requesting State are being considered as part of the extradition process. This is of utmost importance in cases concerning a refugee or an asylum-seeker, for whom extradition may mean return to persecution.

47. The requirement for the requested State to incorporate adequate and effective safeguards against violations of fundamental rights of the individual concerned in its extradition process is increasingly reflected in national legislation governing extradition as well as relevant jurisprudence. However, the procedural rights provided to the wanted person vary significantly from one country to another.<sup>70</sup>

48. Extradition treaties usually do not contain provisions on the procedures for examining extradition requests. As a general rule, national legislation in the requested State determines the procedure as well as the authorities which are responsible for examining whether the extradition request meets applicable formal and substantive requirements, and/or whether to grant or refuse extradition. Procedures established under national law differ, depending on the legal system in place. However, in many States the extradition process involves several stages and different sets of authorities, including the following:

- (i) An initial administrative phase which usually consists of an examination of technical requirements<sup>71</sup> and sometimes also includes a preliminary assessment of whether the request has a chance of being granted, followed by
- (ii) A judicial determination of whether the extradition request satisfies the substantive conditions set out in the relevant national legislation and/or applicable extradition treaty, and
- (iii) A final executive decision on whether or not to grant the request. In most countries, a finding by the competent judicial authority that the legal requirements for granting extradition are not met is binding on the executive, and extradition must be refused. Where extradition is authorized by the courts, the competent

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<sup>70</sup> See S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 170–175.

<sup>71</sup> This typically includes the following: whether the request is addressed to the responsible authority; whether it is duly signed; whether it contains the information required for the purpose of identifying the wanted person and the offences imputed to him or her; whether it is accompanied by the documents required under the applicable extradition treaty and/or legislation of the requested State.

minister usually has discretion either to grant the surrender of the fugitive, possibly subject to conditions, or to refuse extradition.<sup>72</sup>

49. Extradition law does not establish any binding rules as to the stage of the extradition process during which issues related to the wanted person's status as a refugee or an asylum-seeker would need to be considered. In some countries, national legislation precludes the authorities of the requested State from proceeding with a request for the extradition of a recognized refugee submitted by his or her country of origin.<sup>73</sup> In others, extradition requests may be rejected at the initial stage if the competent authorities are aware that the wanted person's refugee status would eventually pose an obstacle to his or her extradition. Generally, however, questions pertaining to a claimed risk of persecution or other serious harm upon surrender are examined at the judicial and/or the final executive stage of the extradition process.

50. Likewise, international refugee law does not prescribe any particular procedure for the consideration of extradition requests concerning a refugee or an asylum-seeker. However, certain procedural consequences for the extradition process flow from the requested State's international protection obligations with regard to the wanted person. The sections of this Note which follow examine the safeguards which need to be in place within the extradition process to enable the requested State to comply with these obligations where the wanted person is a refugee or an asylum-seeker and set out UNHCR's views with regard to the appropriate relationship between extradition and asylum procedures.<sup>74</sup>

## **B. Extradition procedures concerning refugees**

51. In cases involving an extradition request for a refugee, the principal concern from the point of view of international protection is to ensure full respect for the principle of *non-refoulement*. Paragraphs 52–56 below examine relevant safeguards in the extradition process. It is also important that in sharing information in the context of extradition proceedings, States should take into account legitimate confidentiality and privacy interests of refugees as well as potential protection risks to persons associated with them. This is discussed below at paragraphs 57–58.

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<sup>72</sup> Elsewhere, national law provides for a two-stage process, with the final decision being taken by the courts in some countries, while in others the judicial authorities issue non-binding opinions. Some extradition agreements provide for simplified procedures aimed at accelerating the process and reducing costs. In the European Union, a system of mutually agreed arrest warrant has been introduced in 2004 to replace extradition procedures between its Member States (for more information see: [http://ec.europa.eu/justice\\_home/fsj/criminal/extradition/fsj\\_criminal\\_extradition\\_en.htm](http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm)). A more detailed overview of extradition procedures can be found in S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 155–169.

<sup>73</sup> This is the case, for example, in Argentina (pursuant to s. 20 of the Law No. 24.767 of 1997 on International Cooperation in Criminal Matters), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3db93d784>; Brazil (pursuant to s. 33 of the Law No. 9.474 of 1997 on Mechanisms for the Implementation of the 1951 Convention), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f4dfb134>; or Paraguay (pursuant to s. 7 of the Law No. 1938 of 2002 on Refugees), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3d48f0984>.

<sup>74</sup> For more details on the position of the individual in the extradition process and examples of provisions in the national law of some States which expressly require that international legal obligations be taken into consideration when determining whether or not to grant extradition as well as relevant jurisprudence, see S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 170–210.

## 1. Safeguards to ensure respect for the principle of *non-refoulement*

### *Extradition request concerning a refugee recognized by the requested State*

52. Where an extradition request is made by the country of origin in relation to a refugee who has been recognized as a refugee within the meaning of the 1951 Convention in the requested State, the determination of refugee status by the asylum authorities should, in UNHCR's view, be binding for those State organs and institutions which deal with the extradition request.<sup>75</sup> In such cases, the asylum authorities of the requested State have recognized the well-foundedness of the wanted person's fear of persecution with regard to the requesting State.<sup>76</sup> This also means that the applicability of the bar to the refugee's extradition under Article 33(1) of the 1951 Convention or customary international law has already been established. Depending on the circumstances of the particular case, the extradition authorities may, however, need to examine whether the wanted person falls within one of the exceptions to the principle of *non-refoulement* provided for in Article 33(2) of the 1951 Convention. If this determination is made as part of the extradition process, the relevant authorities must assess the situation of the wanted person in light of the substantive criteria of Article 33(2), while the extradition procedure must offer the procedural safeguards and guarantees required for the application of this provision.<sup>77</sup>

53. However, under the national legislation of some countries, the extradition authorities are not bound by a determination on refugee status made by the asylum authorities. Where this is the case, the requested State is nevertheless required to ensure that the decision on an extradition request concerning a refugee is consistent with its *non-refoulement* obligations under international refugee and human rights law.<sup>78</sup> Given that the wanted person has already been determined to be a refugee, the authority responsible for deciding on the extradition request must have due regard to the prohibition of surrender to a risk of persecution provided for in Article 33(1) of the 1951 Convention and customary international law. This requires an examination, by the extradition authorities, of all circumstances pertaining to the individual case with a view to establishing whether a risk of persecution exists for the wanted person at any stage after his or her surrender, be it in connection with the criminal proceedings or independently thereof, including after the trial and/or serving of a sentence. This also applies if the requesting State is a country other than the refugee's country of origin.<sup>79</sup> Where the

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<sup>75</sup> This is the case, for example, with regard to the decisions of the asylum authorities in Switzerland (see the decisions of the Swiss Federal Tribunal of 13 March 1989, BGE 115 V 4, at 6–7, and 14 December 2005, 1A.267/2005/gij, at 3.3), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b64bc>; and those of the *Commission de recours des réfugiés* in France (see *Conseil d'Etat*, Ass. 25 March 1988, *Bereciartua-Echarri*, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7264>).

<sup>76</sup> See also above at para. 25.

<sup>77</sup> With regard to the procedural requirements for the application of Article 33(2) of the 1951 Convention, see above at para. 15.

<sup>78</sup> In Germany, for example, s. 4 of the Asylum Procedure Act expressly provides that decisions of the asylum authorities are not binding for the purposes of extradition. However, the Federal Constitutional Court has held that the extradition court has a duty to take into account the possibility of persecution in the requesting State, and that recognition as a refugee by the German authorities or the authorities of another country is to be considered as evidence of a danger of persecution (decision of 4 November 1979, 1 BvR 654/79).

<sup>79</sup> In such cases, the extradition process needs to offer the individual concerned adequate procedural safeguards. These should include, in particular, the possibility for the wanted person to make submissions to the extradition authorities pertaining to the risks he or she may face in the event of surrender to the requesting State, and an opportunity to appeal against a decision to the effect that protection against *refoulement* is not applicable to him or her.

facts of a particular case raise the question of the applicability of Article 33(2) of the 1951 Convention, the extradition process must ensure full respect for the substantive criteria under this provision as well as relevant procedural fairness requirements.<sup>80</sup>

54. Irrespective of whether or not a refugee status determination by the asylum authorities is binding on the extradition authorities, the requested State is also bound to ensure compliance with its *non-refoulement* obligations under international human rights law.<sup>81</sup>

*Extradition request concerning a refugee recognized by a country other than the requested State*

55. In relation to a person who was recognized as a refugee by another country, the wanted person's refugee status in that country is an important element and must be taken into consideration by the extradition authorities of the requested State when examining whether his or her extradition would be consistent with the principle of *non-refoulement*. A determination by a State that a person is a refugee under the 1951 Convention has an extraterritorial effect, at the very least with respect to other States Parties to the 1951 Convention. Refugee status as determined in one State Party should only be called into question by another State Party in exceptional cases when it appears that the person manifestly does not fulfill the requirements of the 1951 Convention. This may be the case, for example, if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned comes within the terms of an exclusion provision of the 1951 Convention.<sup>82</sup>

*Extradition request concerning a refugee recognized by UNHCR*

56. Similarly, where the wanted person was determined by UNHCR to be a refugee within its international protection mandate,<sup>83</sup> this should be respected by the requested State. A recognition decision by UNHCR means that the individual concerned was found to be in need of, and eligible for, international protection in line with the standards required under the

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<sup>80</sup> See above at para. 15.

<sup>81</sup> See above at paras. 16–20.

<sup>82</sup> See UNHCR Executive Committee, *Conclusion No. 12 (XXIX) – 1978 on the Extraterritorial Effect of the Determination of Refugee Status*, at para. (g), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c4447>. See also UNHCR, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, EC/SCP/9, 24 August 1978, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68cccc>. The German Federal Constitutional Court has held that, while refugee recognition by another State Party to the 1951 Convention is not legally binding for the German extradition authorities, by failing to contact the authorities of the country of asylum and obtain their view on the situation, the extradition court had not complied with its duty to conduct all possible inquiries to establish whether the person concerned was at risk of persecution, especially in the presence of significant elements to support such a finding. In the view of the Court, recognition by another State Party to the 1951 Convention that the person concerned has a well-founded fear of persecution in the requesting State constitutes such elements, even more so if the country of asylum has already rejected an extradition request by the requesting State for the same offences and refusal was based on the refugee status of that person (decision of 14 November 1979, 1 BvR 654/79). It should also be noted that in such cases, the State which recognized the wanted person as a refugee may exercise diplomatic protection on his or her behalf.

<sup>83</sup> Under its international protection mandate, UNHCR may conduct refugee status determination where this is required for protection reasons. UNHCR's authority to do so derives from the Office's 1950 Statute, above footnote 11, as developed and refined in subsequent resolutions of the General Assembly and the Economic and Social Council.

1951 Convention. In view of UNHCR's international protection mandate and, in particular, the Office's supervisory responsibility provided for in Article 35 of the 1951 Convention and Article 1 of the 1967 Protocol as well as Paragraph 8(a) of its 1950 Statute, such decisions should be given due weight in extradition proceedings.<sup>84</sup>

## 2. Confidentiality

57. UNHCR holds the view that States should, as a general rule, refrain from revealing any information about a person's refugee status to the authorities of another State unless the individual concerned has given express consent to the sharing of such information. This is particularly relevant where the other State is the refugee's country of origin and applies with regard to the refugee's personal data as well as any elements pertaining to his or her asylum claim, including the very fact that an asylum application had been submitted. Disclosure of such information without a legitimate basis for doing so, or of more information than is necessary for the purpose, would constitute a breach of the refugee's right to privacy.<sup>85</sup> It may also endanger the safety of the refugee or persons associated with him or her.<sup>86</sup>

58. States must ensure the confidentiality of information related to a person's refugee claim also in their interactions in the context of proceedings which may result in the extradition of a refugee. In such cases, the legitimate interest of the requesting State in prosecuting persons responsible for criminal acts may justify the disclosure of certain personal data. However, the requested State needs to consider the potential protection risks which may result from the sharing of information about the wanted person entering into contact with the authorities of the requesting State, especially where the latter is the refugee's country of origin.<sup>87</sup> In accordance with its protection obligations under international refugee and human rights law as well as general principles of data protection, the requested State may

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<sup>84</sup> As noted by G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edition, Oxford University Press (2007), at p. 553, "[...] the very definition of refugees [...] incorporates areas of appreciation, so that in practice UNHCR's position on individuals and groups may be challenged. Nevertheless, [...] UNHCR's opinions must be considered by objecting States in good faith and a refusal to accept its determinations requires substantial justification." See also V. Türk, "UNHCR's supervisory responsibility", 14.1 *Revue québécoise de droit international* (2001), at pp. 135–158.

<sup>85</sup> International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference (see, for example, Article 12 of the Universal Declaration of Human Rights; Article 17 (1) ICCPR; Article 8 ECHR; Article 11 ACHR).

<sup>86</sup> Effective measures need to be taken to ensure that information concerning a person's private life does not reach the hands of third parties that might use such information for purposes incompatible with human rights law. See Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)*, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, U.N. Doc. HRI/GEN/1/Rev.1, 8 April 1988, at para. 10, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453883f922>. See also UNHCR, *Advisory Opinion on the rules of confidentiality regarding asylum information*, 31 March 2005, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42b9190e4> (hereafter "UNHCR, *Advisory Opinion on the rules of confidentiality*"). See also below at paras. 69, 93 and 96.

<sup>87</sup> UNHCR recognizes that the sharing of data between States is crucial to combating terrorism, and contacts with the authorities of the country of origin may exceptionally be justified in cases where there is suspicion of past or potentially ongoing terrorist activities or where national security is at stake. In all such cases, however, the existence of an asylum application should remain confidential. See UNHCR, *Addressing Security Concerns without Undermining Refugee Protection – UNHCR's Perspective*, November 2001, at para. 11, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c0b880e0>. See also UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, Annex E, (hereafter "*Guidelines on Exclusion*"), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857684>.

be bound to refrain from transmitting any personal data and/or other information to the requesting State, or to limit the information shared, depending on the circumstances.<sup>88</sup> The confidentiality requirement should be observed at all stages of the extradition process, including when communicating to the requesting State the grounds for a refusal to extradite in a case concerning a refugee. In UNHCR's view, the involvement of the asylum authorities in any decision on disclosure of information about a refugee in the context of extradition proceedings is essential in order to ensure that due regard is given to the wanted person's international protection needs.<sup>89</sup>

### **C. Extradition procedures concerning asylum-seekers**

59. Where an extradition request concerns an asylum-seeker, the requested State is not only required to provide protection against *refoulement* in line with international refugee and human rights law, it must also ensure that a claim for recognition as a refugee submitted to its authorities is determined in a manner that is consistent with the standards and criteria required under the 1951 Convention. Information that comes to light in the context of extradition process may have a bearing on the determination of the asylum claim, while the outcome of refugee status determination procedures is an essential element to be considered by the requested State when establishing whether or not the wanted person may be lawfully extradited.

60. The intersection of extradition and asylum issues in such cases has procedural consequences. The sub-sections which follow discuss the appropriate relationship between extradition and asylum procedures, including the sequencing of decisions in either procedure, as well as safeguards to be provided in extradition procedures concerning asylum-seekers. UNHCR's role in such procedure is also addressed. Questions of procedure related to extradition within the asylum determination process are discussed below in Section IV.B.2.

#### **1. Separate extradition and asylum procedures**

61. Extradition and refugee status determination are distinct procedures, which have different purposes and are governed by different legal criteria. Decision-makers in either area must have specific sets of knowledge, expertise and skills. Where the determination on whether or not the wanted person has a well-founded fear of persecution is incorporated into the extradition procedure, this may significantly reduce an asylum-seeker's opportunity to have his or her claim examined. It may also entail a limitation of legal remedies available in case of a negative status determination. It is UNHCR's position, therefore, that the decision on the asylum claim and on the extradition request, respectively, should be made in separate procedures.

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<sup>88</sup> In accordance with general principles of data protection, any sharing of information must be limited to what is necessary to achieve the legitimate purpose for which it was requested. It should be noted that communications between different authorities of the requested State are also subject to applicable data protection principles, which impose limits on the extent and nature of data that may be shared.

<sup>89</sup> Procedures where responsibility for the decision on disclosure lies with the asylum authority is considered best practice in this regard. This is the case, for example, in Switzerland, where the Federal Police Authority is required to defer to Federal Asylum Office if a request for information concerns a refugee or an asylum-seeker, including in the context of extradition proceedings and related matters (e.g. arrest warrants disseminated by way of an Interpol "wanted (red) notice").

62. This does not mean that the two processes should be conducted in isolation. As seen throughout this Guidance Note, whether or not the wanted person qualifies for refugee status has important consequences for the scope of the requested State's obligations under international law with respect to the wanted person, and hence for the decision on the extradition request. At the same time, information related to the extradition request may have an impact on the determination of the asylum claim. In order to reach a proper decision in both the asylum and the extradition procedure, the responsible authorities need to consider all relevant elements.

## **2. Determination of asylum claim by the asylum authorities of the requested State**

63. In order to ensure a determination of the individual's international protection needs in keeping with the criteria set out in the 1951 Convention, the asylum claim should be examined by the authority which is responsible for adjudicating applications for refugee status in the requested State.<sup>90</sup> The asylum authorities must take into consideration all relevant facts, including the extradition request and any related information which may have a bearing on the applicant's asylum claim.<sup>91</sup>

## **3. Sequencing of decisions on extradition and asylum**

### *Extradition request from the asylum-seeker's country of origin*

64. If the extradition request was submitted by the authorities of the asylum-seeker's country of origin, the question of his or her refugee status needs to be resolved for the requested State to be in a position to decide whether the wanted person may be lawfully extradited. This follows from the requested State's obligation to ensure respect for the principle of *non-refoulement* under international refugee and human rights law. On the one hand, as an asylum-seeker, the wanted person enjoys protection against *refoulement* to the country of origin for the entire duration of the asylum proceedings, including on appeal. On the other hand, the scope of the requested State's *non-refoulement* obligations under international law differs depending on whether or not the wanted person is a refugee. It follows that the question of refugee status would need to be clarified before it can be established whether the legal requirements for extradition are met.

65. As a consequence, in cases which may result in the surrender of an asylum-seeker to his or her country of origin, asylum proceedings must be conducted and a final determination on the asylum claim made prior to the decision on the extradition request.

66. In UNHCR's view, it would generally be prudent to conduct extradition and asylum proceedings in parallel. This would be beneficial for reasons of efficiency and because the extradition process may result in the availability of information which has a bearing on the wanted person's eligibility for refugee status and would therefore need to be taken into

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<sup>90</sup> Best State practice in this regard provides for a single, central asylum authority, and a single procedure to assess the claims of all those seeking refugee status or other complementary protection. See UNHCR, *Asylum Processes*, above footnote 13, at paras. 48 and 50(e) and (i).

<sup>91</sup> See also above at para. 62 and below at paras. 73–85.

consideration by the asylum authorities.<sup>92</sup> It may however be necessary to withhold a decision on the extradition request until the asylum determination has become final.<sup>93</sup>

#### *Extradition request from a country other than the asylum-seeker's country of origin*

67. If the extradition of an asylum-seeker is sought by a country other than his or her country of origin, the wanted person may, under certain circumstances, be extradited before his or her asylum claim has been finally determined in the requested State. For this to be consistent with international refugee and human rights law, the requested State must:

- (i) establish that extradition to the requesting State would not expose the asylum-seeker to a risk of persecution, torture or other irreparable harm, and
- (ii) in keeping with its primary responsibility for making certain that the asylum claim is determined in line with the criteria of the 1951 Convention and internationally accepted standards of fairness and efficiency, ensure that the asylum-seeker has access to asylum determination procedures which comply with these standards.

68. If both conditions are fulfilled, asylum procedures which have already been initiated in the requested State may be suspended.<sup>94</sup> In such cases, consideration of the asylum application would be resumed and brought to its final conclusion after the resolution of the prosecution, whether by conviction and sentence or by acquittal. This could be done either in the requested State where the asylum application was initially pending, through an agreement on re-admission to that State, or through transfer of responsibility for examining the asylum application to the State requesting extradition, provided similar procedural standards are in place there.<sup>95</sup>

#### **4. Confidentiality in extradition procedures concerning an asylum-seeker**

69. When dealing with an extradition request concerning an asylum-seeker, the responsible authorities need to ensure due respect for confidentiality. As a general rule no information regarding the asylum application, or the fact that such an application has been made, should be shared with the State requesting extradition, be it the wanted person's country of origin or a third country. The considerations set out above in paragraphs 57–58 with regard to refugees are equally applicable to asylum-seekers.<sup>96</sup>

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<sup>92</sup> For a discussion of substantive questions related to eligibility for refugee status which arise in the context of extradition, see below at paras. 71–85.

<sup>93</sup> This is reflected, for example, in a number of decisions of the Swiss Federal Tribunal, which has held that in cases where asylum proceedings are still ongoing, the extradition of the wanted person may only be granted on the condition that he or she will not be granted asylum by the asylum authorities (see the decisions of 11 September 1996, BGE 122 II 373, at pp. 380–382, and the decision of 14 December 2005, 1A.267/2005/gij, at 3.2).

<sup>94</sup> See also above at para. 37 and below at paras. 88–89.

<sup>95</sup> See UNHCR, *Recommendations on the European Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States* COM(2001)522 final 2001/0215 (CNS), October 2001; see also UNHCR, *Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005 (hereafter: “UNHCR, *Provisional Comments*”), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42492b302>, comment on Article 6.

<sup>96</sup> See also UNHCR, *Advisory Opinion on the rules of confidentiality*, above footnote 86. See also below at para. 93.

## **D. The role of UNHCR in extradition proceedings**

70. In cases where the person whose extradition has been requested is a refugee or an asylum-seeker, UNHCR has both a mandated and protection interest and should be able to take the necessary actions to ensure the protection of the individual concerned. Depending on the circumstances, this may involve interventions with the authorities of the requested country at the diplomatic level or in the context of extradition procedures, either directly or through lawyers or others acting on behalf of a person of concern to the Office. UNHCR may undertake appropriate measures even if the legislation governing extradition proceedings in the requested State does not foresee a formal role for the Office. UNHCR's mandate to act on behalf of persons of concern who are the subject of an extradition request stems from the Office's 1950 Statute as well as its supervisory responsibility as provided for in Article 35 of the 1951 Convention, Article 1 of the 1967 Protocol and Paragraph 8a of UNHCR's Statute. In keeping with these provisions, States should also provide UNHCR with information concerning such cases.<sup>97</sup> Moreover, refugees or asylum-seekers who are the subject of an extradition request should be permitted to contact UNHCR and/or qualified NGOs and lawyers providing legal advice.<sup>98</sup>

## **IV. ELIGIBILITY FOR REFUGEE PROTECTION AND EXTRADITION**

### **A. General considerations**

71. As noted previously, information obtained in the context of extradition proceedings concerning an asylum-seeker may be relevant to his or her eligibility for international protection.<sup>99</sup> The asylum authorities examining the claim of an individual who is also the subject of an extradition request would need to carefully assess the assertion by the requesting State that the wanted person was involved in criminal conduct. Any other information pertaining to the reasons and circumstances of the applicant's flight as well as the consequences of his or her return to the country of origin would also need to be taken into consideration when determining whether the asylum-seeker is in need and deserving of international protection as a refugee.

72. Questions with regard to eligibility for refugee status may also be raised as a consequence of extradition proceedings concerning a refugee. Depending on the circumstances, this may trigger a re-examination of the wanted person's refugee status in cancellation or revocation proceedings.

73. In all such cases, the reliability of information related to the extradition request as well as its significance with regard to the eligibility criteria for refugee status must be evaluated in light of all circumstances of the case.<sup>100</sup> Moreover, asylum determination procedures as well as procedures which may result in the cancellation or revocation of

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<sup>97</sup> See V. Türk, above footnote 84, at pp. 135–158.

<sup>98</sup> See UNHCR, *Asylum Processes*, above footnote 13, at para. 50(g).

<sup>99</sup> See above at paras. 59, 62 and 64.

<sup>100</sup> This also applies where extradition proceedings concerning a refugee or asylum-seeker have been initiated on the basis of a “wanted (red) notice” issued by Interpol at the request of a Member State. Information brought to the attention of the requested State in connection with a “red notice” must be examined in the same way as if it were submitted directly by the requesting State. More information on the system of Interpol notices can be found at <http://www.interpol.int>.

refugee status must offer full procedural safeguards. The sections which follow examine substantive and procedural issues which arise when eligibility for refugee status is considered in cases involving an extradition request.

## **B. Refugee status determination in cases involving extradition considerations**

### **1. Substantive requirements**

#### *“Inclusion” within the refugee definition of Article 1A(2) of the 1951 Convention*

74. In examining whether an asylum-seeker whose extradition has been requested by the authorities of his or her country of origin qualifies for refugee status, the asylum authorities need to assess whether the individual concerned is seeking to escape legitimate prosecution or punishment for criminal acts, rather than persecution, in that country. If it is found that an applicant is a fugitive from justice rather than fleeing persecution, he or she would not meet the refugee definition set out in Article 1A(2) of the 1951 Convention (the “inclusion” criteria), and his or her claim should be rejected.<sup>101</sup>

75. Asylum adjudicators should consider the possibility of the authorities in the applicant’s country of origin using criminal prosecution as a means of persecution, or of the extradition request being made to obtain the surrender of the wanted person with persecutory intent. There may also be situations where an asylum-seeker may be legitimately prosecuted but has a well-founded fear of persecution, be it in the context of the criminal proceedings against him or her (e.g. risk of torture during pre-trial detention) or for unrelated reasons.<sup>102</sup> Under these circumstances, the applicant would satisfy the inclusion criteria set out in Article 1A(2) of the 1951 Convention, provided there is a link between the feared persecution and a 1951 Convention ground.<sup>103</sup>

76. However, even if it is established that the wanted person meets the requirements for inclusion within the refugee definition, it may be necessary to consider exclusion under Article 1F of the 1951 Convention.

#### *Exclusion based on the criteria of Article 1F of the 1951 Convention*

77. An extradition request and/or related information will trigger the need for considering exclusion under Article 1F of the 1951 Convention if there are indications that the person concerned may have committed, or participated in the commission of, crimes within the scope of that provision.<sup>104</sup>

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<sup>101</sup> See UNHCR, *Handbook*, above footnote 46, at paras. 56–60.

<sup>102</sup> If the requesting State has submitted diplomatic assurances with regard to the treatment of the wanted person upon surrender, these would need to be assessed in line with the criteria set out above at para. 28 and discussed in more detail in UNHCR, *Note on Diplomatic Assurances*, above footnote 26.

<sup>103</sup> Under this “nexus” requirement, a person comes within the inclusion criteria of the 1951 Convention only if he or she has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. For more detailed guidance on the criteria for “inclusion” within the refugee definition set out in the 1951 Convention, see UNHCR, *Handbook*, above footnote 46, as well as UNHCR’s *Guidelines on International Protection* on specific aspects of the application of Article 1A(2) of the 1951 Convention, which can be found at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=rsd>.

<sup>104</sup> Article 1F of the 1951 Convention states: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

78. Other international refugee instruments also contain exclusion provisions. The 1969 OAU Convention replicates, in Article I(5), the language of Article 1F of the 1951 Convention except for a reference to the principles and purposes of the OAU. Moreover, the OAU Convention provides for the ending of refugee protection if a refugee “has committed a serious non-political crime outside the country of refuge after his admission to that country as a refugee”<sup>105</sup> or if a refugee engages in subversive activities against any Member State of the OAU.<sup>106</sup> Although formulated as “cessation clauses”, these provisions are in effect based on exclusion considerations. Since the OAU Convention complements the 1951 Convention, these provisions should be read within the framework of the 1951 Convention and applied in a manner consistent with the latter. Thus, the reference to “acts contrary to the purposes and principles of the OAU” should be subsumed within Article 1F(c) of the 1951 Convention, while any activities of a refugee after recognition may give rise to the withdrawal (revocation) of refugee status only if the acts in question come within the scope of Article 1F(a) or (c) of the 1951 Convention.<sup>107</sup> An exclusion provision is also contained in Paragraph 7(d) of UNHCR’s 1950 Statute.<sup>108</sup>

79. Detailed guidance on substantive and procedural aspects related to the application of the exclusion clauses can be found in UNHCR’s *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* and the accompanying *Background Note* of 4 September 2003.<sup>109</sup> Additional guidance concerning on exclusion in cases involving acts considered to be of a terrorist nature can be found in UNHCR’s forthcoming *Guidelines on International Protection: Application of the Exclusion Clauses of Article 1F of the 1951 Convention Relating to the Status of Refugees in relation to acts considered to be terrorist in nature* of May 2008.<sup>110</sup>

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- (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.”

<sup>105</sup> Article I(4)(f) of the OAU Convention.

<sup>106</sup> Article I(4)(g) in conjunction with Article III of the OAU Convention.

<sup>107</sup> On the criteria for revocation of refugee status, see below at paras. 94–96.

<sup>108</sup> Given that Article 1F of the 1951 Convention represents a later and more specific formulation of the category of persons envisaged in paragraph 7(d) of the UNHCR Statute, UNHCR officials should apply the 1951 Convention formula in determining cases of exclusion.

<sup>109</sup> See *Guidelines on Exclusion*, above footnote 87, and the accompanying *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857d24> (hereafter: “*Background Note on Exclusion*”).

<sup>110</sup> See UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses of Article 1F of the 1951 Convention Relating to the Status of Refugees in relation to acts considered to be terrorist in nature* (HCR/GIP/03/05/Add.1, May 2008 (forthcoming) (hereafter: “*Guidelines on Exclusion and acts of terrorism*”).

80. While there are linkages between extradition and exclusion,<sup>111</sup> asylum adjudicators should bear in mind that extradition and exclusion have different purposes and are governed by different legal criteria. Extradition is a tool whereby States provide each other mutual assistance in criminal matters, in accordance with applicable extradition treaties and national legislation, as well as extradition-related provisions in other international treaties. Exclusion is concerned with denial of international refugee protection to persons who would otherwise meet the criteria of the refugee definition set out in Article 1A(2) of the 1951 Convention, but with regard to whom there are serious reasons for considering that they are responsible for certain serious crimes or heinous acts. The kinds of criminal conduct which may give rise to exclusion from international refugee protection are exhaustively enumerated in Article 1F of the 1951 Convention.

81. If the requirements for extradition are met, this does not necessarily mean that exclusion under Article 1F is applicable to the individual concerned. Although in many cases crimes for which extradition may be granted also come within the scope of Article 1F, there is no automatic correlation between “extraditable” and “excludable” offences. Under applicable extradition treaties and/or legislation, States may grant extradition in relation to offences which do not fall within Article 1F of the 1951 Convention. Conversely, a criminal offence which may give rise to exclusion under Article 1F may not be an extraditable offence in the extradition relations of the two States involved. Thus, when considering the application of an exclusion clause, asylum adjudicators need to examine the nature and gravity of the acts in question in light of the requirements under the applicable sub-clause of Article 1F.

82. This applies in all cases where the possibility of exclusion is raised, including those involving acts which may constitute “serious non-political offences” within the meaning of Article 1F(b). On the one hand, for exclusion to be justified, the crimes in question must be sufficiently serious to warrant denial of international protection. On the other hand, they must be “non-political” in character. The criteria for establishing, in the context of an exclusion assessment, whether or not an offence is political in nature are derived from approaches used in jurisprudence under extradition law. Relevant factors include, in particular, the motivation, context, methods and proportionality of the crime to its objectives.<sup>112</sup> While the designation of an increasing number of criminal acts as “non-political” for extradition purposes<sup>113</sup> is significant in determining the political element of a crime in the context of exclusion proceedings, the applicability of Article 1F(b) of the 1951 Convention is nevertheless subject

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<sup>111</sup> Historically and in terms of the underlying concepts, there is a close link between extradition and exclusion, particularly in cases where the criminal conduct imputed to the individual may bring him or her within the scope of Article 1F(b) of the 1951 Convention. For some time, non-extradition for political crimes – as expressed in extradition law in the refusal ground referred to as “political offence exemption” – was regarded as the essence of asylum. The 1951 Convention does not make a direct link between extradition and exclusion. However, in devising the exclusion clauses of Article 1F, the drafters of the 1951 Convention sought to ensure, *inter alia*, that those guilty of heinous acts and serious crimes do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. See UNHCR, *Guidelines on Exclusion*, above footnote 87, at para. 2. See also S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 318–319.

<sup>112</sup> For a more detailed discussion, see UNHCR, *Background Note on Exclusion*, above footnote 109, at paras. 41–43.

<sup>113</sup> As noted at para. 42 above, the scope of this “political offence exemption” has been reduced significantly over the past decades, as an increasing number of crimes have been designated as non-political for the purposes of extradition. For a more detailed discussion of the political offence exemption in extradition law, see S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 72–87.

to a separate assessment in light of the particular facts of the case.<sup>114</sup> In addition, for Article 1F(b) to apply, it is also necessary that the crime was committed “outside the country of refuge prior to [the person’s] admission to that country as a refugee”.<sup>115</sup>

83. An examination, of the nature, seriousness and context of a criminal offence imputed to an individual in the context of an extradition request, and their assessment in light of the criteria under international refugee law, is also needed where the acts in question are considered to be terrorist in nature. In many cases, such acts come within the scope of one of the sub-clauses of Article 1F of the 1951 Convention. However, the fact that a particular conduct has been labelled “terrorist”, be it in a definition of terrorism in a regional instrument or national legislation, an extradition request or otherwise, does not as such justify the application of an exclusion clause of the 1951 Convention, although an examination of the applicability of exclusion will normally be necessary in such cases.<sup>116</sup>

84. It should also be recalled that for exclusion to be justified, it must be established that the person concerned incurred individual responsibility for crimes within the scope of Article 1F of the 1951 Convention. Under that provision, the decision-maker is required to establish whether there is clear and credible evidence which meets the standard of proof required for exclusion from international refugee protection (“serious reasons for considering”). The information which needs to be submitted in support of an extradition request is not necessarily sufficient to meet this threshold.<sup>117</sup>

85. If the individual concerned is excluded from refugee status, he or she does not benefit from protection against *refoulement* under international refugee law, although extradition may be precluded on the basis of *non-refoulement* provisions in international human rights law or under the applicable extradition treaty or legislation. If the host State has jurisdiction over the acts which gave rise to exclusion, it may initiate criminal proceedings in its national justice system.<sup>118</sup> With regard to certain excludable crimes, international law establishes a requirement to “extradite or prosecute” (*aut dedere aut judicare*).<sup>119</sup>

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<sup>114</sup> See UNHCR, *Background Note on Exclusion*, above footnote 109, at paras. 85–86, for a discussion of the circumstances in which the crime of hijacking, for example, could be considered a political act and therefore not give rise to exclusion from refugee status. Similar considerations would apply to other crimes designated as “non-political” in international treaties.

<sup>115</sup> For further details on the interpretation of Article 1F(b), see UNHCR, *Background Note on Exclusion*, above footnote 109, at paras. 37–45 and para. 81. See also S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 315–338.

<sup>116</sup> More detailed guidance on issues related to exclusion in cases involving acts commonly considered to be terrorist in character can be found in UNHCR’s *Guidelines on Exclusion and acts of terrorism*, above footnote 110.

<sup>117</sup> In general, an extradition request must identify the wanted person and specify why his or her surrender is sought. Usually, the requesting State is required to submit a copy of the arrest warrant or conviction, the text of relevant legal provisions, information which permits identifying the fugitive and a description of the allegations against him or her. The requested State is normally entitled to seek further information if it considers it necessary. Some countries (particularly in the common law tradition) may require that evidence be submitted in a particular format (e.g. affidavit) or meet a certain threshold (e.g. sufficient to support a *prima facie* case against the wanted person). For more details, see S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 46–55.

<sup>118</sup> As noted above at para. 2, the fact of being a refugee or an asylum-seeker does not render a person immune from criminal prosecution. Article 2 of the 1951 Convention reflects the requirement that refugees and asylum-seekers conform to the laws and regulations of the host country, and persons who do not do so may be prosecuted in the host country to the full extent of the law.

<sup>119</sup> See S. Kapferer, *Extradition and Asylum*, above footnote 2, at paras. 21–32.

## 2. Questions of procedure

86. The right to seek and enjoy asylum, as enshrined in Article 14 of the Universal Declaration of Human Rights and inherent in the proper functioning of the 1951 Convention/1967 Protocol, encompasses the obligation of States to provide fair and efficient procedures for the examination of applications for international refugee protection outside a context of mass influx situations.<sup>120</sup> While procedures for the examination of asylum claims differ depending on administrative traditions and/or the legal system in place, certain core elements are necessary for decision-making in keeping with international protection standards.<sup>121</sup>

87. This fully applies as well in situations where an asylum-seeker is also the subject of an extradition request. In such cases, the principal concern, from the point of view of international refugee protection, is to ensure that a request for the extradition of an asylum-seeker does not preclude him or her from access to the asylum procedure or otherwise result in restrictions of essential procedural safeguards during the asylum process. This is particularly important in view of the fact that extradition may result in the return of an asylum-seeker to the country where he or she claims to be in danger of persecution.

88. More specifically, this means that an asylum application should not be declared inadmissible solely because it has been submitted after an extradition request has been received by the authorities of the requested State, or after the asylum-seeker learned of a request for his or her extradition. Admission into asylum procedures may be denied only if it is established that the individual concerned has already found protection in line with the standards of the 1951 Convention in another country or that he or she would have access to an asylum determination procedure and protection in another country.<sup>122</sup> In all other cases, a substantive assessment of the applicant's asylum claim in the requested State is required.

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<sup>120</sup> See UNHCR, *Asylum Processes*, above footnote 13, at paras. 4–5; see also Executive Committee Conclusions No. 8 (XXVIII) – 1977 on Determination of Refugee Status; No. 15 (XXX) – 1979 on Refugees Without an Asylum Country; No. 30 (XXXIV) – 1983 on Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum; No. 58 (XL) – 1989 on Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection. The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its General Conclusions No. 29 (XXXIV) – 1983; No. 55 (XL) – 1989; No. 65 (XLII) – 1991; No. 68 (XLIII) – 1992; No. 71 (XLIV) – 1993; No. 74 (XLV) – 1994; No. 81 (XLVIII) – 1997; No. 85 (XLIX) – 1998; No. 92 (LIII) – 2002; as well as Conclusion No. 82 (XLVIII) – 1997 on Safeguarding Asylum. See also Goal 1, Objective 2, point 2 of the Programme of Action for the implementation of the Agenda for Protection, adopted during the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, convened in Geneva on 12 and 13 December 2001, and endorsed by the Executive Committee in its Conclusion No. 92 (LIII) – 2002, at para. (a). The Conclusions on International Protection are available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=type&skip=0&type=EXCONC>.

<sup>121</sup> For an overview of best State practices with regard to these core elements, see UNHCR, *Asylum Processes*, above footnote 13, at para. 50.

<sup>122</sup> Removal to a country where a person has already been recognized as a refugee (“first country of asylum”) is only appropriate where it has been first ascertained that the person will be accepted upon return and will continue to enjoy effective protection in that country. Return to a country of transit (“safe third country”) for purposes of submission of a refugee application there is appropriate only if responsibility for assessing the particular asylum application in substance is assumed by the third country, if the asylum-seeker will be protected from *refoulement* and will be able to seek and, if recognized, enjoy asylum in accordance with accepted international standards. See UNHCR, *Asylum Processes*, above footnote 13, at paras. 7–18 and 50(b)–(c). See also UNHCR Executive Committee Conclusion No. 15 (XXX) at 1979 on Refugees without an Asylum Country, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c960>.

For the reasons set out above, the determination on refugee status should be made by the asylum authorities of the requested State.<sup>123</sup>

89. As noted above, asylum proceedings which are already under way at the time of the submission of an extradition request should, as a general rule, be continued in the requested State.<sup>124</sup>

90. The fact alone that an extradition request has been submitted cannot as such form the basis for rejecting an asylum application submitted by the wanted person, nor should an asylum claim be regarded as manifestly unfounded or abusive solely because of the existence of an extradition request. This also applies where a person has submitted an asylum claim after learning of an extradition request, as this may well alert him or her to a risk of persecution. The asylum application should be examined in the regular asylum procedure, unless it is manifestly unfounded for other reasons.<sup>125</sup> It may, however, be appropriate to prioritize the processing of the claim.

91. Claims raising issues of exclusion under Article 1F of the 1951 Convention, in particular, should be examined in the regular asylum determination procedure, which allows for a full factual and legal assessment of all aspects of the individual case by qualified personnel, rather than at the admissibility stage or in accelerated proceedings.<sup>126</sup> However, in the interest of efficiency as well as to ensure the proper application of the exclusion clauses, asylum applications which raise exclusion questions may be considered on a priority basis by specialized exclusion units within the institution responsible for refugee status determination.<sup>127</sup>

92. It is essential that the asylum procedure offers full procedural safeguards, notably with regard the right of appeal to an independent body in case of a negative status determination and protection against *refoulement* for the entire duration of the asylum determination procedure, including at the appeal and/or review stage.<sup>128</sup> This is particularly important in cases where an asylum-seeker is the subject of an extradition request, as denial of refugee status may result in the decision to surrender him or her directly to the authorities of the country where he or she claims a fear of persecution.

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<sup>123</sup> See above at para. 63.

<sup>124</sup> See above at paras. 64–68.

<sup>125</sup> On the criteria which must be met for a claim to be considered “manifestly unfounded”, see UNHCR Executive Committee Conclusion No. 30 (XXXIV) – 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c6118>. See also UNHCR, *Asylum Processes*, above footnote 13, at paras. 24–33 and 50(d).

<sup>126</sup> See UNHCR, *Guidelines on Exclusion*, above footnote 87, at para. 31; see also UNHCR, *Background Note on Exclusion*, above footnote 109, at para. 99.

<sup>127</sup> See UNHCR, *Background Note on Exclusion*, at footnote 109, at paragraph 101. It should be noted that applications involving questions related to exclusion under Article 1F of the 1951 Convention should not be treated as “manifestly unfounded”, as they may give rise to complex issues of substance and credibility which are not given appropriate consideration in accelerated procedures. See UNHCR, *Asylum Processes*, above footnote 13, at paragraph 29.

<sup>128</sup> See UNHCR, *Asylum Processes*, above footnote 13, at paras. 41–43 and 50(p). See also UNHCR, *Background Note on Exclusion*, above footnote 109, at para. 98.

93. Throughout the asylum procedure, the confidentiality of all aspects of an asylum claim should be respected.<sup>129</sup> As a general rule, no information regarding an asylum application, or the fact that such an application has been made, should be shared with the country of origin or any other country. This also applies where an asylum-seeker may have been involved in criminal conduct, be it in his or her country of origin or in a third country. Should it exceptionally be deemed necessary to contact the authorities of that country, in case additional information which can only be obtained from these authorities is required to determine the extradition request or aspects of the asylum application which are related to an extradition request, there should be no disclosure of the fact that the individual has applied for asylum.<sup>130</sup>

### C. Cancellation and revocation of refugee status

94. Information related to the request for the extradition of a person whom the requested State previously determined to be a refugee may raise questions with regard to his or her eligibility for refugee protection. This may lead to the opening of procedures which, depending on the circumstances, may result in a decision to cancel or revoke the wanted person's refugee status.

- “Cancellation” refers to a decision to invalidate a refugee status recognition which should not have been granted in the first place because the individual concerned did not meet the eligibility criteria at the time of the original decision.<sup>131</sup> Cancellation affects determinations which have become final, that is, they are no longer subject to appeal or review. It takes effect from the time of the initial, incorrect decision (*ab initio* or *ex tunc* – from the start or from then).<sup>132</sup>
- “Revocation” means withdrawal of refugee status in situations where a person who was properly recognized as a refugee has incurred individual responsibility for acts within the scope of Article 1F(a) or 1F(c) of the 1951 Convention after recognition.<sup>133</sup> This has effect for the future (*ex nunc* – from now).<sup>134</sup>

95. Not every extradition request concerning a refugee triggers cancellation or revocation considerations. Whether or not a re-examination of the wanted person's refugee status is required depends on the nature of the information available. The authorities of the requested State need to assess the reliability of the extradition request and any information submitted in connection with it, as well as its significance with regard to the wanted person's eligibility for international protection as a refugee. National legislation may impose time limits and/or other

<sup>129</sup> See UNHCR, *Asylum Processes*, above footnote 13, at para. 50(m). See also UNHCR, *Advisory Opinion on the rules of confidentiality*, above footnote 86.

<sup>130</sup> See also above at paras. 57–58 and 69.

<sup>131</sup> This may be because he or she did not have a well-founded fear of persecution for reason of race, religion, nationality, membership of a particular social group or political opinion, or because one of the grounds for exclusion from refugee protection set out in the 1951 Convention should have been applied at that time.

<sup>132</sup> A fuller discussion of the standards and criteria for the cancellation of refugee status can be found in UNHCR's *Note on the Cancellation of Refugee Status* of 22 November 2004, available <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=41a5dfd94>.

<sup>133</sup> Unlike Article 1F(b), the exclusion clauses in Article 1F(a) and 1F(c) of the 1951 Convention are not subject to temporal or geographic restrictions.

<sup>134</sup> Detailed guidance on the substantive and procedural criteria for the application of Article 1F(a) and 1F(c) of the 1951 Convention are set out in UNHCR, *Guidelines on Exclusion*, above footnote 89, and UNHCR, *Background Note on Exclusion*, above footnote 109. See also UNHCR, *Guidelines on Exclusion and acts of terrorism*, above footnote 110.

requirements for the re-opening of a final refugee status determination. From the point of view of international protection, the opening of cancellation proceedings will be appropriate if there are valid reasons to doubt the correctness of the initial recognition decision. Similarly, where there is reliable information which indicates that a person recognized as a refugee may have subsequently engaged in conduct which brings him or her within the scope of Article 1F(a) or 1F(c) of the 1951 Convention, this would warrant the initiation of revocation procedures.

96. In either case, however, the loss of refugee status would be consistent with international refugee law only if the substantive requirements for cancellation or revocation<sup>135</sup> have been established in procedures which offer the individual full procedural safeguards, including in particular, the right to make relevant submissions and the possibility of an appeal or review of a decision to cancel or revoke on grounds of fact as well as law.<sup>136</sup> It should also be noted that the principle of *non-refoulement* under international refugee law continues to operate as a bar to extradition until a decision to cancel or revoke refugee status has become final. Where extradition law provides for time limits for the determination of an extradition request, the requested State may be bound to refuse extradition if cancellation or revocation procedures have not yet been completed.<sup>137</sup> Confidentiality requirements with regard to information about the refugee apply equally during proceedings to review an individual's refugee status.<sup>138</sup>

## **V. CONCLUSION**

97. As explained in this Guidance Note, extradition and asylum intersect in a number of ways if the person whose extradition is sought is a refugee or an asylum-seeker. UNHCR acknowledges the legitimate concern of States to ensure that fugitive criminals be brought to justice. Extradition is an important tool in this regard. Sometimes, however, extradition requests are used with persecutory intent. This is worrying, as extradition may amount to the return, directly or indirectly, of a refugee to the country where he or she would be at risk of persecution or other irreparable harm.

98. From an international protection point of view, the principal concern in extradition cases concerning refugees or asylum-seekers is to ensure that those in need and deserving of international protection have access to and benefit from such protection, while at the same

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<sup>135</sup> The substantive considerations set out above in Section IV.B.1. apply equally if the wanted person's refugee status is examined in the context of cancellation or revocation proceedings.

<sup>136</sup> For a discussion of procedural fairness requirements in cancellation proceedings, see UNHCR, *Note on Cancellation of Refugee Status*, above footnote 132, at paras. 42–43. Guidance on procedural safeguards which should be ensured in proceedings involving the possible application of Article 1F of the 1951 Convention can be found in UNHCR, *Background Note on Exclusion*, above footnote 109, at para. 98.

<sup>137</sup> See, for example, the decision of the Swiss Federal Tribunal of 14 December 2005, 1A.267/2005/gij, at 3.4.

<sup>138</sup> This is reflected, for example, in Article 38(1)(d) of the European Union's *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4394203c4>, which provides the following: "...Member States shall ensure in the framework of a procedure [to reconsider a person's refugee status]: ...where information on an individual case is collected for the purposes of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee whose status is under reconsideration, nor jeopardize the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin."

time avoiding the abuse of the institution of asylum by persons who seek to hide behind it for the purpose of evading being held responsible for serious crimes.

99. This requires, on the one hand, a rigorous assessment of the wanted person's eligibility for refugee protection, based on a careful examination of all relevant facts and with due observance of procedural fairness requirements. As seen above, persons responsible for crimes may not qualify for refugee status, either because they do not meet the inclusion criteria of the refugee definition set out in Article 1A(2) of the 1951 Convention, or because their involvement in certain serious crimes or heinous acts gives rise to an exclusion clause of Article 1F of the 1951 Convention.

100. On the other hand, where an extradition request concerns a refugee or an asylum-seeker, States must ensure compliance with their protection obligations under international refugee and human rights law. These obligations form part of the legal framework governing extradition and need to be taken into consideration when determining whether the wanted person may be lawfully surrendered to the requesting State. Most importantly, in considering the extradition of a refugee or an asylum-seeker, States are bound to ensure full respect for the principle of *non-refoulement* under international refugee and human rights law.

101. Extradition and asylum processes must be coordinated in such a way as to enable States to rely on extradition as an effective tool in preventing impunity and fighting transnational crime in a manner which is fully consistent with their international protection obligations.