



**UNHCR**

**United Nations High Commissioner for Refugees**  
Haut Commissariat des Nations Unies pour les réfugiés

**LEGAL AND PROTECTION POLICY  
RESEARCH SERIES**

**The Interface between Extradition  
and Asylum**

**Sibylle Kapferer**

**UNHCR Consultant**

**DEPARTMENT OF INTERNATIONAL PROTECTION**

**PPLA/2003/05  
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# EXECUTIVE SUMMARY

## I. INTRODUCTION

This research paper examines the relation between extradition and asylum. Extradition is a formal process whereby States grant each other mutual judicial assistance in criminal matters on the basis of bilateral or multilateral treaties or on an *ad hoc* basis. Asylum means offering sanctuary to those at risk and in danger, in compliance with States' obligations under international refugee law, human rights law and customary international law.

Over time, both areas have undergone significant legal and practical developments. On the one hand, since the 18<sup>th</sup> century, extradition has evolved from being regarded as a matter of State practice, and entirely within the discretion of sovereign rulers, into a concept in law. Thus, extradition came to be governed by a body of rules, which for the most part reflect a consensus among States, and which have changed substantially in response to new types of crime and security concerns, such as, in particular, the emergence of a threat of international terrorism since the 1970s. This has led to restrictions on certain grounds for refusing to grant extradition and the establishment of simplified and accelerated extradition proceedings. Within the European Union, this process will culminate as of 1 January 2004 in the abolition of extradition and its replacement with a system of surrender based on mutually accepted arrest warrants.

On the other hand, developments in various areas of international law from 1945 onward have had a significant impact on the legal framework for extradition. International criminal, humanitarian and human rights law provides a basis for extradition in the absence of inter-State agreements with respect to certain crimes, and in some cases even imposes an obligation on States to extradite or prosecute the alleged perpetrators of such crimes. At the same time, international human rights law has strengthened the position of the individual in the extradition procedure and established bars to the surrender of a wanted person if this would expose him or her to a risk of serious human rights violations. The principle of *non-refoulement*, as enshrined in international refugee and human rights law as well as international customary law, plays an important role in this regard and constitutes the principal element defining the legal framework for the interplay between extradition and asylum.

## II. CURRENT STATE OF EXTRADITION LAW AND PRACTICE

### A. Legal Basis for Extraditing

International law does not establish a general duty to extradite. A legal obligation for one State (the requested State) to surrender a person wanted by another State (the requesting State) exists only on the basis of bilateral or multilateral extradition agreements, or if the requested State is a party to an international instrument which institutes a duty to extradite, as is the case with respect to specific offences such as, for example, genocide or apartheid. Other international instruments impose an obligation to extradite or prosecute – that is, if surrender is refused, the requested State must prosecute the wanted person in its own courts. This is known as the principle of *aut dedere aut judicare*, which also applies under a

number of anti-terrorism instruments and conventions dealing with other types of transnational crime. In addition, customary international law may also serve as the basis for extradition in the absence of previous treaty arrangements, if extradition is sought for crimes against humanity or war crimes, although there is no general obligation to extradite under such circumstances.

Most States are bound by a variety of bilateral and multilateral extradition agreements as well as extradition provisions in international instruments. At the same time, international human rights law, refugee law and customary international law prohibit extradition in certain circumstances. In practice, this may result in a conflict of obligations for the requested State, which needs to be resolved in accordance with applicable principles and standards of international law. Where international human rights and/or refugee law imposes a bar to extradition, this takes precedence over any duty to extradite which may exist on the basis of an agreement between two States.

## **B. General Principles of Extradition Law**

International law leaves States considerable latitude to establish their national legal framework for extradition. Conditions and requirements may vary significantly from one country to another. Partly, this is due to different traditions and approaches between common law and civil law jurisdictions. Yet national extradition laws are also similar in a number of respects, and it is possible to identify certain general principles and requirements, including the following:

- The State seeking the surrender of a person must present a **formal extradition request**, which must identify the wanted person and the offence imputed to him or her. The requesting State is also regularly required to submit certain documents in support of the request. The kind and format of the evidence needed as well as the standard of proof applied by the requested State may differ significantly from one country to another. The formal extradition request may be preceded by a provisional arrest warrant.
- Extradition may only be granted if the conduct imputed to the wanted person constitutes an **extraditable offence** under the applicable extradition agreement or legislation. Certain acts – e.g., military, political or fiscal offences – have traditionally been deemed outside the realm of extraditable offences, although recent developments have brought about significant changes in this respect, most notably with regard to the so-called “political offence exemption”.
- Generally, extradition will be granted only if the offence imputed to the wanted person is a criminal offence under the jurisdiction of both the requesting and requested State. This is known as the principle of **double criminality**.
- Under the rule of **speciality**, the requesting State may prosecute an extradited person only for the offence(s) specified in the extradition request, unless the requested State consents. Similarly, the requesting State may not re-extradite the person to a third State without the agreement of the requested State. Recent developments in Europe have significantly amended the traditional practice with regard to both the double criminality requirement and the speciality rule.

### C. Grounds for Refusing Extradition Requests

States have long accepted that extradition may be refused on certain grounds, and extradition treaties as well as national extradition laws regularly contain provisions to this effect.

One traditional refusal ground which has undergone significant restrictions in recent times is the **political offence exemption**. This principle was developed in the mid-19<sup>th</sup> century, essentially for the purpose of permitting the requested State to refuse extradition if the offence for which it was sought was deemed to be of a political nature while at the same time enabling States to maintain friendly relations, as the refusal of extradition on this ground would not be considered as an undue interference with the internal affairs of the requesting State. The definition of “political offence” has long been controversial in practice, and a considerable body of jurisprudence has developed. Since the 1970s, acts defined as “terrorism” in regional and international anti-terrorism instruments have increasingly been declared non-political for the purposes of extradition.

The so-called “**discrimination clause**”, according to which extradition may be refused if the requested State considers that it is sought with a persecutory and/or discriminatory intent, is a more recent development. First provided for in the European Convention on Extradition (1957), it has since been included in a number of multilateral extradition agreements, bilateral treaties, national extradition laws and even some anti-terrorism instruments. Modelled along the lines of the prohibition of *refoulement* in Article 33(1) of the Convention relating to the Status of Refugees (1951, hereinafter referred to as: the 1951 Convention), it occupies an important position in the interplay between extradition and asylum. In practice, however, States have often been reluctant to rely on the discrimination clause to refuse extradition.

Other traditional refusal grounds include the following:

- The principle of **non-extradition of nationals** of the requested State;
- **Principles of fundamental justice and fairness** (including, for example, the principle of *ne bis in idem*; non-extradition if a judgment was rendered *in absentia* or by a special court in proceedings during which guarantees of fair trial were not observed; the applicability of a statute of limitations; or because the wanted person enjoys immunity from prosecution);
- The wanted person would be subjected to the **death penalty** or another type of punishment considered incompatible with the requested State’s notions of justice;
- **Humanitarian exceptions**, for example, in view of the age or state of health of the wanted person.

Extradition legislation in many States also provides for the refusal of extradition if the wanted person is a refugee or asylum-seeker. The interface between extradition and asylum is discussed in detail in Part V of the paper.

### III. EXTRADITION AND HUMAN RIGHTS LAW

#### A. General

International human rights law does not establish a right not to be extradited. On the contrary, as an instrument which enables States to obtain custody of, and prosecute, the alleged perpetrators of human rights violations, extradition can make a significant contribution to the fight against impunity for such crimes. Human rights law does, however, impose certain restrictions and conditions on the freedom of States to extradite, most importantly by prohibiting the surrender of the wanted person to a risk of serious human rights violations. In some circumstances, this means an absolute bar to extradition, while in others – in particular, cases involving the death penalty – it has long been established practice to grant extradition only if the requesting State gives assurances concerning the treatment of the wanted person upon return.

Evolving human rights standards have fundamentally changed the position of the individual in the extradition process. Traditionally, extradition was viewed as a matter solely between States, and the wanted person was deemed to have standing to oppose extradition only on the grounds that it would be in breach of the applicable inter-State agreement. This traditional view would appear to be incompatible with States' human rights obligations. However, it still has an influence on current extradition practice.

#### B. Human Rights Bars to Extradition

International and regional human rights instruments impose bars to extradition under certain circumstances. This is the case, in particular, where surrender would expose the wanted person to a risk of the following:

- **Torture, cruel, inhuman or degrading treatment or punishment.** As a peremptory norm of international law (*jus cogens*), the prohibition of torture is binding on all States. It applies in all circumstances, including during armed conflict and in times of national emergency. The prohibition of extradition to a risk of torture, cruel, inhuman or degrading treatment or punishment has been confirmed in the jurisprudence of international and regional human rights institutions as well as national courts. Assurances by the requesting State that it will not subject the wanted person to such treatment will not normally be sufficient to exonerate the requested State from its obligations under human rights law.
- **Capital punishment.** While the death penalty is not as such prohibited in international and regional human rights instruments, it is nevertheless subject to certain conditions, and there is a general tendency towards its abolition. Accordingly, an increasing number of States are precluded under the relevant protocols and/or their national legislation from surrendering anyone to a risk of capital punishment. As noted above, it is established practice for the requested State to seek and obtain assurances by the requesting State to the effect that the death penalty will not be sought or, if it has already been imposed, not executed. If such assurances effectively eliminate the risk of capital punishment, extradition is normally considered to be compatible with the requested State's human rights obligations.

- **Unfair trial in the requesting State.** The obligation to safeguard the wanted person's right to a fair trial under international and regional human rights instruments requires the requested State to assess the quality of the criminal proceedings which would await him or her if surrendered.

#### **IV. EXTRADITION: PROCEDURAL QUESTIONS**

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

Extradition conventions and agreements do not normally contain provisions on procedure. The stages of the extradition process as well as the authorities competent to examine and decide on extradition requests are determined in national legislation.

In most countries, formal extradition requests are examined in a procedure which consists of three stages: (i) an initial, administrative phase in which the authority responsible for receiving the extradition request examines its admissibility, based on formal requirements; (ii) a judicial stage, during which a judge determines whether the extradition request satisfies the conditions laid down in the relevant national legislation and/or applicable extradition agreement; (iii) a final executive decision to grant or refuse extradition. In most countries, the executive official responsible for taking the final decision is bound by a judicial determination that extradition would not be lawful. Elsewhere, national law provides for entirely administrative proceedings with a final decision taken by the courts, or systems where the judicial authorities only provide a non-binding opinion.

In many countries, formal extradition proceedings may be waived provided both the wanted person and the requested State consent. Some extradition agreements establish simplified procedures, aimed at accelerating the process and reducing its costs. In practice, States sometimes also resort to irregular methods of surrendering alleged fugitives or obtaining jurisdiction over them. Many such methods – for example, unlawful seizure, abduction or kidnapping – are illegal under international law, as has been made clear by international and regional jurisdictions and national courts.

##### **B. The Position of the Individual in the Extradition Process**

The procedural rights and safeguards available to an individual whose extradition is sought vary from one country to another. Some States provide for procedural rights and safeguards, but often the extent to which such rights are implemented are limited. This results, in part, from the traditional notion that extradition is a matter exclusively between States, in which the individual has no standing. Given that the judicial authorities of the requested State do not decide whether the wanted person is guilty of the offence imputed to him or her, the guarantees available to individuals in domestic criminal proceedings are often considered inapplicable. In some countries, however, it is recognised that extradition proceedings constitute “quasi-criminal matters” and are therefore covered by guarantees of due process and other procedural safeguards.

Depending on the procedure in place under the law of the requested country, the wanted person may oppose his or her surrender by way of a challenge to the legality of arrest and detention pending extradition and/or, subsequently, during the extradition process. The availability of avenues of appeal against and/or review of decisions taken at the various

stages of the extradition process is an important factor. In a number of countries, the opportunities for the wanted person to raise objections to his or her surrender are restricted, either under applicable legislation or as a matter of practice. In some countries, this has the effect of effectively depriving the individual concerned of the possibility to oppose his or her extradition to the requesting State.

## V. EXTRADITION AND ASYLUM

This part of the paper examines how extradition and asylum interrelate where the person whose extradition is sought is a refugee or asylum-seeker, or if an asylum application is filed after the wanted person learns of a request for his or her extradition. While international refugee law does not in itself stand in the way of extradition, its principles and requirements impose certain conditions on the lawfulness of extradition, which need to be taken into consideration by the requested State. Conversely, information which comes to light in the extradition process may affect the credibility of an asylum application and/or give rise to the application of an exclusion clause in the asylum procedure. Such information may also cast doubt on the validity of a refugee status determination, which in turn may result in its cancellation or revocation.

### A. The Principle of *Non-refoulement* and its Relevance for Extradition

Any decision concerning the extradition of a refugee or asylum-seeker must be in compliance with the principle of *non-refoulement*, as guaranteed under the 1951 Convention and customary international law. Pursuant to Article 33(1) of the 1951 Convention, no refugee or asylum-seeker may be sent to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The only exceptions to the principle of *non-refoulement* are those provided in Article 33(2) of the 1951 Convention. Under no circumstances, however, is it permitted to send a person to a danger of torture, cruel, inhuman or degrading treatment or punishment.

The prohibition of *refoulement* applies to any form of removal, including extradition, as has been recognised, *inter alia*, in the national legislation of many countries. The principle of *non-refoulement* establishes a mandatory bar to extradition, regardless of whether or not it is explicitly provided for in an extradition treaty or legislation. Where extradition of a refugee or asylum-seeker is sought by a country other than the country of persecution, the requested State must obtain effective assurances which protect the wanted person against a risk of chain *refoulement* from the requesting State to another country.

The principle of *non-refoulement* overlaps to some extent with a number of refusal grounds under extradition law, most importantly the political offence exemption – where it is still applicable –, the discrimination clause, certain refusal grounds related to notions of justice and fairness and the rule of speciality. However, there are differences resulting, on the one hand, from the mandatory character of the *non-refoulement* principle and, on the other, from its link to certain grounds for a risk to life or freedom, and, except where there is a risk of torture, cruel, inhuman or degrading treatment upon return, its applicability only to refugees and asylum-seekers.

## **B. Questions of Procedure**

As regards the position of refugees and asylum-seekers in the extradition procedure, the two principal concerns from an international protection point of view are: (i) to ensure that the extradition process provides for adequate and effective safeguards against violations of the principle of *non-refoulement*; and (ii) to avoid the interplay between extradition and asylum procedures having the effect of limiting the procedural standards and guarantees available to asylum-seekers during refugee status determination.

The special protection needs of refugees and asylum-seekers need to be taken into consideration during the extradition process. A number of countries have made special provision in their extradition or asylum legislation providing for the inadmissibility of extradition requests concerning refugees. In some countries, recognition of refugee status by the asylum authorities is binding on the extradition authorities. Where an extradition request concerns an asylum-seeker, questions arise concerning the appropriate relation between extradition and refugee status determination procedures. In practice, States have adopted different approaches: in certain countries, the extradition procedure is suspended until a determination on asylum has been made. In others, the two procedures are conducted in parallel, but the decision on extradition may not be taken until the asylum claim has been determined. Yet elsewhere, extradition and asylum authorities proceed independently of each other.

Based on an analysis of the implications of States' obligation to comply with the principle of *non-refoulement*, it is argued in this paper that best practice consists in a system where (i) the final determination on the asylum claim must, in principle, precede the decision on extradition; (ii) the asylum claim and the extradition request should be examined in separate proceedings, in accordance with the criteria and requirements applicable in each area; and (iii) the fact that an extradition request has been submitted cannot render an asylum application inadmissible without further proceedings, nor is it of itself a sufficient basis for rejecting an asylum application as manifestly unfounded.

## **C. Extradition and Exclusion**

One of the areas in which the linkages between extradition and asylum are particularly close is that of exclusion from international refugee protection of persons who meet the criteria of the refugee definition as contained in Article 1A(2) of the 1951 Convention but are deemed undeserving of such protection pursuant to Article 1F of that Convention. The link is particularly close between the principle of non-extradition for political offences and asylum: the exclusion clause of Article 1F(b) of the 1951 Convention, which applies to serious non-political crimes committed outside the country of refuge prior to admission to that country as a refugee, was introduced in part to ensure that persons who flee legitimate prosecution, rather than persecution, should not benefit from international refugee protection.

Despite these linkages, exclusion and extradition are nevertheless distinct, and the applicability of Article 1F(b) of the 1951 Convention should not be made dependent on the question of whether or not the person in question is extraditable. Exclusion, on the one hand, and extradition, on the other, have different purposes, and different criteria apply in either area. This has been recognised by courts in a number of countries, which pronounced themselves on differences in the definition of "political offence" under extradition law and refugee law, respectively. Moreover, acts which are considered "non-political offences" for

the purposes of extradition do not necessarily meet the criteria of Article 1F(b) of the 1951 Convention, as, for example, they may not reach the level of seriousness required. In addition, there may be differences with regard to applicable standards of proof and evidentiary requirements.

Extradition and exclusion may also overlap where the offence imputed to a refugee or asylum-seeker is an act defined as “terrorism” in applicable international instruments or national legislation. In the view of UNHCR and a number of commentators, Article 1F(b) of the 1951 Convention rather than the vague provision of Article 1F(c), which refers to “acts contrary to the purposes and principles of the United Nations”, provides an appropriate basis for considering most cases of this kind.



# THE INTERFACE BETWEEN EXTRADITION AND ASYLUM\*

## I. INTRODUCTION

1. Extradition is the formal surrender of a person by one State (the “requested State”) to the authorities of another (the “requesting State”) for the purpose of criminal prosecution or the enforcement of a sentence. It is a form of legal assistance between States, granted on the basis of a bilateral or multilateral treaty, or by *ad hoc* agreement. Asylum means offering sanctuary to those at risk and in danger, in compliance with States’ obligations under international refugee law, human rights law and customary international law.
2. Extradition and asylum are not mutually exclusive. The institution of asylum is not intended to shield fugitives from legitimate criminal prosecution. However, where the extradition of a refugee or an asylum-seeker is sought, or where an asylum application is filed after the individual concerned learns that a request for his or her extradition has been made, the special protection needs of the wanted person must be taken into consideration. From the point of view of international refugee protection, the principal concern in such situations is to ensure that those fleeing persecution rather than prosecution are adequately protected against *refoulement* – that is, removal to a country where their life, freedom or physical integrity would be at risk.
3. The interplay between extradition and asylum must be examined against the background of extradition law and practice as it evolves under the influence of various, sometimes conflicting, factors. Long regarded as the prerogative of sovereign rulers, subject entirely to their discretion, extradition has emerged as a concept in law in the 18<sup>th</sup> century<sup>1</sup>. On the one hand, a shared interest of States in the availability of an effective means of obtaining jurisdiction over fugitive offenders and the widely recognised need for international cooperation in matters of criminal justice have led to the development of a body of legal rules and a general acceptance that the extradition process is subject to certain legal requirements and conditions. For the most part, these reflect a consensus among States, without necessarily constituting binding principles of international law.
4. Extradition law is not static. Over time, the need to respond to new types of crime and security concerns has brought about significant modifications. Since the 1970s, in particular, increased efforts to counter threats posed by international terrorism and other

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<sup>1</sup> The practice of extradition originated in ancient societies. M.C. Bassiouni, *International Extradition and World Public Order*, A.W. Sijthoff, Leyden (1974), at pp. 3–4, notes that the first recorded extradition agreement was concluded around 1280 B.C., as part of a peace treaty between Ramses II, Pharaoh of Egypt, and the Hittites.

forms of transnational crime have led to restrictions on some of the traditionally accepted grounds for the refusal of extradition and the establishment of simplified and accelerated extradition procedures. Within the European Union, these developments will, as of 1 January 2004, culminate in the abolition of extradition and its replacement with a system of mutually accepted arrest warrants.

5. On the other hand, the international legal framework within which States determine whether or not to extradite has undergone fundamental changes. With respect to a number of particularly serious crimes, developments in international criminal law, humanitarian and human rights law since 1945 have provided States with a basis for extradition in the absence of pre-existing extradition agreements and in some cases established an obligation to extradite and/or prosecute the alleged perpetrators of such crimes.

6. Evolving international standards of human rights and the establishment of increasingly effective mechanisms for their implementation have also resulted in much greater emphasis being placed on the rights of the individual in the extradition process, both with regard to the treatment he or she is likely to face upon surrender and during extradition procedures in the requested State. The emergence of an absolute prohibition under international and regional human rights law of torture, cruel, inhuman or degrading treatment, continuing progress towards the abolition of capital punishment and, in particular, the consolidation of the principle of *non-refoulement* into a norm of customary international law which is binding on all States have been particularly important in this regard.

7. At the same time, however, it is still common for States to regard extradition as a matter very close to their sovereignty. Political considerations continue to play an important role in extradition relations between States and in practice may override concerns for the human rights of the individual affected.

8. This research paper explores the extent to which the special protection needs of refugees and asylum-seekers are safeguarded in the context of extradition. It examines how the extradition process and asylum procedures interrelate, and what consequences this may have for the protection of refugees and asylum-seekers. This paper is based on extensive research of the law and practice on extradition and its relation to asylum in States from both common and civil law jurisdictions.

9. Part II of this paper describes the current state of extradition law. It sets out the various instruments which serve as the legal basis for extradition as well as the general principles governing extradition practice, including, in particular, formal and substantive requirements for extradition requests and the grounds on which the requested State is entitled, and in some cases required, to refuse to extradite. The question of the hierarchy of obligations stemming from different sources of law and sometimes imposing conflicting demands is also addressed.

10. In Part III, the paper examines the ways in which international human rights law has a bearing on extradition and the obligations it imposes on the States involved, most notably by establishing bars to the surrender of the wanted person under certain circumstances. Part IV provides an overview of extradition procedures, with special emphasis on the position of the individual during the various stages of the extradition process and the opportunities available to them to raise objections to their surrender.

11. Part V addresses specific questions arising at the interface between extradition and asylum. It sets out the principle of *non-refoulement* and its significance with regard to extradition, including, in particular, the conditions under which the *non-refoulement* rule operates as a mandatory bar to the surrender of a requested person. It analyses the scope of protection offered to refugees and asylum-seekers by the various refusal grounds and other principles of extradition law as well as under the principle of *non-refoulement*, and specifically examines at what stage in the procedure, and before which authority, refugees and asylum-seekers may oppose their extradition on grounds related to their fear of persecution. This part also addresses the question of the appropriate relation between extradition and asylum procedures. Finally, it explores the linkages and differences between extradition and exclusion from international refugee protection, particularly in the context of efforts to fight international terrorism and other transnational crime.

## II. CURRENT STATE OF EXTRADITION LAW AND PRACTICE

### A. Legal Basis for Extraditing

12. Under international law, there is no general duty to extradite<sup>2</sup>. Rather, extradition is understood to be a matter of international comity – that is, a favour accorded by one nation to another –, and the conditions under which an extradition request may be granted, or refused, are determined by the law of the requested State. Many States have enacted specific extradition laws and/or provisions on extradition in legislation on criminal procedure or penal codes, which enable States to extradite a fugitive to another State if requested. A legal obligation to extradite exists only where States have entered into bilateral or multilateral extradition agreements, or if they have become parties to international instruments which institute a duty to extradite with respect to specific offences<sup>3</sup>.

#### 1. Bilateral extradition agreements

13. Bilateral agreements establishing a reciprocal duty to extradite have traditionally been the preferred legal instrument used by States in their extradition relations. A large number of such treaties were concluded during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, many of which are still in force. Bilateral treaties continue to provide the legal basis for

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<sup>2</sup> See M.C. Bassiouni, above at fn. 1, at pp. 3–4; G. Gilbert, *Transnational Fugitive Offenders in International Law*, Martinus Nijhoff Publishers, The Hague, Boston, London (1998), at p. 47; see also Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, “Extradition – A Review of Australia’s Law and Policy”, Report No. 40 (2001), at para. 2.3.

<sup>3</sup> Under the relevant Security Council resolutions, States also have an obligation to cooperate with the international criminal tribunals for the former Yugoslavia and for Rwanda, which includes a duty to arrest and surrender a suspect, if so requested. States Parties to the Rome Statute of the International Criminal Court have an obligation to cooperate with the latter. This, however, is not extradition in the strict sense, as it concerns relations between a State and an organ established under international law, rather than two States. On the difference between “transfer” and “surrender” to an international criminal jurisdiction, on the one hand, and “extradition”, on the other, see B. Swart, “General Problems”, in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford (2002), at pp. 1589–1598.

extradition in many cases<sup>4</sup>. In some countries, national law requires the existence of an extradition treaty as a precondition for permitting the surrender of a fugitive to another State. This has long been the case, in particular, for countries in the common law tradition, and still applies in the United States of America, but also in some civil law countries such as Brazil, the Netherlands or Slovenia.

14. There is no rule of international law which prevents States from extraditing in the absence of a treaty<sup>5</sup>. In many States, national legislation provides for the possibility of extraditing without a pre-existing agreement. Sometimes, this is subject to the explicit condition of reciprocity<sup>6</sup>. A number of common law countries have recently amended their extradition laws to allow for the possibility of extradition without pre-existing extradition relations with the requesting State<sup>7</sup>.

## 2. *Multilateral treaties and conventions on extradition*

15. In addition to bilateral treaties, an increasing number of multilateral extradition agreements and conventions establish a mutual duty for States parties to extradite under the conditions set out by the respective instrument.

16. In 1990, the UN General Assembly adopted a Model Treaty on Extradition<sup>8</sup>, which, together with a Model Treaty on Mutual Assistance in Criminal Matters<sup>9</sup>, is intended to be “used as a basis for international co-operation and national action against organised crime and terrorist crime”<sup>10</sup>. It is not binding, however, and as yet there is no universal general extradition convention. Despite a shared interest in effective extradition relations, States’

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<sup>4</sup> It has been noted that bilateral extradition treaties are easier to negotiate than multilateral agreements. They permit the contracting States to take into consideration any particular political or legal concerns that may be relevant between them. See, for example, “International cooperation and practical technical assistance for strengthening the rule of law: promoting the United Nations Crime Prevention and Criminal Justice Programme”, Background paper for the workshop on extradition and international cooperation, prepared for the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, 29 April–8 May 1995, UN doc. A/CONF.169/8, 1 March 1995, at paras. 18–20 and 37–39. See also G. Gilbert, above at fn. 2, at pp. 9–10 and 33.

<sup>5</sup> See P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7<sup>th</sup> rev. edn., Routledge, London, New York (1997), at p. 117.

<sup>6</sup> This is the case, for example, in Austria (s. 3 of the Law on Extradition and Mutual Legal Assistance of 1979); Belgium (s. 1 of the Law on Extradition of 15 March 1874); former Yugoslav Republic of Macedonia (Article 29(3) of the Constitution); Germany (s. 5 of the Law on International Mutual Assistance in Criminal matters of 23 December 1982); Moldova (Article 17 of the Constitution, s. 23(2) of the Aliens Law and s. 13(2) of the Criminal Code); Peru (s. 3 of the Law No. 24.710 of 1987 on Extradition); Russian Federation (s. 362 of the Code of Criminal Procedure); Slovak Republic (s. 373 of the Code of Criminal Procedure); Switzerland (s. 8(1) of the Federal Law on International Legal Assistance in Criminal Matters establishes a general requirement of reciprocity, but s. 8(2) provides for a number of exceptions.

<sup>7</sup> For example, the United Kingdom (Extradition Act 1989) or Canada (Extradition Act 1999). Australia had introduced a change permitting extradition on an *ad hoc* basis already in 1966 (Extradition (Foreign States) Act 1966).

<sup>8</sup> General Assembly Resolution 45/116 of 14 December 1990, Annex.

<sup>9</sup> General Assembly Resolution 45/117 of 14 December 1990, Annex.

<sup>10</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August–7 September 1990: report prepared by the Secretariat*, at para. 245, cited in United Nations, International Review of Criminal Policy Nos. 45 and 46, 1995, at p. iv.

approaches to extradition differ widely in a number of areas. This is due, in part, to different traditions under common and civil law, but variations also exist within either of these legal systems.

17. States have found it easier to reconcile their differences at a regional or sub-regional level, although in some instances, including in closely integrated regions such as Europe, consensus was achieved through provisions for opt-out clauses or the possibility of making reservations to certain provisions in regional extradition instruments<sup>11</sup>. In addition to the European instruments outlined at para. 19 below, regional extradition instruments include the following:

- Montevideo Convention on Extradition (Inter-American) (1933)<sup>12</sup>
- Convention on Extradition of the League of Arab States (1952)<sup>13</sup>
- Convention on Extradition of the *Organisation Africaine et Malgache* (OCAM) (1961)
- Inter-American Convention on Extradition (1981)
- Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases of the Commonwealth of Independent States (1993)<sup>14</sup>
- Economic Community of West African States (ECOWAS) Convention on Extradition (1994)<sup>15</sup>
- South African Development Community (SADC) Protocol on Extradition (2002)

18. In addition, States members of the Commonwealth are bound by the London Scheme for Extradition within the Commonwealth, formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders<sup>16</sup>. Though not formally a treaty, this instrument, which was adopted in 1966 and last amended in November 2002, is binding for Commonwealth countries and contains guidelines to be implemented in their extradition laws and agreements<sup>17</sup>.

19. Historically, extradition relations have been particularly close among European States, and a comparatively large number of extradition instruments have been adopted in this region. They include the following:

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<sup>11</sup> See below at para. 67.

<sup>12</sup> Earlier extradition conventions in the Americas include the Montevideo Convention of 1989, a Convention concluded in Mexico in 1902, the Bolivarian Convention adopted in Caracas in 1911, and the Bustamante Code of 1928. See M.C. Bassiouni, above at fn. 1, at p. 22.

<sup>13</sup> A supplementary agreement to this Convention was concluded in 1983. See G. Gilbert, above at fn. 2, at p. 35.

<sup>14</sup> Hereinafter referred to as Minsk Convention (1993).

<sup>15</sup> Hereinafter referred to as ECOWAS Convention (1994).

<sup>16</sup> The Scheme was given its new title at the Commonwealth Law Ministers' meeting at Kingstown, St Vincent and the Grenadines, 18–21 November 2002.

<sup>17</sup> Hereinafter referred to as London Scheme for Extradition (1966 and 2002). The text of this instrument, including the most recent amendments, can be found in Annex B to the Communique issued by the Commonwealth Law Ministers on 21 November 2002, following their meeting at Kingstown. It is available at: <http://nationalecurity.ag.gov.au/www/attorneygeneralHome.nsf/Web+Pages/B8036294D0246502CA256C7C007EB533?OpenDocument>.

- European Convention on Extradition (1957)<sup>18</sup> and its additional protocols of 1975<sup>19</sup> and 1978<sup>20</sup>, adopted under the auspices of the Council of Europe
- Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters (1962), concluded between Belgium, the Netherlands and Luxembourg<sup>21</sup>
- Nordic States Scheme on extradition (1962), concluded between Denmark, Finland, Iceland, Norway and Sweden
- Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests (1989)
- Title III, Chapter 4 of the Convention implementing the 1985 Schengen Agreement (Schengen Convention, 1990)
- Convention on Simplified Extradition Procedures between the Member States of the European Union (1995)
- Convention Relating to Extradition between Member States of the European Union (1996)<sup>22</sup>

20. These instruments have created a complex web of regulations governing extradition within the European Union as well as between Member States of the latter and third States<sup>23</sup>. As of 1 January 2004, the extradition regime under the above-listed instruments will be replaced within the European Union by a new system of mutually recognised and enforceable arrest warrants, as provided for in the Council Framework Decision of 13 June 2002 on a European Arrest Warrant and the Surrender Procedures between Member States<sup>24</sup>.

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<sup>18</sup> This Convention has been ratified by 42 members of the Council of Europe as well as Israel, Serbia and Montenegro, and South Africa. It constitutes the principal legal basis for extradition practice in Europe. For ratification information, see at <http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=024&CM=&DF=> (ETS No.: 024).

<sup>19</sup> This protocol excludes war crimes and crimes against humanity from the category of political offences. It also defines cases where extradition can be refused on the ground that the offender has already been brought to trial.

<sup>20</sup> This protocol supplements and replaces certain provisions of the European Convention on Extradition concerning fiscal offences, judgments *in absentia*, amnesty etc.

<sup>21</sup> As completed and modified by the Protocol of 11 May 1974.

<sup>22</sup> Both the 1995 and the 1996 EU Conventions have not yet entered into force, as France and Italy have not ratified them. Both Conventions do, however, apply between Member States which have made declarations to that effect. These are, for the 1995 Convention: Austria; Denmark; Finland; Germany; Luxembourg; the Netherlands; Spain; Sweden; and the United Kingdom. For the 1996 Convention: Austria; Belgium; Denmark; Finland; Germany; Luxembourg; the Netherlands; Spain; Sweden; and the United Kingdom. The text of these declarations can be found in Schedules 2, 4, 6 and 8 to the UK European Union Extradition Regulations, 25 February 2002, available at: <http://www.hmso.gov.uk/cgi-bin2/dialogserver?DB=hmso-new>.

<sup>23</sup> It has been noted that, as a result, it is often difficult to determine the exact conditions and requirements which apply to any given case. See, for example, S. Gleß, *Auslieferungsrecht der Schengen-Vertragsstaaten, Neuere Entwicklungen*, Projektbericht, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg im Breisgau, August 2002, available at: <http://www.iuscrim.mpg.de/forsch/straf/projekte/gless.html>, at p.8.

<sup>24</sup> OJ L 190, 18.7.2002, pp. 1–18. The extradition instruments which will be superseded by the European arrest warrant will continue to apply in extradition relations between member States of the European Union and third States.

### 3. Extradition obligations under other international instruments

21. With regard to certain offences, the legal basis for extradition can be found in international law. This is the case, in particular, with regard to war crimes and certain crimes against humanity, acts considered to be terrorism and other types of transnational crime. Some of the international conventions concerned with the suppression, prevention and punishment of such crimes provide for an obligation to extradite for States Parties. Others enable States to extradite, rather than establishing a duty to do so. Customary international law may also serve as the basis for extradition without previous treaty arrangements.

#### a. Crimes against humanity and war crimes

22. Crimes against humanity<sup>25</sup> and war crimes<sup>26</sup> are criminal offences under international law. The prohibition of such crimes imposes upon States obligations owed to the international community as a whole (*erga omnes*). It has also become part of *jus cogens*, that is, norms which protect fundamental principles and rank higher than treaty law and even general customary rules not endowed with the same force. One of the consequences of the *jus cogens* character of the prohibition of international crimes is that every State is entitled to investigate, prosecute, punish or extradite individuals accused thereof<sup>27</sup>. The fundamental character of the prohibition of war crimes and crimes against humanity also means that certain traditionally accepted grounds for the refusal to extradite will not apply in cases where extradition is requested for such crimes<sup>28</sup>. It does not, however, establish a general duty, based on customary law, to extradite in the absence of a treaty<sup>29</sup>.

23. An obligation to extradite those accused or convicted of certain international crimes is specifically provided for in some of the international instruments dealing with such acts:

- Pursuant to Article 7(2) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), States Parties undertake to extradite suspects to the

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<sup>25</sup> Crimes against humanity are defined in customary international law as serious crimes (such as, for example, murder, extermination, enslavement, torture, rape and other grave acts of sexual violence, the enforced disappearance of persons), when committed as part of an attack directed against a civilian population which is either widespread, or systematic, or both. ‘Widespread’ refers to the scale of the crime and means that it must involve a substantial number of victims. An attack is ‘systematic’ if it is part of a larger plan or pattern, usually involving a high degree of orchestration and planning. But one single act can constitute a crime against humanity, if it is particularly egregious, or if it is committed as part of such a plan or pattern. Genocide, apartheid and torture, as defined in the relevant international conventions, are special cases of crimes against humanity. Crimes against humanity can be committed in times of armed conflict as well as times of peace.

<sup>26</sup> War crimes are serious violations of international humanitarian law, committed in international and non-international conflict, as defined in international customary law and in treaties, such as, in particular, the four Geneva Conventions of 1949 and the two Additional Protocols thereto of 1977, as well as the relevant provisions of the Rome Statute of the International Criminal Court of 1998.

<sup>27</sup> See *Pinochet Ugarte, re.* [1999] 2 All ER 97, at 108–109; see also the judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Anto Furundzija*, Trial Chamber II, 10 December 1998, IT-95-17/1-T, at para. 156.

<sup>28</sup> This is the case, in particular, with regard to the political offence exemption. See below at para. 76.

<sup>29</sup> See B. Swart, “Arrest and Surrender”, in: A. Cassese et al (eds.), above at fn. 3, at pp. 1655-1658, and at p. 1660, with further references.

authorities of the State on whose territory genocide was committed, or to a competent international criminal tribunal.

- Article XI(2) of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) establishes a mutual duty to extradite for States Parties.
- Article III of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) imposes a duty on States Parties to adopt all necessary measures to make possible the extradition, in accordance with international law, of the persons within its scope.

24. Other international instruments permit States to decide whether or not to extradite, but if they refuse to do so, they are under the obligation to prosecute the person in their own courts. This is known as the principle *aut dedere aut judicare* (“extradite or prosecute”). On the basis of Article 7(1) of the 1984 United Nations Convention Against Torture (UNCAT), it applies to the States Parties to that Convention. It is also provided for in Article 14 of the Inter-American Convention to Prevent and Punish Torture (1985); Article VI of the Inter-American Convention on Forced Disappearance of Persons (1994); Article 9(2) of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989); and Article 10(4) of the Convention on the Safety of United Nations and Associated Personnel (1994).

25. With respect to war crimes in international armed conflict – that is, grave breaches of the four Geneva Conventions of 1949<sup>30</sup> and of Additional Protocol No. I thereto of 1977 – the primary duty of States is to prosecute the perpetrators and instigators of such crimes<sup>31</sup>. These instruments establish mandatory universal jurisdiction for any State Party over those who commit, or order the commission of, war crimes. Each State Party has an obligation to search for such persons and bring them to justice before its own courts, regardless of their nationality. It may also, if it prefers, and in accordance with its own legislation, hand such persons over for trial to another State Party provided the latter has made out a *prima facie* case against the suspected war criminal<sup>32</sup>. Article 88(2) of Additional Protocol No. I provides that States Parties shall co-operate in the matter of extradition and give due

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<sup>30</sup> The 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); the 1949 Geneva Convention relative to the Treatment of Prisoners of War (GC III); the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV).

<sup>31</sup> Pursuant to Article 50 GC I, Article 51 GC II, Article 130 GC III and Article 147 GC IV, grave breaches are the following acts, if committed against persons or property protected by the respective Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body and health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In addition, grave breaches comprise, under Article 130 GC III, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention; and under Article 147 GC IV, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights or a fair and regular trial prescribed in GC IV, as well as the taking of hostages.

<sup>32</sup> Article 49(1) and (2) GC I; Article 50(1) and (2) GC II; Article 129(1) and (2) GC III; Article 146(1) GC IV; Article 85(1) of Additional Protocol No. I of 1977.



consideration to the request of the State in whose territory the alleged offence has occurred<sup>33</sup>.

26. There is no specific provision establishing a duty to prosecute or extradite persons accused of war crimes committed in non-international armed conflicts, although the principle *aut dedere aut judicare* is provided for in Article 9 of the Draft Code of Crimes of the International Law Commission (1996) for certain war crimes committed in non-international armed conflict, including, in particular, violations of common Article 3 of the Geneva Conventions of 1949.

b. Acts of “terrorism” and other transnational crimes

27. A number of anti-terrorism conventions also contain provisions which establish a duty to extradite or prosecute those responsible for offences designated as terrorist acts. These include the following:

- European Convention on the Suppression of Terrorism (1977)<sup>34</sup>
- South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (1987)<sup>35</sup>
- Arab Convention on the Suppression of Terrorism (1998)<sup>36</sup>
- Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999)<sup>37</sup>
- Organisation of African Unity (OAU) Convention on the Combating and Preventing of Terrorism (Algiers Convention) (1999)<sup>38</sup>

28. By contrast, the Inter-American Convention against Terrorism (2002) does not impose an obligation to extradite or prosecute, but refers to States’ obligations under already existing international anti-terrorism instruments as well as under their domestic law<sup>39</sup>.

29. The principle *aut dedere aut judicare* also applies under the following international instruments dealing with the suppression and punishment of specific offences:

- Convention for the Suppression of Unlawful Seizure of Aircraft (1970)<sup>40</sup>
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)<sup>41</sup>

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<sup>33</sup> A duty to prosecute or extradite also applies to States Parties to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1999).

<sup>34</sup> Article 7.

<sup>35</sup> Article IV.

<sup>36</sup> Article 6(h). The obligation to prosecute in case of non-extradition only applies where extradition is precluded because the legal system of the requested State does not allow it to extradite its nationals.

<sup>37</sup> Article 6(8). The obligation to prosecute in case of non-extradition only applies where extradition is precluded because the legal system of the requested State does not allow it to extradite its nationals.

<sup>38</sup> Article 8(4).

<sup>39</sup> Article 9.

<sup>40</sup> Article 7.

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)<sup>42</sup>
- International Convention against the Taking of Hostages (1979)<sup>43</sup>;
- Convention on the Physical Protection of Nuclear Material (1980)<sup>44</sup>
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)<sup>45</sup>
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988)<sup>46</sup>
- International Convention for the Suppression of Terrorist Bombings (1997)<sup>47</sup>
- International Convention for the Suppression of the Financing of Terrorism (1999)<sup>48</sup>

30. A duty to extradite or prosecute also applies to the States Parties to the following international conventions dealing with other types of transnational crime:

- Single Convention on Narcotics Drugs (1961), as amended by the Protocol amending the Single Convention on Narcotics Drugs (1972)<sup>49</sup>
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)<sup>50</sup>
- United Nations Convention against Transnational Organized Crime (2000)<sup>51</sup>

31. These conventions typically require States Parties to ensure that the acts in question are offences under their criminal law, coupled with an obligation to either extradite a person suspected of having committed such crimes or submit their cases to their own competent authorities for the purpose of prosecution. Many such instruments also contain provisions to the effect that the offences within their scope shall be deemed to be included as an extraditable offence in any existing bilateral treaties that apply between States Parties, as well as enabling States Parties to use them as surrogate extradition treaties in the absence of pre-existing bilateral extradition agreements. Where extradition is not conditional upon the existence of a treaty, these acts are to be considered extraditable offences under national law<sup>52</sup>.

32. There are conflicting opinions as to whether the principle *aut dedere aut judicare*

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<sup>41</sup> Article 7.

<sup>42</sup> Article 7.

<sup>43</sup> Article 8(1).

<sup>44</sup> Article 10.

<sup>45</sup> Article 6(4).

<sup>46</sup> Article 3(4).

<sup>47</sup> Article 8(1).

<sup>48</sup> Article 10(1).

<sup>49</sup> Article 36(2)(iv).

<sup>50</sup> Article 6(9)(a).

<sup>51</sup> Article 16(10). The obligation to prosecute in case of non-extradition applies only where extradition is refused solely on the grounds that the person concerned is a national of the requested State, and at the request of the State seeking extradition.

<sup>52</sup> Such provisions are also contained, for example, in Article 8 of the United Nations UNCAT (1984), and Article 15 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989).

has become part of customary international law<sup>53</sup>. The predominant view continues to be that there is no such obligation<sup>54</sup>.

#### 4. *Hierarchy of obligations*

33. Most States are bound by extradition obligations arising from bilateral and multilateral extradition agreements as well as extradition provisions in other international instruments dealing with terrorism or other types of transnational crime. A significant number of such agreements may apply in any given country. For example, the United States of America is a party to over 100 bilateral or multilateral extradition treaties<sup>55</sup>. Similarly, the United Kingdom has extradition relations with more than 100 countries<sup>56</sup>, while Australia has entered into more than 45 extradition agreements<sup>57</sup>. Canada, too, has concluded over 50 bilateral extradition treaties and is a party to several multilateral conventions. 42 European countries, as well as Israel, Serbia and Montenegro and South Africa, have ratified the European Convention on Extradition<sup>58</sup>. In addition, many European States have also concluded bilateral treaties with countries in Europe and elsewhere<sup>59</sup>.

34. At the same time, States have obligations under international law which preclude them from granting extradition under certain circumstances. International human rights and refugee law, as well as customary international law, impose bars on extradition where fundamental rights of the individual concerned would be at risk<sup>60</sup>.

35. As a consequence, a State which must determine a request for the extradition of a person within its jurisdiction may find itself in a conflict of obligations under various pertinent legal instruments. Such conflicts must be resolved in accordance with applicable principles and standards of international law.

36. Traditionally, extradition was seen as a matter between States as the only subjects of international law. The individual affected was considered to be a mere “object”, without standing to assert violations of their individual rights as a result of extradition, except on the

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<sup>53</sup> M.C. Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, Dordrecht, Boston, London (1995), at pp. 20–25; M.C. Bassiouni, *Crimes against Humanity in Criminal International Law*, 2<sup>nd</sup> rev. edn., Martinus Nijhoff Publishers, Dordrecht, Boston, London (1999), at pp. 219–221, goes as far as to suggest that the principle of *aut dedere aut judicare* has become *jus cogens* where aggression, war crimes, genocide and other crimes against humanity are involved.

<sup>54</sup> See, for example, B. Swart, above at fn. 29, at pp. 1662-1663, who notes the absence of sufficient State practice and *opinio juris* in support of it as the main difficulty in supporting the argument that *aut dedere aut judicare* has become a norm of customary international law. G. Gilbert, above at fn. 2, states that “there is certainly no rule of customary international law that fugitives in general should be extradited or prosecuted”, but that “a new norm of international law may be developing” (at p. 14).

<sup>55</sup> See A. Powers, “Justice Denied? The Adjudication of Extradition Applications”, 37:277 *Texas International Law Journal* (2002), at p. 283.

<sup>56</sup> See Extradition Procedures in the United Kingdom, Home Office, 2002, available at: <http://www.homeoffice.gov.uk/oicd/jcu/extranote.htm>.

<sup>57</sup> Parliament of the Commonwealth of Australia, above at fn. 2, at para. 2.23.

<sup>58</sup> For ratification information see above at fn. 18.

<sup>59</sup> Belgium, for example, is party to 58 bilateral agreements. See I. Delbrouck, *Guide de la personne*, Supplément 18, December 2000, at p. 9.

<sup>60</sup> See Parts III and V below.

grounds that it would be contrary to specific provisions of the applicable inter-state agreement<sup>61</sup>. With regard to the current state of international human rights and refugee law, however, this view is no longer tenable.

a. Conflicting obligations under extradition agreements and conventions

37. In principle, international treaties between States have the same force under international law. This may give rise to conflicting obligations under different treaties. The requested State may have a duty to extradite under a bilateral or multilateral extradition agreement, but it may also have an obligation under another – usually regional – treaty to refuse extradition under certain circumstances.

38. A number of extradition conventions contain clauses which clarify their relationship with other conventions and/or bilateral treaties. Thus, for example, Article 28 of the European Convention on Extradition (1957) provides that its provisions supersede those of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties. States Parties may conclude bilateral or multilateral agreements among themselves only to the extent that they supplement the Convention or facilitate its implementation<sup>62</sup>. Similar provisions are contained in Article 32 of the ECOWAS Convention (1984). Article 3 of the recent extradition agreement between the European Union and the United States of America determines for each of its clauses whether it is applicable in place of, in addition to, or in the absence of bilateral treaty provisions between EU Member States and the United States of America, which the new treaty is intended to supplement<sup>63</sup>. By contrast, Article 33 of the Inter-American Convention on Extradition (1981) provides that multilateral and bilateral treaties remain in force unless the States Parties concerned expressly declare or agree otherwise. However, such declarations cannot suspend the applicability of international human rights treaties.

39. Article 30 of the Vienna Convention on the Law of Treaties (1969) sets out general rules for the application of successive treaties between the same parties and on the same subject matter which do not contain explicit provisions as to which of them should take precedence over the other. In brief, the later treaty will normally prevail over the earlier one, and the more specialised over the more general.

b. Extradition obligations vs. obligations under other international treaties

40. The above-described rules do not apply to conflicts of obligations under treaties dealing with different subject matters, in particular human rights and refugee protection instruments. Such treaties create not merely subjective, reciprocal rights and duties between States, but rather “particular legal orders involving objective obligations to protect human

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<sup>61</sup> See J. Dugard and C. van den Wyngaert, “Reconciling extradition with human rights”, 92:2 *American Journal of International Law* (1998), 187, at pp. 188-190, with references to case law in the United States, Canada and the United Kingdom, which “interprets extradition laws and treaties in favour of enforcement because this course is perceived to serve the interests both of justice and of friendly international relations”.

<sup>62</sup> See Article 59 of the Schengen Convention (1990) and Article 1, respectively, of the 1995 and 1996 EU Conventions dealing with extradition (see above at para. 19). The European arrest warrant scheme suspends the extradition provisions of various European instruments (see above at para. 20).

<sup>63</sup> Agreement on extradition between the European Union and the United States of America, signed on 25 June 2003, OJ L 181, 19.7.2003, pp. 27–32. The agreement is not yet in force.

rights”<sup>64</sup>. With respect to those rights guaranteed under international human rights treaties which have attained the status of *jus cogens*, or peremptory norms of international law, Articles 53 and 64 of the Vienna Convention on the Law of Treaties (1969) apply and provide that any treaty provisions which conflict with *jus cogens* are void<sup>65</sup>. Thus, the prohibition of handing a person over to a country where he or she would be exposed to a risk of torture, cruel, inhuman or degrading treatment or punishment always prevails over an duty to extradite pursuant to an extradition treaty binding the requested and the requesting States<sup>66</sup>. The same holds for other fundamental rights which are recognised as forming part of *jus cogens*<sup>67</sup>.

41. Conflicts arising from the requested State’s duties under extradition agreements, on the one hand, and its obligations under international human rights or refugee instruments which do not constitute peremptory norms of international law, on the other, need to be resolved on the basis of States’ obligations under the UN Charter. Articles 55(c) and 56 of the UN Charter impose a duty on States to promote and respect human rights. Article 103 of the UN Charter provides that, “[i]n 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”. Human rights bars to extradition therefore take precedence over a duty to extradite which may exist on the basis of an agreement between the requested and the requesting State.

c. Extradition obligations vs. obligations under customary international law

42. Customary international law may also impose obligations on the requested State which take precedence over extradition agreements. Where the applicable norm of customary international law is a peremptory norm of international law, or *jus cogens*, the same considerations apply as set out in para. 40 above. As for other international law principles which have not (yet) attained such status, the relation between treaties and custom is more differentiated. As a general rule, the later in time will prevail<sup>68</sup>. Thus, where the requested State’s duty to extradite under a treaty precedes the emergence of a new rule of customary international law which establishes a bar to extradition, it will be superseded by the latter. This may be the case in particular with regard to the principle of *non-*

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<sup>64</sup> See M.N. Shaw, *International Law*, 4<sup>th</sup> edn., Cambridge University Press, Cambridge (1997), at p. 696.

<sup>65</sup> Article 53 of the Vienna Convention on the Law of Treaties provides: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general 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.” Under Article 64 of the same Convention, “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.

<sup>66</sup> On the *jus cogens* character of the prohibition of exposing a person to a risk of torture, cruel, inhuman or degrading treatment or punishment, see below at paras. 117 and 125.

<sup>67</sup> The Human Rights Committee lists as examples of violations of peremptory norms of international law the taking of hostages, imposing collective punishments, arbitrary deprivations of liberty or deviating from fundamental principles of fair trial, including the presumption of innocence. See Human Rights Committee, *General Comment No. 29 on States of Emergency* (Article 4), 2001, UN doc. CCPR/C/21/Rev.1/Add.11, at para. 11.

<sup>68</sup> See M.N. Shaw, above at fn. 64, at p. 96.

*refoulement* under customary international law<sup>69</sup>. Once a new rule of customary international law has emerged, States are bound by it. Treaties concluded subsequently must be read in the light of existing obligations under customary international law.

## **B. General Principles of Extradition Law**

43. Under international law, States have considerable latitude in establishing their national legal framework for extradition. Conditions and requirements may vary significantly from one country to another. Divergent traditions and approaches in common law and civil law jurisdictions account for a number of differences. Thus, for example, civil law States typically refuse to extradite their own nationals, while nationality is not usually a refusal ground in common law jurisdictions<sup>70</sup>. On the other hand, evidentiary standards and requirements applied under common law are unfamiliar to, and frequently impossible to meet for, civil law countries seeking extradition<sup>71</sup>. In practice, differences in these and other areas have been the cause of complications in extradition relations.

44. Over the past decades, however, there has been a tendency towards more common approaches. Some of these impediments have recently been eliminated or at least attenuated in the course of amendments of national extradition legislation in a number of countries<sup>72</sup> as well as in some more recent bilateral treaties<sup>73</sup>. Increasingly, multilateral extradition agreements and other international legal instruments establish an obligation to extradite and define the conditions and requirements for extradition. This has also led to a *rapprochement* on some of the issues which have long caused difficulties, as have developments in international criminal, human rights and humanitarian law.

45. Although differences continue to exist, national extradition regimes are also similar in many ways<sup>74</sup>, and a number of general principles and requirements can be derived from States' extradition laws, procedures and practices. The following sub-sections examine the need for an extradition request and related requirements of form, content as well as supporting documentation and evidence; the criterion of "extraditable offence" to determine the types of conduct for which extradition may be granted; and the principles of double criminality and speciality. Section II.C. addresses the grounds on which the requested State may, and in some cases must, refuse to extradite. Questions of procedure are also dealt with in Part IV below.

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<sup>69</sup> See below at para. 218 and generally the discussion in Part V of this paper.

<sup>70</sup> See below at paras. 105–106.

<sup>71</sup> See below at paras. 47–55.

<sup>72</sup> Among the countries which have recently amended their extradition laws are, for example, Australia (Extradition Act 1988) and Canada (Extradition Act 1999). In a number of countries, changes have been made necessary in order to comply with their obligations under the Rome Statute of the International Criminal Court. A reform of extradition legislation is currently under way in the United Kingdom.

<sup>73</sup> See below at fn. 204.

<sup>74</sup> See G. Gilbert, above at fn. 2, at p. 2, who notes that extradition laws are designed to achieve the same effect.

## 1. Extradition request and supporting documentation – questions of evidence

### a. Extradition request

46. As a prerequisite for extradition proceedings to be initiated, the State seeking the extradition of a fugitive from another State must present a request to the authorities of the latter. This is usually done by way of a formal request for the arrest and surrender of the person concerned, transmitted through diplomatic channels<sup>75</sup>. Under some extradition agreements and conventions which provide for simplified procedures, States may also address extradition requests directly to the competent authorities of the requested State<sup>76</sup>. Applicable conventions and treaties regularly provide that extradition will proceed pursuant to the laws of the requested State. While there is little variation with regard to the type of information which the requesting State must submit, the applicable rules and procedures as well as evidentiary standards may differ substantially between jurisdictions.

47. In general, however, the request must identify the person whose extradition is sought and specify why his or her surrender is wanted. Extradition treaties and conventions<sup>77</sup>, as well as bilateral agreements and national extradition laws, regularly require the requesting State to submit:

- the arrest warrant (either in the original or an authenticated copy)
- the text of the relevant laws (or a description of the law applying to the conduct imputed to the person whose extradition is sought, particularly in the case of common law offences)
- information which permits the identification of the fugitive
- a description of the allegations against the fugitive; or in the case of a person already convicted, the judgment

48. The above-listed elements are usually deemed sufficient to support a positive decision on an extradition request in civil law countries, where the requesting State is not normally required to provide any evidence to support the case against the fugitive, although the requested State is typically entitled to seek further information if it considers it necessary<sup>78</sup>. In some civil law countries, extradition legislation does require the requesting State to submit evidence in support of the request<sup>79</sup>.

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<sup>75</sup> See, for example, Article 12(1) of the European Convention on Extradition (1957), or Article 10 of the Inter-American Convention on Extradition (1981).

<sup>76</sup> See, for example, Article 5 of the Second Additional Protocol to the European Convention on Extradition (1978); Article 65 of the Schengen Convention (1990); Article 13 of the Convention relating to Extradition between the Member States of the European Union (1996). On simplified extradition procedures, see below at paras. 163–165.

<sup>77</sup> See, for example, Article 12(2) of the European Convention on Extradition (1957); Article 11 of the Inter-American Convention on Extradition (1981); or Article 18 of the ECOWAS Convention (1984).

<sup>78</sup> See, for example, Article 13 of the European Convention on Extradition (1957); Article 12 of the Inter-American Convention on Extradition (1981); or Article 19 of the ECOWAS Convention (1984).

<sup>79</sup> This is the case, for example, in the former Yugoslav Republic of Macedonia, Germany, Norway or Slovenia. Under s. 416 of the Criminal Procedure Code (2003) of Bosnia and Herzegovina, the requesting State must submit, in addition to information permitting to identify the wanted person, an indictment or verdict or decision on detention or any other act which is equivalent to such a

49. By contrast, common law countries have traditionally required the requesting State to submit, in addition to the arrest warrant, evidence which must amount to a *prima facie* case against the person whose extradition is being sought. In addition, under the rules of evidence in force in many common law countries, only evidence presented in a certain format – for example, sworn affidavits by direct witnesses – is admissible, while other types of evidence, most notably, hearsay information, is excluded<sup>80</sup>. Those civil law countries which require evidence do not normally restrict its admissibility in this way.

50. Varying evidentiary requirements have frequently created complications for extradition between common law and civil law countries. The *prima facie* standard of evidence to support an extradition request, in particular, is not used in civil law jurisdictions. However, problems may also arise where countries of the same legal tradition apply differing rules of evidence and approaches to extradition. In practice, this may result in extradition requests meeting with refusal because evidentiary requirements are not met, as well as causing difficulties when negotiating bilateral extradition agreements<sup>81</sup>.

51. In order to avoid such obstacles to extradition, some common law countries have recently abandoned the *prima facie* requirement in their extradition legislation and/or bilateral treaties in favour of evidentiary requirements which are more in line with the civil law tradition, although a *prima facie* case must still be shown under older treaties. This can result in a situation where different standards apply to extradition requests to be dealt with by the authorities of the same country, depending on the law or extradition treaty applicable to the case in question. This is the case, for example, in Australia, where the *prima facie* standard<sup>82</sup> continues to be in force in relations with countries governed by the Commonwealth scheme as well as extradition treaties inherited from the United Kingdom and one bilateral extradition treaty, while 30 further treaties and non-treaty arrangements based on the understanding of reciprocity apply a “no evidence” rule<sup>83</sup>, which is also the default scheme under the Extradition Act 1989.

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decision. Denmark has made a reservation to Article 12 of the European Convention on Extradition (1957), according to which, where indicated by special circumstances, the Danish authorities may require the requesting country to produce evidence establishing a sufficient presumption of guilt with respect to the person concerned. Under s. 3(4) of the Extradition Act, extradition for an offence cannot take place if, because of special circumstances, it must be assumed that the criminal charges for which it is requested are not supported by sufficient evidence. In December 2002, Denmark applied this provision to refuse the surrender of Chechen envoy Akhmed Zakaev, whose extradition was sought by Russia with a view to prosecution for a number of offences, including terrorism, hostage-taking and murder. An unofficial translation of the decision by the Danish Ministry of Justice is available from: <http://www.jm.dk/wimpdoc.asp?page=document&objno=65884>. See also below at fn. 184.

<sup>80</sup> See A. Jones, *Jones on Extradition and Mutual Legal Assistance*, Sweet & Maxwell, London (2001), at pp. 354–363, for an analysis of evidentiary rules and requirements and related jurisprudence in the United Kingdom.

<sup>81</sup> See G. Gilbert, above at fn. 2, at pp. 119–127.

<sup>82</sup> In Australia, s. 11(5)(b) of the Extradition Act 1988 defines the *prima facie* standard for extradition purposes as evidence which would be sufficient to justify trial, had the offence taken place in Australia.

<sup>83</sup> The “no evidence” rule under s. 19(3) of the Australian Extradition Act 1989 requires the requested State only to provide an authenticated statement of the imputed offence and the applicable penalty, the warrant for arrest and a statement setting out the alleged conduct constituting the offence. No evidence in support of the alleged conduct, such as for example witnesses’ statements,



52. In the United Kingdom, the *prima facie* standard<sup>84</sup> remains in place for requests from Commonwealth countries and under earlier treaties, but not in extradition relations with other States Parties to the European Convention on Extradition (1957)<sup>85</sup> or under a new bilateral extradition treaty with the United States of America<sup>86</sup>. The Commonwealth extradition scheme itself was amended in 1990 to provide for a “record of the case” scheme as an alternative to the *prima facie* case requirement<sup>87</sup>.

53. In Canada, the Extradition Act 1999 retains the *prima facie* standard<sup>88</sup> for all countries but permits the requesting State to present at the extradition hearing hearsay evidence and other evidence normally not admissible in Canada<sup>89</sup>. The judge may also receive as evidence a certified “record of the case”, in which a judicial or prosecuting authority of the requesting country attests to a summary of the available evidence and certifies that the evidence is available for trial and is either sufficient to justify prosecution, or at least was legally obtained according to the law of that country<sup>90</sup>.

54. In the United States, the required standard is that of probable cause, which is defined as evidence to provide reasonable grounds to believe that a person is guilty of the offence imputed to him or her<sup>91</sup>. This standard, which is less demanding than the *prima facie* requirement, reportedly does not pose difficulties for European civil law countries<sup>92</sup>.

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needs to be submitted. Essentially, this corresponds to the requirements under Article 12 of the European Convention on Extradition (1957) (see above at paras. 47–48).

<sup>84</sup> In the United Kingdom, a *prima facie* case is proven if the extradition magistrate is satisfied that, if the evidence stood alone at trial, a reasonable jury, properly directed, could accept it and find a verdict of guilty. See *R. v. Governor of Brixton Prison, ex p. Schtraks* [1964] AC 556 (HL). In other words, the required standard is met if, on the basis of the evidence provided, the accused has a case to answer (see G. Gilbert, above at fn. 2, at pp. 122–123, with reference to s. 9(4) of the Criminal Justice and Public Order Act 1994).

<sup>85</sup> For example, the new extradition treaty between the United Kingdom and Spain of 2001. See also fn. 125.

<sup>86</sup> This treaty was signed on 31 March 2003. It has not yet entered into force. The treaty imposes different evidentiary requirements on the two contracting parties: under s. 8(2) of the treaty, extradition requests to the United Kingdom must be supported by a statement of the facts of the offence(s), while, pursuant to s. 8(3) of the treaty, extradition requests to the United States of America must be based on such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested.

<sup>87</sup> The relevant provisions are Article 5(4) and 6 of the London Scheme for Extradition (1966 and 2002). This means, the requesting State must submit a comprehensive statement of all the evidence, including a full description of witnesses’ statements, an affidavit from the investigating authority, and a certificate from the Attorney-General of the requesting country that the evidence is sufficient to justify bringing a criminal prosecution. The court in the requested country must then determine whether the evidence is sufficient under its own laws to justify bringing the matter to trial. Malaysia, Samoa, Tonga and Zimbabwe have also enacted legislation to give effect to this procedure. See Parliament of the Commonwealth of Australia, above at fn. 2, at paras. 3.58–3.59.

<sup>88</sup> Under s. 29(1)(a) of the Extradition Act 1999, the *prima facie* standard is met if there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada.

<sup>89</sup> Section 32 of the Extradition Act 1999.

<sup>90</sup> Section 33 of the Extradition Act 1999.

<sup>91</sup> The standard of probable cause applicable in extradition proceedings is identical to that used by courts in federal preliminary hearings. It is met if the evidence would support a reasonable belief that the defendant was guilty of the crime charged. See the decision by the Court of Appeals for the

55. The question of the appropriate evidentiary requirements in extradition proceedings has been the subject of some debate<sup>93</sup>. From the point of view of the State's interest in effective law enforcement, extradition proceedings should not turn into a trial, and evidentiary requirements assimilated to those which apply to criminal trials are deemed counterproductive. On the other hand, evidence is needed for the requested State to assess whether extradition would result in a violation of the rights of the individual, and consequently be in breach of its obligations under international human rights and refugee law. As the example of an Australian case shows, evidence is crucial not only for the courts but also for the minister responsible for making the determination at the final executive stage of the process to assess the full circumstances of the case and decide whether a bar to extradition applies<sup>94</sup>.

b. Provisional arrest warrant

56. The requesting State may also approach the judicial authorities in the requested State and seek a "provisional arrest warrant"<sup>95</sup>, which needs to be followed by the presentation of a formal extradition request within the period of time prescribed under the law of the requested State and/or set by the judge authorising the arrest of the wanted person<sup>96</sup>. National laws typically require the requesting State to show that the arrest is a matter of urgency, and it must be evident from the request for a provisional arrest that a formal extradition request will be presented. Once the requesting State has submitted the request,

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Third Circuit in *Sidali v. Immigration and Naturalization Service (INS)*, Docket No. 96-5215, 24 February 1997, with references to earlier jurisprudence.

<sup>92</sup> See Parliament of Australia, above at fn. 2, at paras. 3.64–3.72. In practice, it is the question of the application of the death penalty rather than evidentiary issues which poses problems in extradition relations between the United States and European countries. See below at paras. 144–147.

<sup>93</sup> For example, in Australia (see Parliament of the Commonwealth of Australia, above at fn. 2, at paras. 3.1–3.98) or in the United Kingdom (see the various documents submitted in response to the Consultation on the Draft Extradition Bill 2002, available at: <http://www.homeoffice.gov.uk/crimpol/oic/extradition/bill/documents.html>).

<sup>94</sup> This is the case of an Australian national and his wife, whose extradition was requested by the Philippines under its 1988 bilateral extradition treaty with Australia, which does not require any evidence (on extradition treaties which apply the "no evidence" rule, see above at fn. 83). The Philippine Government nevertheless submitted evidence. An Australian court, upon review, found the persons concerned eligible for extradition under the terms of the treaty. Although the material submitted to it was not relevant for the purpose of its functions under the Extradition Act 1988, the court commented on the evidence. Noting that it raised a number of disturbing features which raised doubts about the quality of the police investigation conducted in the Philippines and, at worst, the genuineness of the charges laid against the applicants, the Court suggested that the matter called for the most careful scrutiny by the Attorney-General. The latter subsequently rejected the extradition request. *Stanton v. DPP & Republic of the Philippines* (unreported, Spender J, 12 January 1993), referred to in D. Chaikin, Submission 21 to the Joint Committee on Treaties, available at <http://www.aph.gov.au/house/committee/jsct/extradition/sub21.pdf>, at pp. 4–6.

<sup>95</sup> In principle, this possibility applies only to cases where the arrest of a fugitive is a matter of urgency. See, for example, Article 16(1) of the European Convention on Extradition (1957) or Article 22(1) of the ECOWAS Convention (1984).

<sup>96</sup> Article 16(4) of the European Convention on Extradition (1957) provides that the extradition request must be presented within 18 days, and in any event not later than 40 days from the date of the provisional arrest. Under Article 20(4) of the ECOWAS Convention (1984), the requesting State has 20 days to submit the formal extradition request.

the normal extradition process will ensue, except where provisions for simplified extradition procedures apply<sup>97</sup>.

57. The arrest of alleged fugitives may be sought through international channels of police co-operation. Thus, the Member States of Interpol may request the arrest of international fugitives with a view to their extradition through “wanted (red) notices”, based on an arrest warrant or court order issued by a judicial authority in the requesting State<sup>98</sup>. Under the law of a number of countries, such “red notices” constitute a valid request for provisional arrest. Where this is not the case, the requesting State must issue a request for provisional arrest after it has been informed that the wanted person has been located. In either case, the “red notice” is not of itself an arrest warrant, but forms the basis on which the judicial authorities of another State decide whether or not to authorise the provisional arrest of the wanted person<sup>99</sup>.

58. States Parties to the Schengen Convention (1990) may avail themselves of the Schengen Information System (SIS), established pursuant to Title IV of the Convention. Article 95(1) of the Schengen Convention provides that “data relating to persons wanted for arrest for extradition purposes shall be included at the request of the judicial authority of the requesting Contracting Party”. Under Article 95(2), the requesting State must check whether the arrest is authorised by the national law of the requested State(s). A report in the SIS for the purposes of extradition has the same effect as a request for provisional arrest<sup>100</sup>.

## 2. *Extraditable offence*

59. Extradition may only be granted if the conduct imputed to the individual concerned constitutes an extraditable offence. Earlier bilateral extradition treaties and national extradition laws usually contained lists of crimes considered to be extraditable offences. These regularly included crimes such as murder, manslaughter, rape, robbery, arson, bribery or fraud. However, as the precise definition of crimes may vary from one State to another, the practice of enumerating extraditable acts in lists has often led to complications in extradition relations. Moreover, many of the older extradition treaties have become outdated, as their lists of extraditable offences no longer correspond to current needs. To address such difficulties, the enumerative method of defining extraditable offences has increasingly been abandoned in favour of an eliminative approach.

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<sup>97</sup> See below at paras. 163–165.

<sup>98</sup> Article 16(3) of the European Convention on Extradition 1957 specifically provides that a request for provisional arrest may be made by the requesting State through Interpol. The London Scheme for Extradition (1966 and 2002) and the ECOWAS Convention (1994) contain similar provisions, as does the UN Model Treaty on Extradition.

<sup>99</sup> “Red notices” are circulated among member States in paper form and, for countries with the necessary technical equipment, through Interpol’s restricted-access website. Member States can also request that their “red notices” be placed on the public website. See “‘Wanted by Interpol’ goes live on the Internet”, Interpol Press Release CPN°01/00/COM&PR, 25 February 2000, available at: <http://www.interpol.int/Public/ICPO/PressReleases/PR2000/PR200001.asp>. For a more detailed discussion of refugee-related issues arising where States use Interpol channels for extradition purposes, see below at paras. 306–314.

<sup>100</sup> Article 64 of the Schengen Convention (1990).

60. Thus, modern bilateral<sup>101</sup> and multilateral extradition treaties<sup>102</sup> generally define an extraditable offence as any act punishable by a custodial sentence of a certain length – usually a minimum of one or two years – under the law of both the requesting and the requested State. Where extradition is sought for the purpose of enforcing a sentence, the threshold is usually four or six months’ deprivation of liberty. More recent national extradition laws also employ this approach to define extraditable offences. With regard to terrorist acts and other transnational crimes, however, the relevant international instruments continue to rely on the more traditional method of specifically designating certain acts as extraditable offences<sup>103</sup>, although some of the definitions used in recent general anti-terrorism conventions are very broad<sup>104</sup>. It has been noted that the number of extraditable crimes has greatly increased as a result of the eliminative method of defining extraditable offences<sup>105</sup>.

61. The notion of what constitutes an extraditable offence has changed over time. Until the mid-18<sup>th</sup> century, it was common practice to extradite political, military or religious offenders rather than those accused of ordinary crimes<sup>106</sup>. The late 18<sup>th</sup> and early 19<sup>th</sup> century saw a complete reversal: under the influence of evolving ideas of political liberalism, and as a consequence of changes in society and ways of life, which created an increased need for international cooperation in fighting ordinary crime, it now became the general rule for States to extradite common criminals, and to refuse the surrender of persons whom the requested State considered to be political offenders. The “political offence exemption”, which permits the requested State to refuse to surrender a fugitive if it considers that the offence for which extradition is sought is of a political nature, has since been included in numerous bilateral extradition agreements and national extradition laws, although its application has been controversial. The notion of political offence as a ground for refusing extradition is discussed at paras. 72–87 below. Its relevance in the context of exclusion from international refugee protection is addressed at paras. 244–248 and 315–339.

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<sup>101</sup> For example, the extradition treaties between Peru and Brazil (1919), or Peru and Chile (1932); treaties concluded between France and Nigeria (1961), France and Congo (1962), France and the Central African Republic (1965), France and Tunisia (1972), France and Madagascar (1973), France and Israel (1972), France and Romania (1974), France and Egypt (1982); the extradition treaty between Canada and the United States of America of 1971, as amended by a Protocol of 1988; or the recent treaty between the United Kingdom and the United States of America (2003),

<sup>102</sup> See, for example, Article 1(1) of the European Convention on Extradition (1957); Article 2(2) of the London Scheme for Extradition (1966 and 2002); Article 3 of the Inter-American Convention on Extradition (1981); Article 2(1) of the Convention relating to Extradition between the Member States of the European Union (1996); Article 56(2) of the Minsk Convention (1993). The requirement that an extraditable offence must reach a certain level of seriousness is also reflected in provisions in some extradition instruments which provide for triviality as a ground of refusal for the requested State. See, for example, Article 13(1)(b) of the London Scheme for Extradition (1966 and 2002). This principle is also expressed, for example, in s. 4 of the Federal Law on International Legal Assistance in Criminal Matters of Switzerland, which provides for refusal of extradition if the offence is not sufficiently significant to justify the conduct of the proceedings.

<sup>103</sup> See above at para. 31.

<sup>104</sup> See, for example, Article 1(e) of the European Convention on the Suppression of Terrorism (1977); Article 1(3) of the OAU Convention on the Prevention and Combating of Terrorism (1999); or Article 1(2) of the Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1999).

<sup>105</sup> G. Gilbert, above at fn. 2, at p.85.

<sup>106</sup> See M.C. Bassiouni, above at fn. 1, at p. 4.

62. Other acts traditionally deemed not to be extraditable are military and fiscal offences. The former are acts which are offences solely under military law, but not also under ordinary criminal law, such as, for example, desertion and insubordination. Military offences continue to be regarded as non-extraditable<sup>107</sup>. By contrast, more recent extradition treaties usually permit the surrender of persons accused or convicted of fiscal offences, that is, offences against laws relating to taxation, customs duties, foreign exchange control or other revenue matters<sup>108</sup>. This development is linked to the increased need to fight transnational crime, and in particular, money laundering and the infiltration of criminal proceeds into national economies<sup>109</sup>.

63. Acts which constitute crimes under international law are also extraditable offences. This applies not only to States parties to the international treaties which establish a duty to extradite. As noted above<sup>110</sup>, the prohibition of war crimes and crimes against humanity forms part of *jus cogens* and of the obligations owed by each State to the international community *erga omnes*. As a consequence, every State is entitled to assume jurisdiction over, and to extradite, the perpetrators of such crimes. This also applies to acts of torture<sup>111</sup>.

### 3. *Double criminality and speciality*

64. Two further conditions which have long formed part of general extradition law and practice are those of double criminality and of speciality. Double criminality means that the acts imputed to the person whose extradition is sought must constitute a criminal offence under the jurisdiction of both the requesting and the requested State<sup>112</sup>. In parallel with the increasing reliance on the eliminative, rather than enumerative, method of identifying extraditable offences, it has become generally accepted that for the double criminality criterion to be met, it suffices that the acts of the person concerned be a crime under the laws of both States, even if they apply a different definition to such conduct<sup>113</sup>.

65. Pursuant to the speciality principle, the requesting State may only prosecute an extradited person for the offence(s) specified in the extradition request, and it may not

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<sup>107</sup> See, for example, Article 4 of the European Convention on Extradition (1957); Article 7 of the ECOWAS Convention (1984); or Article 3(c) of the UN Model Treaty on Extradition and commentary thereto, United Nations, International Review of Criminal Policy Nos. 45 and 46, at para. 20.

<sup>108</sup> See, for example, Article 2 of the Second Additional Protocol to the European Convention on Extradition (1978); Article 9 of the ECOWAS Convention (1984); or Article 2(4)(a) of the London Scheme for Extradition (1966 and 2002), respectively, which leave it to the discretion of the requested State to provide for extradition for fiscal offences. See also Article 2(3) of the UN Model Treaty on Extradition and commentary thereto, above at fn. 107, at para. 44. Under Article 6 of the Convention Relating to Extradition between Member States of the European Union (1996), fiscal offences are, in principle, extraditable offences, but Member States may make a reservation restricting extradition to offences connected with excise, value-added tax or customs.

<sup>109</sup> United Nations Crime Prevention and Criminal Justice Programme, Background Paper, above at fn. 4, at para. 57.

<sup>110</sup> See above at para. 22.

<sup>111</sup> See above at paras. 22 and 24. See also below at para. 117.

<sup>112</sup> See, for example, Article 1(1) of the European Convention on Extradition (1957); Article 3(1) of the Inter-American Convention on Extradition (1981); Article 3(1) of the ECOWAS Convention (1984); Article 56(3) of the Minsk Convention (1993); Article 2(2) and (3) of the London Scheme for Extradition (1996 and 2002); Article 2(2) of the UN Model Treaty on Extradition.

<sup>113</sup> See G. Gilbert, above at fn. 2, at pp. 106–112; A. Jones, above at fn. 80, at pp. 34–59.

charge him or her with any other crime committed prior to surrender, unless the requested State consents. As with the double criminality requirement, the type of criminal conduct is decisive, rather than the specific term used under the law of either State<sup>114</sup>. The rule of speciality no longer applies if the person concerned, after having been extradited, leaves the territory of the requesting State and voluntarily returns to it, or does not leave the territory of the requesting State within a certain time after being free to do so<sup>115</sup>.

66. Closely related to the rule of speciality is the principle that the requesting State is not entitled to re-extradite a person to a third State, for an offence committed prior to his or her surrender, without the consent of the State which granted that surrender in the first place<sup>116</sup>. The latter may be entitled to request the documents produced by the third State in support of its extradition request<sup>117</sup>.

67. The requirements of double criminality and speciality have been termed the two “leading principles” in extradition law<sup>118</sup>. Recent developments in the European Union, however, constitute a departure from traditional practice with respect to both:

- (i) Under Article 9 of the Convention on Simplified Extradition Procedures between the Member States of the European Union (1995), Member States may make a declaration that the speciality rule does not apply where the person concerned consents to extradition, or consents to extradition and expressly renounces his or her entitlement to the speciality rule<sup>119</sup>. The conditions for such consent are set out in Article 7 of the Convention which provides, *inter alia*, that consent must be given before a competent judicial authority of the requested State; voluntarily and in full awareness of the consequences, and that the person concerned has right to legal counsel to that end. Unless Member States declare otherwise, such renunciation of the entitlement to the speciality rule may not be revoked<sup>120</sup>. Under Article 13 of the Convention, it also renders inapplicable the provisions on re-extradition as contained in Article 15 of the European Convention on Extradition (1957).
- (ii) Article 3(1) of the Convention relating to Extradition between the Member States of the European Union (1996) provides that the double criminality criterion does not apply if the requesting State seeks extradition for an offence which is punishable

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<sup>114</sup> See G. Gilbert, above at fn. 2, at p. 197, with further references.

<sup>115</sup> See, for example, Article 14(1) of the European Convention on Extradition (1957); Article 13 of the Inter-American Convention on Extradition (1981); Article 20 of the ECOWAS Convention (1984); Article 66(1) of the Minsk Convention (1993); Article 20 of the London Scheme for Extradition (1966 and 2002); Article 14 of the UN Model Treaty on Extradition.

<sup>116</sup> See, for example, Article 15 of the European Convention on Extradition (1957); Article 21 of the ECOWAS Convention (1984); Article 14 of the UN Model Treaty on Extradition; Article 20(5) of the London Scheme for Extradition (1966 and 2002).

<sup>117</sup> See, for example, Article 15, last sentence, of the European Convention on Extradition (1957); Article 20(6) of the London Scheme for Extradition (1966 and 2002).

<sup>118</sup> I. Brownlie, *Principles of Public International Law*, 5<sup>th</sup> edn., Clarendon Press, Oxford (1998), at p. 319; see also A. Jones, above at fn. 80, at p. 34.

<sup>119</sup> A declaration under Article 9 has been made by Austria; Denmark; Finland; Germany; Greece; Luxembourg; the Netherlands; Spain; Sweden; and the United Kingdom. See Schedules 2 and 4 to the UK European Union Extradition Regulations, 25 February 2002, above at fn. 22.

<sup>120</sup> Consent to the simplified procedure may be revoked in Denmark; Finland; and Sweden. See Schedules 2 and 4 to the UK European Union Extradition Regulations, 25 February 2002, above at fn. 22.

under its own law by at least one year's imprisonment, and which it classifies as a conspiracy or an association to commit a terrorist offence<sup>121</sup>, a drug-related offence or other form of organised crime, or other acts of violence against the life, physical integrity or liberty of a person or creating a collective danger for persons. Even in a region as closely integrated as Europe, this provision proved difficult for many States to accept. Therefore, Article 3(3) provides for the possibility of reservations for EU Member States wishing not to apply Article 3(1) at all, or only under certain specified circumstances, although those States which have entered such reservations are bound by Article 3(4) to make extraditable the behaviour of any person which, intentionally and knowingly, contributes to the commission by a group of persons acting with a common purpose of any of the offences referred to in Article 3(1), even where that person does not take part in the actual execution of the offence or offences concerned<sup>122</sup>.

- (iii) As regards speciality, Article 10(1) of the 1996 EU Convention provides that the consent of the requested State for the prosecution or trial of a person in respect of offences other than those for which he or she has been extradited is no longer required, if this does not result in deprivation of liberty for the person concerned, or in case of extradition with a view to the enforcement of a sentence or other custodial order, if he or she has expressly and specifically waived the benefit of the rule of speciality. Pursuant to Article 10(3), such waiver must be given voluntarily and in full awareness of the consequences, before the competent judicial authorities of the requested State, and the person concerned shall have a right to legal counsel to that end. Article 11 provides for a presumption of consent of a requested Member State which has made a declaration to that effect with regard to its extradition relations with other Member States that have made the same declaration<sup>123</sup>. Furthermore, Article 12(1) of the 1996 EU Convention eliminates the prohibition of re-extradition without consent from one Member State to another, although Member States may declare that they continue to apply the principle as contained in Article 15 of the European Convention on Extradition (1957)<sup>124</sup>.
- (iv) The European arrest warrant scheme, which, as of 1 January 2004, will replace the current extradition regime with a system of transfer of fugitives within the European Union, expressly abolishes the double criminality requirement for an extensive list of offences<sup>125</sup> but permits its application for other acts which are offences under the

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<sup>121</sup> As defined in the European Convention on the Suppression of Terrorism (1977).

<sup>122</sup> Reservations with regard to Article 3(1) of the Convention were made by Austria (for offences not punishable under Austrian law); Belgium; Denmark (for offences not punishable under Danish law); Luxembourg (extradition subject to certain requirements under national law); the Netherlands; Sweden. See Schedule 8 to the UK European Union Extradition Regulations, above at fn. 22.

<sup>123</sup> Such a declaration was made by Austria; Germany; and the United Kingdom. See Schedules 6 and 8 to the UK European Union Extradition Regulations, above at fn. 22.

<sup>124</sup> Denmark; Greece; Luxembourg; the Netherlands; Portugal; and Sweden have declared that Article 15 of the European Convention on Extradition (1957) shall continue to apply unless the person concerned has consented to re-extradition. Belgium has declared that Article 15 continues to apply without exceptions. See Schedule 8 to the UK European Union Extradition Regulations, above at fn. 22.

<sup>125</sup> Article 2(2) of the Council Framework Decision of 13 June 2002 on a European Arrest Warrant and the Surrender Procedures between Member States. The list in this provision covers more than 30 offences, if punishable under the law of the issuing member State by a custodial sentence or

law of the Member State executing the European arrest warrant<sup>126</sup>. The speciality principle is, in principle, retained<sup>127</sup>, although Member States may make a declaration of prior consent to the prosecution, sentencing or detention with a view to carrying out a custodial sentence or detention order for an offence committed before surrender, with the effect that the speciality rule does not apply between them<sup>128</sup>. Moreover, the European arrest warrant scheme retains the exceptions to the speciality principle as contained in earlier European extradition treaties<sup>129</sup>, and, in addition, provides that speciality does not apply where the person concerned has, after surrender, expressly renounced entitlement to the speciality rule with respect to offences committed before surrender<sup>130</sup>. Member States may also make a declaration establishing a presumption of consent to the re-extradition of a person surrendered on the basis of a European arrest warrant<sup>131</sup>.

68. These developments have given rise to concern, as both the double criminality requirement and the rule of speciality are generally regarded as essential safeguards for the protection of the rights of the individual affected by an extradition request<sup>132</sup>. While it is

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detention order for a maximum period of at least three years, and as defined by the law of the issuing State. The bilateral extradition treaty signed by the United Kingdom and Spain in November 2001 also abolishes the requirement of double criminality. See “*UK and Spain sign fast-track extradition treaty in Madrid*”, Home Office, Press release No. 299/2001, 23 November 2001. The extradition treaty signed by the United Kingdom and the United States of America on 31 March 2003 retains the double criminality requirement but provides that the requesting State may waive the rule of speciality without the individual’s consent (Article 18(1)(c)). On this and other concerns raised by this extradition treaty, including lack of parliamentary scrutiny as it is expected to become law through the process known as “Orders in Council”, see Statewatch, “The new UK-US Extradition Treaty”, Analysis No. 17 (2003), available at: <http://www.statewatch.org/news/2003/jul/analy18.pdf>.

<sup>126</sup> Article 2(4).

<sup>127</sup> Article 27(2).

<sup>128</sup> Article 27(1).

<sup>129</sup> Article 27(3)(a–e) and (g).

<sup>130</sup> Article 27(3)(f). It is interesting to note that these provisions, while allowing for far-reaching exceptions, are nevertheless closer to the requirements traditionally applied in extradition law than the earlier proposal of the EU Commission to abolish the speciality requirement and provide only for a very limited application of the double criminality principle. See Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States presented by the Commission of the European Communities on 25 September 2001, COM(2001) 522 final/2, 2001/0215 (CNS). For a critical assessment of the original proposal, see, for example, Statewatch, “Proposed Framework Decision on European arrest warrants”, Analysis No. 3 and addendum (16 January 2001), available at: <http://www.statewatch.org/news/2001/oct/ewarrant.pdf>.

<sup>131</sup> Article 28(1). Absent such a declaration, similar rules apply to re-extradition of a person surrendered under the European arrest warrant scheme as under the 1995 and 1996 EU Conventions relating to extradition.

<sup>132</sup> See, for example, Amnesty International, “Amnesty International concerned about EU Convention on Extradition”, Press release, 24 September 1996; Ligue des Droits de l’Homme, “Note relative à la proposition de décision-cadre du Conseil relative à la lutte contre le terrorisme ainsi qu’à la proposition de décision-cadre du Conseil relative au mandat d’arrêt européen et aux procédures de remise entre États membres”, 22 October 2001; Liberty, *Briefing on the Extradition Bill, 2<sup>nd</sup> reading in the House of Commons*, November 2002, at paras. 9 and 30–31. See also K. Landgren, *Reflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests*, UNHCR, New Issues in



sometimes stressed that measures such as those established under the aforementioned EU instruments are only acceptable – including to States themselves – where sufficient human rights guarantees are in place<sup>133</sup>, such concerns would need to be examined carefully. As will be seen in Part IV below, the application of procedural safeguards and guarantees in the extradition process varies significantly from one country to another.

### C. Grounds for Refusing Extradition Requests

69. Extradition law traditionally provides for a number of grounds on the basis of which States may refuse extradition requests. Some concern the offence itself and relate to its nature, seriousness, or the punishment it carries, while others are based on the circumstances of the person whose extradition is sought, in addition to notions of fundamental justice and fairness, or jurisdictional issues<sup>134</sup>. Such grounds for refusal are provided for in the national law of many States. In some countries, certain protections against extradition are guaranteed under constitutional law. Bilateral extradition treaties as well as multilateral extradition agreements and conventions also provide for specific grounds for refusal to extradite on the part of the requested State.

70. The applicable treaty or national legislation may provide for refusal of extradition in mandatory or discretionary terms; extradition law leaves it to States to define the terms of refusal<sup>135</sup>. By contrast, bars to extradition under international human rights and/or refugee law impose an obligation on States to refuse extradition where this would result in the violation of fundamental rights of the individual concerned<sup>136</sup>. On the other hand, customary international law as well as the duty to extradite or prosecute, as contained in a number of international legal instruments, restrict the freedom of States to refuse extradition for certain international crimes<sup>137</sup>.

71. Some of the more recent regional and international conventions applicable to extradition have limited the scope of certain grounds for refusal, most notably, the political offence exemption. At the same time, other international instruments have instituted new grounds for refusal based on the principles and standards of international human rights and refugee law. Such developments may result in conflicts between national law and

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Refugee Research, Working Paper No. 10, June 1999, at pp. 31–42. See also Statewatch Analysis No.3, “Proposed Framework Decision on European arrest warrants”, available at: <http://www.statewatch.org/news/2001/oct/ewarrant.pdf>, at pp. 8–10.

<sup>133</sup> See, for example, H. Nilsson, “International cooperation to combat transnational organized crime – with special emphasis on mutual legal assistance and extradition”, UNAFEI, Resource Material Series No. 57, September 2001, available at: <http://www.unafei.or.jp/pdf/57-05.pdf>, at pp. 46–47. See also below at fn. 308.

<sup>134</sup> For a discussion of different criteria for classifying grounds for refusal of extradition, see M. Plachta, “Contemporary problems of extradition: human rights, grounds for refusal and the principle *aut dedere aut judicare*”, UNAFEI, Resource Material Series No. 57, September 2001, available at: <http://www.unafei.or.jp/pdf/57-08.pdf>.

<sup>135</sup> The UN Model Treaty on Extradition lists a number of grounds for refusal and divides them into mandatory (Article 3) and discretionary (Article 4) grounds. For States members of the Commonwealth, the distinction between mandatory and discretionary refusal grounds in the London Scheme for Extradition (1966 and 2002) is binding.

<sup>136</sup> I. Brownlie, above at fn. 118, at p. 318, notes that “[...] no general rule forbids surrender, and this is lawful unless on the facts it constitutes complicity in conduct harmful to human rights or in crimes under international law, for example, acts of genocide”.

<sup>137</sup> See also above at paras. 22–32.

obligations under international treaties or conventions. The rules and principles which apply to such situations and determine which obligations will prevail have been set out above at paras. 33–41.

### 1. *The political offence exemption*

#### a. History and purpose

72. Since the mid-19<sup>th</sup> century, bilateral agreements<sup>138</sup> and national legislation<sup>139</sup> 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. This principle – known as the political offence exemption – developed not primarily out of concern for the

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<sup>138</sup> The first general bilateral extradition agreement to include a political offence exemption was the 1834 treaty between Belgium and France. See I. Stanbrook and C. Stanbrook, *Extradition: Law and Practice*, 2<sup>nd</sup> edn., Oxford University Press, Oxford (2000), at p. 4. Other examples include the extradition treaties concluded between Austria and Hungary (1976); Austria and Poland (1980) (both referred to in G.S. Goodwin-Gill, at fn. 166, at p. 148, note 136); Peru and France (1874), Peru and Belgium (1888); Peru and United States of America (1899); Peru and the United Kingdom (1904); Peru and Brazil (1919); Lithuania and the United States of America (1924); Peru and Chile (1932); France and Germany (1951); France and Australia (1988); France and Canada (1988); Peru and Spain (1989); China and Thailand (1993); Moldova and Ukraine (1993); Peru and Italy (1994); Moldova and Romania (1996); France and the United States of America (1996); Peru and the United States of America (2001, annexed to the earlier treaty); Peru and Costa Rica (2002); the United Kingdom and the United States of America (2003).

<sup>139</sup> For example, Argentina (s. 8(a) of the Law No. 24.676 on International Cooperation in Criminal Matters); Australia (s. 7(a) of the Extradition Act 1988); Austria (s. 14 of the Law on Extradition and Mutual Legal Assistance); Bangladesh (s. 5(2)(a) of the Extradition Act 1974); Brazil (Article 5(LII) of the Federal Constitution); Bosnia and Herzegovina (s. 415(1)(e) of the Code of Criminal Procedure 2003); Bulgaria (s. 439B of the Code of Criminal Procedure); Canada (s. 46(1)(c) of the Extradition Act 1999); China (s. 8(c) of the Extradition Law of 2000); Cyprus (s. 6(1)(a) of the Extradition of Fugitives Law 1970); Denmark (s. 5(1) of the Extradition Act); El Salvador (Article 28 of the Constitution); France (s. 5(2) of the Law of 10 March 1927, see also the opinion (*avis*) of the *Conseil d'Etat* of 9 November 1995, No. 357.344, which affirmed that the principle whereby a State has the right to refuse extradition for offences which it considers political constitutes a fundamental principle recognized by the laws of the Republic, which has constitutional status in this regard); former Yugoslav Republic of Macedonia (Article 29(3) of the Constitution, s. 518(2) of the Code of Criminal Procedure); Germany (s. 6(1) of the Law on International Legal Assistance in Criminal Matters of 1982); Georgia (Article 47(3) of the Constitution); Hungary (s. 5(b) of the Act No. XXXVIII of 1996 on International Legal Assistance in Criminal Matters); Indonesia (s. 5 of the Act No. 1 of 1979 on Extradition); Italy (Article 10(4) of the Constitution); Kyrgyzstan (s. 433(1) of the Code of Criminal Procedure); Latvia: (s. 490(1)(4) of the Code of Criminal Procedure); Lithuania (s. 9(3)(2) of the Criminal Code, in force as of 1 May 2003); Namibia (s. 5(1)(a) of the Extradition Act 1996); New Zealand (s. 7(a) of the Extradition Act 1999); Norway (s. 5(1) of the Extradition Law 1975); Peru (Article 37 of the Constitution, s. 7 of the Law No. 24.710 of 1987 on Extradition); Portugal (Article 33(2) of the Constitution; s. 7(1) of the Law No. 144/99 on International Judicial Cooperation in Criminal Matters); Romania (s. 9(1) of the Law No. 296/2001 on Extradition); Slovak Republic (s. 394(d) of the Code of Criminal Procedure); Slovenia (s. 530(2)(a) of the Code of Criminal Procedure); Spain (s. 4(1) of Law No. 4/1985 on Passive Extradition); Switzerland (s. 3 of the Federal Law on International Legal Assistance in Criminal Matters); Syria (s. 24(a) of the Criminal Code); Thailand (s. 12(3) of the Extradition Act 1929); Tunisia (s. 313(1) of the Code of Criminal Procedure); United Kingdom (s. 6(1)(a) and Schedule 1, para. 1(2)(a) of the Extradition Act 1989); Zambia (s. 31(1)(a) of the Extradition Act 1968).

rights of the individual whose extradition was sought, but as a way of safeguarding the interests of States by permitting them to maintain friendly relations and protect their sovereignty. Acceptance of a general rule of non-extradition for political offences meant that the refusal of extradition on this ground would not be viewed as an unfriendly act or undue interference with the internal affairs of the requesting State.

73. Moreover, non-extradition of political offenders was deemed to be a correlative of the sovereign right of a State to grant political asylum to a person, rather than the consequence of an individual right to seek asylum and protection from persecution. The establishment of the political offence exemption was also linked, however, to evolving concepts and ideas rooted in political liberalism, which gave rise to the recognition that those fighting against tyranny and oppression should be protected from extradition to their country of origin<sup>140</sup>.

74. The political offence exemption forms part of a number of multilateral extradition agreements. Article 3(1) of the European Convention on Extradition of 1957 provides that

[e]xtradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.

Similar provisions are contained in Article 4(4) of the Inter-American Convention on Extradition (1981), Article 4(1) of the ECOWAS Convention (1984) and Article 12(1)(a) of the London Scheme for Extradition (1966 and 2002). Two recent regional anti-terrorism conventions – the Arab Convention on the Suppression of Terrorism (1998) and the Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1999) – also contain the political offence exemption, although under both conventions, certain acts designated as non-political under various international anti-terrorism instruments are explicitly excluded from its realm<sup>141</sup>.

b. "Political offence" – definition and scope

75. Acts such as treason, sedition, *lèse-majesté*, espionage, subversive propaganda, founding of or membership in a prohibited political party or election fraud are generally deemed to be political offences which give rise to the refusal of extradition, as are direct assaults on the integrity or security of the State<sup>142</sup>.

76. However, certain particularly serious acts have long been considered to fall outside the scope of the political offence exemption, even if they are directed against the State. From the mid-19<sup>th</sup> century onward, many national extradition laws and bilateral extradition treaties have included a so-called "*attentat* clause", which provides that the taking or attempted taking of the life of a head of state or a member of his or her family is not to be

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<sup>140</sup> See, for example, W. Kälin, *Das Prinzip des Non-Refoulement*, Europäische Hochschulschriften, Bd./Vol. 298, Peter Lang, Bern, Frankfurt am Main (1982); W. Kälin and J. Künzli, "Article 1 F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes", in 12 *International Journal of Refugee Law*, Special Supplementary Issue (2000), at pp. 64–65, with further references; See also G. Gilbert, above at fn. 2, at pp. 204–208.

<sup>141</sup> See also below at para. 82.

<sup>142</sup> See W. Kälin and J. Künzli, above at fn. 140, at p. 65.

deemed a political offence<sup>143</sup>. The crimes of genocide<sup>144</sup> and apartheid<sup>145</sup> have also been explicitly excluded from this exemption. Furthermore, war crimes and crimes against humanity will not qualify as political offences, whatever the context, on account of the *jus cogens* character of their prohibition under international law and the *erga omnes* obligation of all States to ensure the suppression, prevention and punishment of such crimes. Some States have expressly excluded such crimes from the scope of the political offence exemption under national extradition legislation<sup>146</sup>.

77. While the general principle of non-extradition of political offenders is not disputed, States have traditionally differed in their views on what constitutes a political offence, particularly where extradition was sought for conduct which involved violence<sup>147</sup>. There is no generally accepted definition. Over time, the question has engendered a considerable body of jurisprudence. Different categories of offences are commonly distinguished<sup>148</sup>:

- *Absolute or purely political offences*, which only affect the political organization of the State and are directly aimed at undermining its integrity or security (see above at para. 75)<sup>149</sup>;
- *Relative or related political offences*, which are offences under ordinary criminal law, but have been committed with a clear political motivation in order to bring about a change in the government or balance of power within a specific State. A distinction is sometimes made between *délits complexes* (or “compound political offences”), which

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<sup>143</sup> See also Article 3(3) of the European Convention on Extradition (1957) and Article 12(2)(i) and (ii) of the London Scheme for Extradition (1996 and 2002).

<sup>144</sup> Article 7(1) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides: “Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.”

<sup>145</sup> Article XI(1) of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid also provides that “[a]cts enumerated in article II of the present Convention shall not be considered political crimes for the purpose of extradition”.

<sup>146</sup> For example, Australia (s. 5 of the Extradition Act 1988); Canada (s. 46(2) of the Extradition Act 1999); France (see the Communiqué by the *Conseil des Ministres*, 10 November 1982, setting out French policy on extradition); Germany (s. 6(1) of the Law on International Legal Assistance in Criminal Matters); Portugal (s. 7(2) of the Law No. 144/99 on International Judicial Cooperation in Criminal Matters); Switzerland (s. 3(2) of the Federal Law on International Legal Assistance in Criminal Matters). In some cases, certain particularly serious ordinary criminal offences, such as, for example, murder or manslaughter are also excluded from the scope of the political offence exemption.

<sup>147</sup> It has been noted that the international community has generally accepted the application of the political offence exemption to non-violent activities. See United Nations Crime Prevention and Criminal Justice Programme, Background paper, above at fn. 4, at para. 53. See also C.L. Blakesley, “The Law of International Extradition: A Comparative Study”, in J. Dugard and C. van den Wyngaert, *International Criminal Law and Procedure*, Dartmouth, Aldershot, Brookfield, Singapore, Sydney (1996), at p. 167, who points out that, paradoxically, the political offence exemption “is one of the most universally accepted, but still contested rules of international law”.

<sup>148</sup> See W. Kälin and J. Künzli, above at fn. 140, at p. 65, M.C. Bassiouni, above at fn. 1, at pp. 375–388; see also A. Grahl-Madsen, *The Status of Refugees in International Law*, Volume 1, A.W. Sijthoff, Leyden (1966), at pp. 83–84.

<sup>149</sup> The French decision *Re Giovanni Gatti*, Cour d’appel, 13 January 1947, is generally accepted as the main authority defining this category.

combine a fully political offence and a common crime<sup>150</sup>, and *délits connexes* (or “connected political offences”), which precede a political offence in order to safeguard the consequences of the political crime or to avert criminal prosecution of such offences.

78. In determining whether a common crime may qualify as a relative political offence, courts in the United Kingdom and the United States of America have traditionally applied the so-called “incidence test”: the offence must have been committed in the context of an uprising, a disturbance, an insurrection, a civil war or a struggle for political power, and it must have been committed in furtherance of the political objective<sup>151</sup>. Often, and particularly in cases which involve indiscriminate violence against civilians, the link between the offence and the political purpose is considered as too remote<sup>152</sup>. This criterion of “remoteness” is similar to the so-called “predominance” or “preponderance test” developed by the Swiss *Bundesgericht* (Federal Court).

79. Under this reasoning, for a common crime to be of a “predominantly political nature”, it must have been committed in connection with a struggle for political power within the State, a rebellion or a civil war. The offence must have been politically motivated, apt to achieve the political purpose, and there must have been a close, direct and clear link between the act and the aim pursued. A further criterion is that of the proportionality between the purpose of the act and the means employed to achieve it. Offences which create a collective danger to the life or physical integrity of an indeterminate number of persons who are not or only marginally involved in the political struggle are considered disproportionate. Moreover, the political offence exemption does not apply if extradition is requested by a democratic State, where change can be achieved by non-violent means and whose courts possess genuine autonomy *vis-à-vis* the political authority<sup>153</sup>.

80. In Austria, s. 14(2) of the Law on Extradition and Mutual Legal Assistance of 1979 expressly provides for the “predominance” test: an offence qualifies as a (relative) political offence if its political character prevails over its criminal character. This is sometimes referred to as the “Swiss formula”. In France, the *Conseil d’Etat* (Council of State) examines the circumstances in which a relative political offence has been committed and

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<sup>150</sup> One example of such an offence is the assassination of a head of State, which combines elements of high treason and homicide. W. Kälin and J. Künzli, above at fn. 140, at fn. 87.

<sup>151</sup> See M.C. Bassiouni, above at fn. 1, at pp. 388–400. See also, for example, the UK decisions in *re Castioni* 1891 1 QB 149 and *re Meunier* [1894], 2 QB 415, *R. v. Governor of Brixton Prison, ex parte Kolczynski* [1955] 1 QB 540; *R. v. Governor of Brixton Prison, ex parte Schtraks* [1964] AC 556; *R. v. Governor of Pentonville Prison ex parte Cheng* [1973] AC 931; or the US cases of *Koskotas v. Roche* 931 F.2d 169 (1<sup>st</sup> Cir. 1991); *Eain v. Wilkes* 641 F.2d 504 (7<sup>th</sup> Cir. 1981); *Quinn v. Robinson* 783 F.2d 776 (9<sup>th</sup> Cir. 1986); *McMullen v. Immigration and Naturalization Service* 788 F.2d 591 (9<sup>th</sup> Cir. 1986); *Ahmad v. Wigen* 910 F.2d 1063 2<sup>nd</sup> Cir. 1990).

<sup>152</sup> See, for example, the UK decisions in *re Meunier* [1894], 2 QB 415, *T. v. Secretary of State for the Home Department*, [1996] 2 All ER 865 (22 May 1996); and the US cases *Eain v. Wilkes* 641 F.2d 504 (7<sup>th</sup> Cir. 1981); *Re Doherty* 599 F Supp. 270 (S.D.N.Y. 1984); *McMullen v. Immigration and Naturalization Service* 788 F.2d 591 (9<sup>th</sup> Cir. 1986); *Re Atta (Mahmoud Abed)* 706 F Supp. 1032 (E.D.N.Y. 1989).

<sup>153</sup> See W. Kälin and J. Künzli, above at fn. 140, at pp.65-67, with references to the jurisprudence of the Swiss *Bundesgericht*. See also See M.C. Bassiouni, above at fn. 1, at pp. 402–407, and G. Gilbert, above at fn. 2, at pp. 234–236.

considers the seriousness of the crime in relation to its political objective<sup>154</sup>. In the view of the German *Bundesverfassungsgericht* (Federal Constitutional Court), political offences are crimes perpetrated with a political motivation and directed against the existence and security of the State<sup>155</sup>.

81. The practical application of the political offence exemption has often been controversial. Particularly today, States are sometimes reluctant to invoke the political offence clause as the basis for the refusal of an extradition request, preferring instead to rely on other, less politically sensitive grounds, such as, for example, humanitarian considerations. There are, however, recent examples of decisions in which extradition was refused because the offence for which it was sought was considered to be political<sup>156</sup>.

c. The political offence exemption and terrorism

82. The interpretation of the concept of a political offence has been particularly divisive with regard to acts considered terrorist crimes by some, acts of legitimate resistance by others<sup>157</sup>. From the 1970s onward, an increasing number of offences have been declared non-political for the purposes of extradition in regional and international conventions dealing with terrorism-related crimes, thus precluding the application of the political offence exemption by the requested State<sup>158</sup>. Other international anti-terrorism instruments

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<sup>154</sup> See, for example, the decisions of the *Conseil d'Etat* of 7 July 1978, *Croissant*; 15 February 1980, *Winter*; 26 September 1984, *Galdeano*; see also the opinion (*avis*) of the *Conseil d'Etat* of 9 November 1995, No. 357.344 on the refusal of extradition for political offences.

<sup>155</sup> The German test, which focuses on the nature of the rights violated by an offence, is sometimes referred to as the “injured rights” approach. See H. Dreier, *Grundgesetz-Kommentar*, Bd. I, Mohr Siebeck, Tübingen (1996), at pp. 992–994.

<sup>156</sup> See, for example, in Austria: decision by the *Oberlandesgerichtshof* (Court of Appeal) in Vienna of 21 December 1999 in the case of Bilasi-Ashri (extradition to Egypt refused with regard to a number of offences which the court considered to be political); Germany: refusal by the *Oberlandesgericht* (Higher Regional Court) in Munich to extradite an Australian national to Switzerland, where he was wanted on charges which the court qualified as political under applicable Swiss law (decision of 17 July 1991, see D. Chaikin, above at fn. 83, at pp.9–11); United States of America: decision by the Oregon District Court in *United States v. Pitawanakwat* 120 F. Supp. 2d 921 (D. Or. 2000), cited in T. Rose, “A Delicate Balance: Extradition, Sovereignty and Individual Rights in the United States and Canada”, 27 *Yale Journal of International Law* (2002), 193, at p. 214.

<sup>157</sup> K. Landgren, above at fn. 132, at pp. 33–34, refers *inter alia* to the refusal of France and Belgium to extradite some members of the Basque separatist organisation ETA to Spain; criticism levelled at Belgium for harbouring former President Mobutu of Zaire during many years; as well as accusations by Egypt that the United Kingdom was protecting terrorists in the wake of an attack at Luxor during which 58 tourists were killed. See also the reports submitted by some States to the committee established pursuant to Security Council resolution 1373 (2001) of 28 September 2001 (the co-called “Counter-Terrorism Committee”), for example Algeria (UN doc. S/2001/1280, 27 December 2001) or Tunisia (UN doc. S/2001/1316, 31 December 2001). For a discussion of the distinction between legitimate resistance and acts of violence which are unlawful, even if perpetrated with a political motivation and/or purpose, see W. Kälin and J. Künzli, above at fn. 140, at pp. 46–59.

<sup>158</sup> See, for example: Article 2(1) of the European Convention on the Suppression of Terrorism (1977); Article II of the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (1987); Article 3(2) of the OAU Convention on the Prevention and Combating of Terrorism (1999); Article 2(b) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999); Article 2(b) of the Arab Convention on the Suppression of Terrorism (1999); Article 11 of the Inter-American Convention

adopted during the 1970s and 1980s have instituted a duty to either prosecute or extradite, rather than opting for “de-politicising” the offences covered<sup>159</sup>. Some States declare these offences to be “non-political” under national law<sup>160</sup>. Moreover, as noted above, courts in a number of countries have held that terrorist acts which indiscriminately endanger the lives and physical integrity of civilians do not qualify as political offences.

83. Some more recent general extradition instruments also exclude the political offence exemption as a refusal ground if the fugitive is sought for conduct which has been “de-politicised” by other international treaties or conventions<sup>161</sup>, although it may still be relevant in other contexts.

84. Within the European Union, these developments go further, as the political offence exemption will soon cease to apply to the surrender of fugitives among EU Member States. Originally contained in Article 3(1) of the European Convention on Extradition (1957), its scope was limited first by Article 2 of the European Convention on the Suppression of Terrorism (1977). As a ground for the refusal of extradition between EU Member States, it was eliminated with respect to all offences covered by the Convention relating to Extradition between the Member States of the European Union (1996), which provides in Article 5(1):

For the purposes of applying this Convention, no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence inspired by political motives.

Under Article 5(2) of this Convention, Member States may issue a declaration restricting the scope of Article 5(1) to the offences listed in Articles 1 and 2 of the European Convention on the Suppression of Terrorism<sup>162</sup>. As noted above, this Convention has not yet entered into force, but is already applicable in Member States which have made a declaration to that effect<sup>163</sup>.

85. Similarly, the scheme for the arrest and surrender of fugitives, which will replace existing extradition conventions as applicable between EU Member States as of 1 January 2004<sup>164</sup>, does not provide for a political offence exemption. Member States will not be

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against Terrorism (2002). See also: Article 11 of the International Convention for the Suppression of Terrorist Bombings (1997); Article 14 of the International Convention for the Suppression of the Financing of Terrorism (1999).

<sup>159</sup> See above at paras. 27–29.

<sup>160</sup> For example, Australia (s. 5 of the Extradition Act 1988); Canada (s. 46(2) of the Extradition Act 1999); former Yugoslav Republic of Macedonia (Article 29(3) of the Constitution); Peru (Article 37 of the Constitution); Romania (s. 9(4) of the Law No. 296/2001 on Extradition); Switzerland (s. 3(2) of the Federal Law on International Legal Assistance in Criminal Matters); United Kingdom (s. 24 of the Extradition Act 1989, applicable in extradition relations with 18 designated States Parties to the European Convention on Extradition (1957), the United States of America and India).

<sup>161</sup> See, for example, Article 5 of the Inter-American Convention on Extradition (1981) or Article 12(1)(b) of the London Scheme for Extradition (1966 and 2002).

<sup>162</sup> A declaration under Article 5(2) has been made by Austria, Denmark, Greece, Luxembourg and the Netherlands. These declarations are contained in Schedule 8 to the UK European Union Extradition Regulations 2002, above at fn. 22.

<sup>163</sup> See above at fn. 22.

<sup>164</sup> See above at para. 20.

permitted to refuse to execute a European arrest warrant on the grounds that it was issued for an offence that they consider to be political.

d. Restrictions on the political offence exemption and international refugee protection

86. Despite the fact that it has been incorporated into numerous extradition laws and treaties, the political offence exemption is usually viewed as a matter of State practice rather than a general principle of law. This view was expressed, for example, by the US Court of Appeals for the Second Circuit, which held that “whether or not to include a ‘political offence’ exception in an extradition treaty is a policy judgment, which rests exclusively in the discretion of the Executive Branch and the Senate”.<sup>165</sup> No political offence exemption was included in extradition agreements between States of Eastern Europe during the Soviet bloc era<sup>166</sup>. As described above, its scope of application has been significantly reduced in recent times.

87. This in turn has a bearing on international refugee protection. Though primarily concerned with friendly inter-state relations, the political offence exemption has nevertheless been important for the protection of individuals fighting for human rights and self-determination. In many cases, those benefiting from non-extradition for a political offence also met – or would have met – the criteria of the refugee definition under the terms of the 1951 Convention and 1967 Protocol. The interface between the political offence exemption and international refugee protection is discussed in Part V below.

2. *The discrimination clause*

a. The scope of the discrimination clause

88. Extradition may be denied if a request for extradition, ostensibly submitted on the basis of a common crime, is in fact made with persecutory and/or discriminatory intent, including in situations where the requesting State’s intention is to prosecute the person concerned on political grounds<sup>167</sup>. This ground for refusal is commonly referred to as “discrimination clause”. It is closely related to the *non-refoulement* provision of Article 33(1) of the 1951 Convention<sup>168</sup>. In the context of extradition, it was first recognised in

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<sup>165</sup> *Matter of Extradition of McMullen* 989 F.2d 603 (2<sup>nd</sup> Cir. 1993).

<sup>166</sup> See G.S. Goodwin-Gill, *The Refugee in International Law*, 2<sup>nd</sup> edn., Clarendon Press, Oxford (1996), at p. 60.

<sup>167</sup> This is not an uncommon practice. The problem has been described succinctly by A. Helton, “Harmonizing Political Asylum and International Extradition: Avoiding Cacophony”, 1:3 *Georgetown Immigration Law Journal* [1986], p. 457: “In countries where human rights violations occur, political opponents of the government are often charged with criminal law violations. These charges serve as a pretext for arbitrary detention, sometimes without proper trial or due process of law. Governments that wish to take reprisals against their political opponents living in exile [can] simply charge them with a violation of criminal law in order to secure their extradition.”, cited in K. Landgren, above at fn. 132, at p. 41.

<sup>168</sup> G.S. Goodwin-Gill, above at fn. 166, at p. 148: “The Committee of Experts of the Council of Europe expanded [Article 3(2) of the European Convention on Extradition] expressly to include the basic elements of the refugee definition, although declining to write in ‘membership of a particular social group’ on the ground that it might be interpreted too freely. That apart, every indication is that the Committee intended to close the gap between the political offender and the refugee.”



Article 3(2) of the European Convention on Extradition (1957), which provides that extradition shall not be granted if the requested State

[...] 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 applicability of Article 3(2) of the European Convention on Extradition (1957) is expressly retained in Article 5(3) of the Convention Relating to Extradition between Member States of the European Union (1996).

89. The Inter-American Convention on Extradition (1981) provides for refusal of extradition if the requested State determines that it is sought for an ordinary criminal offence prosecuted for political reasons (Article 4(4)) or if it can be inferred from the circumstances of the case that persecution for reasons of race, religion or nationality is involved, or that the person may be prejudiced for any of these reasons (Article 4(5)). Article 4(2) of the ECOWAS Convention (1984) provides for the refusal of extradition for an ordinary criminal offence, if the request has been made for the purpose of prosecuting or punishing a person on account of race, tribe, religion, nationality, political opinion, sex or status.

90. Article 13(1)(a) of the London Scheme for Extradition (1966 and 2002) provides for mandatory refusal of extradition in cases where an extradition request is made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or if he or she may be prejudiced at trial or punished on those grounds<sup>169</sup>. In addition, Article 13(1)(b) of the London Scheme provides for a bar to extradition where it would be unjust or oppressive or too severe a punishment by reason of, among other grounds, the accusation against the fugitive not having been made in good faith or in the interests of justice<sup>170</sup>.

91. A discrimination clause is also included in a number of regional and international anti-terrorism conventions. Article 5 of the European Convention on the Suppression of Terrorism (1977) contains a provision modelled on Article 3(2) of the European Convention on Extradition (1957). Article 9(1) of the International Convention against the Taking of Hostages (1979), Article 12 of the International Convention for the Suppression of Terrorist Bombings (1997), Article 15 of the International Convention for the Suppression of the Financing of Terrorism (1999); and, most recently, Article 14 of the Inter-American Convention against Terrorism (2002) all include "ethnic origin" among the grounds for discriminatory prosecution or punishment, or prejudice to the position of the requested person<sup>171</sup>.

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<sup>169</sup> "Sex" as one of the grounds for discrimination was introduced into the Commonwealth scheme at the meeting of Commonwealth Law Ministers in November 2002. See Communiqué, above at fn. 17.

<sup>170</sup> Such a clause is also contained in Article VII of the South Asian Association for Regional Cooperation (SAARC) Convention on Suppression of Terrorism (1987). See also below at paras. 153 and 197.

<sup>171</sup> The discrimination clause in Article 3(b) of the UN Model Treaty on Extradition also adds ethnic origin, sex and status to the list as contained in Article 3(2) of the European Convention on Extradition (1957).

92. Under the future European arrest warrant scheme applicable in the European Union, the surrender of a person for whom a European Arrest Warrant has been issued may be refused where

[...] there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons<sup>172</sup>.

93. A number of more recent bilateral extradition treaties<sup>173</sup> also contain discrimination clauses, as do many national extradition laws<sup>174</sup>. In practice, however, there appear to be few cases in which refusal of extradition was explicitly based on the discrimination clause.

b. The rule of non-inquiry – the discrimination clause in practice

94. In common law countries, courts have traditionally refrained from examining the motives of an extradition request, the quality of criminal justice or the human rights situation in the requesting country. This is linked to the longstanding practice under common law of permitting extradition only on the basis of an existing agreement, which in turn was seen as a confirmation of trust in the criminal justice system in the requesting

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<sup>172</sup> Preliminary paragraph 12 of the Council Framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States of the European Union.

<sup>173</sup> For example, the bilateral extradition treaties between the United States of America and Jamaica (1983); the United States of America and Ireland (1983); the Supplemental Extradition Treaty between the United States of America and the United Kingdom (1985); extradition treaties between France and Australia (1988); France and Canada (1988); China and Thailand (1993); Peru and Italy (1994); China and Kazakhstan (1996); Moldova and Romania (1996); France and the United States of America (1996); or the recent extradition treaty between the United Kingdom and the United States of America (2003).

<sup>174</sup> For example, Argentina (s. 8(d) of the Law No. 24.767 on International Cooperation in Criminal Matters); Australia (s. 7(b) and (c) of the Extradition Act 1988); Austria (s. 19(3) of the Extradition and Mutual Legal Assistance Act 1979); Bangladesh (s. 5(2)(h) of the Extradition Act 1974); Belgium (s. 2bis of the Law on Extradition of 15 March 1874); Bosnia and Herzegovina (s. 415(1)(i) of the Code of Criminal Procedure 2003); Bulgaria (s. 439B(2) of the Code of Criminal Procedure); Canada (s. 44(1)(b) of the Extradition Act 1999); China (s. 8(d) of the Extradition Law of 2002); Cyprus (s. 6(1)(b) and (c) of the Extradition of Fugitives Law 1970); Denmark (s. 6 of the Extradition Act); Finland (s. 7 of the Extradition Act 1970); Germany (s. 6(2) of the Law on international legal assistance); Indonesia (s. 7 of Act No. 1 on Extradition of 1979); Italy (s. 698(1) of the Code of Criminal Procedure); Mexico (s. 8 of the Law on International Extradition 1970); Latvia (s. 490(2)(2) of the Code of Criminal Procedure); Moldova (s. 29 of the Law on Legal Status of Foreign Citizens and Stateless Persons in the Republic of Moldova of 1994); Namibia (s. 5(1)(c) of the Extradition Act 1996); The Netherlands (s. 10(1) of the Extradition Act 1967); New Zealand (s. 7(b) of the Extradition Act 1999); Norway (s. 6 of the Extradition Act 1975); Peru (Article 37 of the Constitution; s. 7(2) of the Law No. 24.710 of 1987 on Extradition); Portugal (s. 6(b) and (c) of the Law No. 144/99 on International Judicial Cooperation in Criminal Matters); Romania (s. 9(2) of the Law No. 296/2001 on Extradition); Slovak Republic (s. 403(2)(b) of the Code of Criminal Procedure); South Africa (s. 11 of the Extradition Act of 1962); Spain (s. 5(1) of the Law No. 4/1985 on Passive Extradition); Sweden (s. 7 of the Extradition for Criminal Offenders Act 1957); Switzerland (s. 2(b) and (c) of the Federal Law on International Legal Assistance in Criminal Matters 1981); (United Kingdom (s. 6(1)(c) and (d) of the Extradition Act 1989); Zambia (s. 32 of the Extradition Act 1968).

country, obviating the need for a re-assessment in each case. The reluctance to look behind an extradition request is also based on the conviction that doing so would constitute an inappropriate interference with the requesting State's sovereignty and a breach of the principle of comity between nations<sup>175</sup>. The assessment of the treatment a fugitive is likely to undergo upon surrender is considered to be a matter best left to the executive<sup>176</sup>. This is known as the rule of non-inquiry.

95. This approach is still followed in the United States of America, where it originated in the Supreme Court's decision in *Neely v. Henkel* of 1901. Occasionally, US courts considered the possibility of departing from the non-inquiry rule under special circumstances<sup>177</sup>, although the number of instances in which they have done so is very limited<sup>178</sup>. A recent decision by the Court of Appeals for the Ninth Circuit made it clear, however, that a claim by a person who has been ordered extradited by the Secretary of State, but who fears torture upon surrender, must be examined by the judicial authorities if brought in a petition for habeas corpus against the final extradition order by the Secretary of State<sup>179</sup>.

96. The rule of non-inquiry is also applied by courts in Canada<sup>180</sup>. In a recent case, however, the Canadian Supreme Court has affirmed that the principles of fundamental justice as guaranteed under the Canadian Charter of Rights and Freedoms apply to extradition, rendering it unlawful if its consequences "shock the conscience"<sup>181</sup>. The

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<sup>175</sup> See R.J. Wilson, "Toward the Enforcement of Universal Human Rights Through Abnegation of the Rule of Non-inquiry in Extradition", 3 *ILSA Journal of International and Comparative Law* 751 (1997), at p. 1.

<sup>176</sup> See G. Gilbert, above at fn. 2, at p. 191, on the tendency of common law countries to apply the non-inquiry rule despite the discrimination clauses contained in the Commonwealth extradition scheme. See also J. Dugard and C. van den Wyngaert, above at fn. 61, at pp. 198–190.

<sup>177</sup> See, for example, the cases of *Gallina v. Fraser* 278 F.2d 77 (2<sup>nd</sup> Cir. 1960), *Jhirad v. Ferrandina* 536 F.2d 478 (2<sup>nd</sup> Cir. 1976); *Arnbjornsdottir-Mendler v. United States* 721 F.2d 679 (9<sup>th</sup> Cir. 1983); *Ahmad v. Wigen* 910 F.2d 1063 (2<sup>nd</sup> Cir. 1990); *In re Extradition of Howard* 996 F.2d 1320 (1<sup>st</sup> Cir. 1993); *Lopez-Smith v. Hood* 121 F.3d 1322 (9<sup>th</sup> Cir. 1997); *Mainero v. Gregg* (164 F.3d 1199 (9<sup>th</sup> Cir. 1999)). See J. Dugard and C. van den Wyngaert, above at fn. 61, at pp. 189–190; R.J. Wilson, above at fn. 175, at pp. 2–3; G. Gilbert, above at fn. 2, at pp. 79–83.

<sup>178</sup> T. Rose, above at fn. 156, at p. 210, refers to the case of *United States v. Lui Kin-Hong* 110 F.3d 103 (1<sup>st</sup> Cir. 1997). R.J. Wilson, above at fn. 175, at p. 3, notes the case of *Sidali v. INS* 914 F. Supp. 1104 (N.J. 1996), in which the District Court of New Jersey had denied extradition on the grounds that the requesting State had not established probable cause, although the highest reviewing court of that country had upheld a conviction for rape and murder. This decision, however, was overturned on appeal by the Court of Appeals for the Third Circuit, without any reference to the quality of the criminal proceedings in the requesting State (*Sidali v. INS*; Docket No. 96-5215, 24 February 1997). See also C. Blakesley, "The United States of America", in A. Eser, O. Lagodny and C. Blakesley (eds.), *The Individual as Subject of International Cooperation in Criminal Matters*, Nomos Verlagsgesellschaft, Baden-Baden (2002), at pp. 605–609.

<sup>179</sup> *Cornejo Barreto v. Siefert* 218 F.3d 1004 (9<sup>th</sup> Cir. 2000). See also below at paras. 133, 188 and 201–202.

<sup>180</sup> See, for example, *Canada v. Schmidt* [1987] 1 SCR 500; *Argentina v. Mellino* [1987] 1 S.C.R. 536; *United States v. Cotroni* [1989] 1 SCR 1469; *Kindler v. Canada* [1991] 2 SCR 779; *Re. Ng Extradition* [1991] 2 SCR 858. These cases are analysed in T. Rose, above at fn. 156, at pp. 200–206.

<sup>181</sup> *United States v. Burns* [2001] 1 SCR 283. The possibility that extradition might be denied if it violated fundamental principles of justice had been recognised, for example, in the earlier decisions of *Canada v. Schmidt* [1987] 1 SCR 500 and *United States v. Allard* [1987] 1 SCR 564, but, as

Supreme Court has also held that questions of whether or not the wanted person will receive a fair trial or sentencing hearing in the requesting State or may be subjected to ill-treatment are to be considered by the Minister of Justice, and by the courts upon judicial review of that executive decision<sup>182</sup>.

97. In the United Kingdom, the House of Lords held that it is for the Home Secretary to consider any evidence of bad faith on the part of the requesting Government<sup>183</sup>. Statutory bars to extradition, including those stemming from the discrimination clauses in s. 6(1)(c) and (d) of the Extradition Act 1989 may, however, be raised at committal before the District Court, or before the High Court at habeas corpus<sup>184</sup>. Both in the United Kingdom and in Canada, judicial review of the final executive determination on extradition does provide for control of ministerial discretion and includes a consideration of the consequences which would await the person concerned upon surrender<sup>185</sup>.

98. The non-inquiry principle does not form part of the tradition of civil law countries<sup>186</sup>. Even so, there have been very few instances of refusal of extradition on the basis of a discrimination clause<sup>187</sup>. In Switzerland, for example, the *Bundesgericht* applied Article 3(2) of the European Convention on Extradition (1957) in two decisions in 1973<sup>188</sup> and 1983<sup>189</sup>. In another decision in 1996, the *Bundesgericht* granted extradition on the sole condition that the situation of the person concerned would be monitored by Swiss officials, despite substantial information concerning serious human rights violations in the requesting State<sup>190</sup>.

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noted by T. Rose, above at fn. 156, at p. 207, “the right set of circumstances never seemed to materialise”.

<sup>182</sup> *United States of America v. Cobb* [2001] 1 SCR 587.

<sup>183</sup> *Royal Government of Greece v. Governor of Brixton Prison, ex p. Kotronis* [1971] AC 250 HL, cited in I. Stanbrook and C. Stanbrook, above at fn. 138, at p. 242.

<sup>184</sup> In practice, it is common for the defence to reserve political arguments for consideration by the High Court rather than to raise them at committal. A recent example where the District Court considered objections to extradition on the grounds of s. 6(1)(c) and (d) of the Extradition Act 1989 is the decision of the Bow Street Magistrates’ Court in the case of *The Government of the Russian Federation v. Akhmed Zakaev*, of 13 November 2003 (on file with UNHCR). See also above at fn. 79.

<sup>185</sup> See also below at paras. 189 and 196–198.

<sup>186</sup> An exception is the Netherlands, where the rule of non-inquiry is a “logical extension” of the constitutional requirement of a treaty as the basis for extradition. Recently, however, courts have applied the rule in a somewhat mitigated way. See B. Swart, “The Netherlands”, in A. Eser, O. Lagodny and C. Blakesley (eds.), above at fn. 178, at pp. 447–448 and 520–521.

<sup>187</sup> See J. Dugard and C. van den Wyngaert, above at fn. 61, at p. 202.

<sup>188</sup> *Bundesgericht*, decision of 11 July 1973, BGE 99 Ia 547 (refusal of extradition of an opponent of the Government of Zaire to that country, on the grounds that his position would be seriously aggravated for political reasons).

<sup>189</sup> *Bundesgericht*, decision of 22 March 1983, BGE 109 Ib 64 (refusal of extradition concerning an ethnic Kurd sought for the murder of a journalist on the grounds that his position would be prejudiced for political reasons). In this decision, the *Bundesgericht* noted that it considers the provision of Article 3(2) of the European Convention on Extradition (1957) to be a peremptory norm of international law, in the same way as Article 3 of the ECHR. See also below at para. 222.

<sup>190</sup> *Bundesgericht*, decision of 11 September 1996, BGE 122 II 373. In this decision, which also concerned an ethnic Kurd whose extradition was sought by Turkey, the *Bundesgericht* held that the extradition judge must be particularly prudent in its application of the clause, since it implies a value judgment with respect to internal affairs of the requesting State, in particular, its political system, institutions, understanding of fundamental rights and their effective observance, as well as the

99. In Germany, the *Bundesverfassungsgericht* overturned a decision to grant extradition on the grounds that the *Oberlandesgericht* (Regional High Court) had failed to examine whether the charges on which the requesting State based its request were only a pretext, submitted with the intention of obtaining jurisdiction over the person concerned and prosecuting him for another offence which was punishable by death. In this case, however, the *Bundesverfassungsgericht* based its considerations on the principle of speciality and did not make any reference to the discrimination clause in Article 3(2) of the European Convention on Extradition (1957)<sup>191</sup>.

100. In France, the *Conseil des Ministres* has explicitly stated that the criteria for the assessment of an extradition request included the nature of the political and judicial system in the requesting State; the political motivation behind the request; and the risk of prejudice to the situation of the individual upon extradition on account of his or her actions or political opinions, race or religion<sup>192</sup>. The *Conseil d'Etat* has only once refused extradition on the grounds that the request by Spain, which concerned a Basque activist, was politically motivated. In this case the *Conseil d'Etat* found that Article 5(2) of the Law of 10 March 1927, which provides for refusal of extradition if it is requested for a political purpose, complemented the applicable extradition treaty between France and Spain which dated from 1877<sup>193</sup>. In a number of other cases the *Conseil d'Etat* held that Article 5(2) was not applicable, since the European Convention on Extradition (1957) did not provide for the refusal of extradition on the same ground<sup>194</sup>. In another case, the *Conseil d'Etat* refused extradition because it considered that it had been requested for a political purpose, but this time its decision was based on the fundamental principle recognised by the laws of the Republic that extradition will be rejected if it has been requested for a political purpose<sup>195</sup>.

101. One recent case in which Article 3(2) of the European Convention on Extradition (1957) was applied is the decision of the District Court in Varna, Bulgaria, which rejected a request for the extradition of an Austrian citizen to Turkey on the grounds that the charges against him had been raised and sustained on political grounds<sup>196</sup>.

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independence and impartiality of its judiciary. See also P. Popp, *Grundzüge der Internationalen Rechtshilfe in Strafsachen*, Helbing & Lichtenhahn, Basel, Genf, München (2001), at pp. 259–260, who notes, by way of comment on these decisions, an increasing reluctance on the part of the *Bundesgericht* with respect to the application of the discrimination clause, especially where there are close political and economic ties with the requesting State.

<sup>191</sup> *Bundesverfassungsgericht*, decision of 9 November 2000, 2 BvR 1560/00.

<sup>192</sup> See the Communique of the *Conseil des Ministres* of 10 November 1982, setting out French policy in extradition matters. The fourth criterion is that of the political character of the offence for which extradition is sought. Each of them may give rise to a refusal of extradition.

<sup>193</sup> *Conseil d'Etat*, Ass., decision of 24 June 1977, *Astudillo Calleja*.

<sup>194</sup> E. Rolin, *Le Conseil d'Etat, juge de l'extradition*, Librairie Générale de Droit et de Jurisprudence, Paris (1999), at pp. 113–124, with reference to the decisions by the *Conseil d'Etat* in *Croissant*, 7 July 1978; *Urdian Cirizar*, 23 October 1991; and *Drumm, Murray, O'Kane*, of 13 March 1992.

<sup>195</sup> *Conseil d'Etat*, 3 July 1996, *Moussa-Koné*. See E. Rolin, above at fn. 194, at pp. 125–128.

<sup>196</sup> Decision No. 1599/2002 of 8 November 2002 (unofficial translation available to the author). The court based its considerations on s. 439B(2)2. of the Bulgarian Court of Criminal Procedure and Article 3(2) of the European Convention on Extradition (1957). The District Court's refusal of extradition was upheld by the Varna Appellate Court in a decision of 22 November 2002.

c. Discrimination clause, the political offence exemption and the principle of *non-refoulement*

102. The discrimination clause applies where requests for extradition are made with the intent of prosecuting or punishing the person concerned for political or other motives, or where extradition would prejudice their position for certain reasons, including – but not limited to – political opinion. Unlike the political offence exemption, which establishes a privilege of non-extradition for certain offenders based on the nature of the act for which extradition was sought, the discrimination clause applies to ordinary criminal offences as well as acts which have been “de-politicised” under various international instruments.

103. The discrimination clause has been introduced into extradition law specifically with the purpose of protecting fundamental rights of the individual whose extradition is sought<sup>197</sup>. In view of the progressive restriction of the scope of the political offence exemption, it has an increasingly important function with regard to protection of fundamental rights. This has been recognised, for example, by the Multidisciplinary Group on International Action against Terrorism of the Council of Europe, which referred to the discrimination clause as “a necessary corollary to depoliticisation”<sup>198</sup>.

104. As noted above, there is a close link between refusal of extradition on the grounds set out in the discrimination clause, and the principle of *non-refoulement* applicable to refugees and asylum-seekers. This issue will be discussed below at Part V.

3. *Other grounds for the refusal of extradition*

a. Non-extradition of nationals

105. Whereas under common law, the nationality of the requested person does not normally pose an obstacle to extradition<sup>199</sup>, civil law countries have traditionally refused to extradite their own nationals, usually in mandatory terms<sup>200</sup>. Most regional extradition conventions provide for the possibility of refusal of extradition on the grounds that the person sought is a national of the requested State<sup>201</sup>. Under Article 7 of the Convention relating to Extradition between the Member States of the European Union (1996), however, nationality as a refusal ground only applies for those Member States which have made a

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<sup>197</sup> See G. Goodwin-Gill, above at fn. 166, at p. 148, noting that the persecution ground of membership of a particular social group was expressly left out on the ground that it might be interpreted too freely (see also above at fn. 168).

<sup>198</sup> See *Draft Amending Protocol to the European Convention on the Suppression of Terrorism*, Executive Summary prepared by the Secretariat, Council of Europe document CM(2002)181, 6 November 2002.

<sup>199</sup> This is reflected in the fact that no provision to that effect is contained in the London Scheme for Extradition (1966 and 2002).

<sup>200</sup> In some countries, the extradition of nationals is prohibited by constitutional law. This is the case, for example, in Austria, Brazil, El Salvador, Georgia, Moldova, Romania, the Russian Federation, Turkmenistan, Ukraine. Extradition or criminal (procedure) legislation provides for the non-extradition of nationals, for example, in China, Cyprus, Czech Republic, Ethiopia, former Yugoslav Republic of Macedonia, France, Germany, Hungary, Indonesia, Latvia, Norway, Slovak Republic, Slovenia, Switzerland and Zambia.

<sup>201</sup> See, for example, Article 4(a) of the European Convention on Extradition (1957); Article 7 of the Inter-American Convention on Extradition (1981); Article 10(1) of the ECOWAS Convention (1984); Article 51(1)(a) of the Minsk Convention (1993).

declaration to that effect, to be renewed every five years<sup>202</sup>. As indicated earlier, there is no general obligation to prosecute in such cases, although the possibility of refusing to extradite citizens may be coupled with a duty to prosecute them in the courts of the requested State. Sometimes this is made conditional upon a request by the State which has unsuccessfully sought extradition<sup>203</sup>. The requested State must normally inform the requesting State of the outcome of the prosecution.

106. The non-extradition of the requested State's own citizens has long been one of the main obstacles to extradition from civil law to common law jurisdictions. It is linked to a different tradition with regard to jurisdiction. Whereas common law countries generally adhere to the principle of territorial jurisdiction and favour prosecution in the country where a crime was committed, civil law countries regularly provide for extraterritorial jurisdiction over offences by their nationals, including those committed abroad. More recently, the possibility of extraditing their own nationals has been accepted by some civil law countries in bilateral agreements<sup>204</sup>. There is also an increasing willingness on the part of civil law States to grant extradition of nationals on the condition that, if convicted and sentenced, they will be returned to serve their sentence at home<sup>205</sup>.

b. Non-extradition on the basis of principles of fundamental justice and fairness

107. A number of the traditionally accepted grounds for refusal relate to the need to uphold fundamental principles of justice and fairness. Questions of jurisdiction are also relevant. Thus, extradition treaties and laws typically provide that the requested State shall refuse to extradite in the following circumstances:

- The person whose extradition is requested has already been acquitted, or convicted, of the same offence by a final judgment rendered in the requested State or in a third State. This refusal ground safeguards the principle of "*ne bis in idem*", also known as prohibition of double jeopardy. Article 54 of the Schengen Convention (1990) establishes a particularly stringent *ne bis in idem* rule: it applies whenever criminal proceedings have been finally disposed of in one country, including if no court has been

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<sup>202</sup> Austria, Germany, Greece and Luxembourg have declared that they will not extradite nationals. Denmark has declared that extradition of a national may be refused. Belgium, Finland, the Netherlands, Portugal, Spain and Sweden will grant the extradition of nationals only under certain conditions. These declarations are contained in Schedule 6 to the UK European Union Extradition Regulations 2002, above at fn. 22.

<sup>203</sup> See, for example, Article 6(2) of the European Convention on Extradition (1957); Article 10(2) of the ECOWAS Convention (1984). Under Article 8 of the Inter-American Convention on Extradition (1981), the obligation to prosecute when extradition is rejected, if the laws or treaties of the requested State so permit, is not confined to the refusal ground of nationality.

<sup>204</sup> In December 1997, Colombia amended its Constitution to permit the extradition of citizens for offences committed abroad (Acto Legislativo No. 01 de 1997). However, the relevant provisions of this law were repealed by the Constitutional Court in a decision of 1 October 1998 (No. C-543-98). The extradition of nationals is also permitted, for example, under the bilateral treaties concluded between the United States of America and Italy (1983); the United States of America and Argentina (1997).

<sup>205</sup> See G. Gilbert, above at fn. 2, at p. 180.

involved in doing so and the decision taken does not take the form of a judicial decision<sup>206</sup>.

- The extradition is sought on the basis of a judgment rendered *in absentia* in circumstances where the person concerned did not have notice of the trial or the opportunity to arrange for his or her defence, and where he or she has not had or will not have the opportunity to have the case retried in his or her presence.
- If extradited, the person concerned would be put on trial before an *ad hoc* or extraordinary tribunal, or the extradition is sought on the basis of a judgment rendered by such a tribunal.
- The requested State, which has jurisdiction over the fugitive, prosecutes him or her in its own courts, or has decided either not to institute or to terminate proceedings against the person for the offence for which extradition has been requested.
- The offence for which extradition is sought is subject to a statute of limitations.
- The requested person enjoys immunity from prosecution, for example, because he or she has diplomatic status, or has benefited from an amnesty or pardon.

c. Non-extradition based on the punishment awaiting the fugitive upon surrender

108. The requested State may also refuse extradition if the punishment awaiting the person concerned upon surrender would be contrary to its own notions of justice and fairness. This is the case, in particular, if the person concerned would face the death penalty<sup>207</sup>, or if the punishment he or she would be subjected to in the requesting State is not in keeping with the principle of proportionality<sup>208</sup>.

109. In an increasing number of States, refusal of extradition to capital punishment is mandatory, although the obstacle can usually be overcome by obtaining assurances from the requesting State to the effect that the death penalty will not be sought or, if it has already been imposed, that the requested person will not be executed. The refusal ground of capital punishment is also provided for in a number of international extradition instruments<sup>209</sup>. This issue will be returned to below at paras. 143–147. The law of the requested State may also prohibit extradition if it would lead to the imposition, or execution, of a life-long sentence<sup>210</sup>.

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<sup>206</sup> Court of Justice of the European Communities, Judgment of the Court in Joined Cases C-187/01 and C-385/01 (*Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*), 11 February 2003, available at: [www.curia.eu.int](http://www.curia.eu.int).

<sup>207</sup> See below at paras. 138–147.

<sup>208</sup> See, for example, the decision of the German *Bundesverfassungsgericht* of 24 June 2003, 2 BvR 685/03.

<sup>209</sup> See, for example, Article 11 of the European Convention on Extradition (1957); Article 17 of the ECOWAS Convention (1984); and Article 15(2) of the London Scheme for Extradition (1966 and 2002), both of which permit the requested State to refuse extradition in death penalty cases. Article 9 of the Inter-American Convention on Extradition (1981) provides for mandatory refusal of extradition to capital punishment but permits it on the basis of assurances.

<sup>210</sup> This is the case, for example, in Portugal, where extradition requested for an offence punishable by a life-long sentence or detention order is prohibited under the Constitution. Extradition to a risk of being sentenced to life imprisonment without any possibility of early release could constitute a breach of Article 3 of the European Convention on Human Rights. See the admissibility decision of the European Court of Human Rights in *Sawoniuk v. United Kingdom* (application No.63716/00 of 29 May 2001); *Nivette v. France* (application No. 44190/98, 3 July 2001); *Einhorn v. France* (application No. 71555/01, 16 October 2001). See also below at fn. 248.



110. National legislation in a number of States explicitly provides for the refusal of extradition if this would result in a breach of fundamental human rights of the person concerned. Human rights bars to extradition are addressed in Part III below.

d. The person whose extradition is sought is a refugee or an asylum-seeker

111. This is dealt with in detail in Part V below.

e. Other refusal grounds

112. The requested State may also apply a humanitarian exception, and decide not to extradite, for example, because of the advanced age, or illness, of the individual concerned<sup>211</sup>. In some countries, the law also excludes the extradition of minors<sup>212</sup>. Furthermore, many national extradition laws reserve the possibility of refusing extradition if it would be contrary to vital interests of the requested State.

### III. EXTRADITION AND HUMAN RIGHTS LAW

#### A. General

##### 1. *Human rights and extradition*

113. Human rights do not as such stand in the way of extradition. On the contrary, extradition is an important tool of legitimate law enforcement, not least enabling States to ensure that those responsible for serious human rights violations and international crimes such as war crimes and crimes against humanity are brought to justice. As noted by the UN Human Rights Committee, extradition is “an important instrument of cooperation in the administration of justice, which requires that safe havens should not be provided for those who seek to evade fair trial for criminal offences, or who escape after such fair trial has occurred”<sup>213</sup>. In the context of human rights and the fight against terrorism, this has been

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<sup>211</sup> For example, Canada (s. 47 of the Extradition Act 1999); Denmark (s. 7 of the Extradition Act); Namibia (s. 5(1)(g) of the Extradition Act 1996); Norway (s. 7 of the Extradition Act 1975); Romania (s. 5(e) of Law No. 296/2001 on Extradition); Slovak Republic (s. 403(2)(c) of the Code of Criminal Procedure). See also the decision taken by UK Home Secretary Jack Straw not to extradite Senator Pinochet to Chile, after the House of Lords had decided that he was not entitled to immunity and that extradition proceedings were to proceed. This decision was based on s. 12(2)(a) of the Extradition Act 1989, on the grounds that extradition would be “oppressive” to Senator Pinochet, on account of a deterioration in his state of health during the months of September and October and the lack of prospect of a significant improvement in his condition. The text of Mr Straw’s statement to Parliament can be found at: <http://www.parliament.uk/hansard/hansard.cfm> (columns 357–371; 571–588). See also below at paras. 153 and 197.

<sup>212</sup> For example, Spain (s. 5(2) of the Law No. 4/1985 on Passive Extradition. Non-extradition of minors is also the practice in Belgium (see I. Delbrouck, above at fn. 59, at p. 16). See also Article 10(2) of the ECOWAS Convention (1984).

<sup>213</sup> *Cox v. Canada* (539/1993), 31 October 1994, UN doc. CCPR/C/52/D/539/1993, at para. 10.3. The Human Rights Committee held that “extradition as such is outside the scope of application of the Covenant” and quoted from its earlier communication *M.A. v. Italy* (117/1981, at para. 13.4):

affirmed, for example, by the UN General Assembly and Security Council<sup>214</sup> as well as the Council of Europe<sup>215</sup>. Thus, there is no general right not to be extradited.

114. International human rights law does require, however, that the rights of the individual be taken into account in the extradition process. As noted above, human rights considerations form the basis for discrimination clauses contained in most general extradition agreements since the 1950s as well as a number of international anti-terrorism conventions<sup>216</sup>. More specifically, the Inter-American Convention on Extradition (1981) provides, in Article 6, that none of its provisions may be interpreted as a limitation of the right to asylum when its exercise is appropriate.

115. The Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States provide that “[n]o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”<sup>217</sup>. Several anti-terrorism instruments also explicitly prohibit extradition in situations where this would result in human rights violations<sup>218</sup>.

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“There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country.”

<sup>214</sup> Both UN bodies have emphasised the importance of Member States taking appropriate steps to deny safe haven to those who plan, finance or commit terrorist acts, by ensuring their apprehension and prosecution or extradition. See, for example, General Assembly Resolution 54/164 of 24 February 2000 on Human Rights and Terrorism; Security Council resolution 1269 (1999) of 19 October 1999 on international cooperation in the fight against terrorism; Security Council resolution 1373 (2001) of 28 September 2001 on international cooperation to combat threats to international peace and security caused by terrorist acts; Security Council resolution 1456 (2003) of 20 January 2003 on combatting terrorism.

<sup>215</sup> Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers at its 804<sup>th</sup> meeting (11 July 2002), H(2002)004, at Article XIII(1): “Extradition is an essential procedure for effective international co-operation in the fight against terrorism.” See also Article 4(2) of the Protocol Amending the European Convention on the Suppression of Terrorism, which adds two paragraphs to the discrimination clause as contained in Article 5 of the Convention and provides explicitly that there is no obligation to extradite if the person concerned risks being exposed to torture, or to the death penalty or, where the national law of the requested State does not allow for life imprisonment, to life imprisonment without the possibility of parole (unless under applicable extradition treaties the requested State is under obligation to extradite if the requesting State has given appropriate assurances). The Protocol was opened for signature on 15 May 2003. For ratification information see <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (ETS No.: 190).

<sup>216</sup> See above at paras. 88–91.

<sup>217</sup> Preliminary paragraph 13.

<sup>218</sup> Article 19(1) of the International Convention for the Suppression of Terrorist Bombings (1997) and Article 21 of the International Convention for the Suppression of the Financing of Terrorism (1999), respectively, refer to “[...] other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law”. Article 15(1) of the Inter-American Convention against Terrorism (2002) provides that “[t]he measures carried out by the States Parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms”. Article 15(2) refers to the rights and obligations of States and individuals under international law, “[...] in particular the Charter of the United Nations, the Charter of the OAS, international humanitarian law, international human rights law, and international refugee law”.

116. As will be seen in the following sections, it is well-established in international and national jurisprudence that States' obligations under international human rights law preclude them from granting extradition under certain circumstances. Many States have incorporated human rights safeguards into their national extradition laws and extradition agreements with other countries.

117. Even without explicit mention in extradition laws or treaties, however, States are bound by international legal standards not to expose a person to situations which would result in the violation of certain fundamental rights, including, in particular, the right to life, the right to be free from torture, cruel, inhuman or degrading treatment or punishment, the right not to be discriminated against as well as elements of the right to a fair trial. Pursuant to Article 4 of the International Covenant on Civil and Political Rights (ICCPR, 1966), these rights are non-derogable and cannot be restricted even during times of emergency or on other grounds<sup>219</sup>. The prohibition of exposing an individual to a risk of torture, cruel, inhuman or degrading treatment forms part of *jus cogens*<sup>220</sup>. With respect to other rights, international human rights law permits their limitation under certain circumstances, and for specific purposes, which include the suppression of crime, if such limitation is both necessary and proportionate. Provided these criteria are met, extradition will normally be considered lawful<sup>221</sup>.

118. Human rights law also applies to the process leading to the determination on an extradition request. The question of procedural safeguards and guarantees available to the individual concerned in the requested State are dealt with below at Part IV.

## 2. *Human rights and extradition in practice*

119. Human rights and extradition have long been linked through some of the generally accepted grounds for the refusal of extradition. This applies to the political offence exemption – through its protection function for those involved in struggle for human rights and democracy – and the discrimination clause, but particularly to non-extradition because the criminal procedures in the requesting State are deemed not to conform to the requested State's standards of justice and fairness. Yet as noted above, extradition was traditionally regarded as a matter solely between States. The individual affected was deemed to have

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<sup>219</sup> See Human Rights Committee, *General Comment No. 29*, above at fn. 67. See also below at paras. 125, 138 and 149.

<sup>220</sup> See, for example, the judgment of the ICTY in *Prosecutor v. Anto Furundzija*, 10 December 1998, above at fn. 27, at paras. 143–157, with references to relevant provisions in international and regional human rights instruments, jurisprudence of the European Court of Human Rights and US Courts. See also the judgment of the House of Lords in *Pinochet Ugarte, re.* [1999], above at fn. 27, at paras. 109–109; s. 702(d) and comment n, Restatement (Third) of the Foreign Relations Law of the United States (1987); and the discussion in 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).

<sup>221</sup> See J. Dugard and C. van den Wyngaert, above at fn. 61, at pp. 205–205 and 210–212. With respect to the right to family life, as enshrined in Article 8 of the ECHR, the European Commission on Human Rights found that a decision to extradite constitutes an interference with that right, but made it clear that extradition comes within the restrictions permitted under Article 8(2). In the case before it, the Commission found that the interference caused by the decision to extradite served one of the legitimate aims provided for in Article 8(2) and was both necessary and proportionate. See *Raidl v. Austria*, Application No. 25342/94, admissibility decision of 4 September 1995).

standing to oppose extradition only on the grounds that it would be in breach of the applicable inter-state agreement, for example, because the offence imputed to him or her was not covered by that treaty, or because of a specific refusal ground contained therein<sup>222</sup>.

120. This traditional view of extradition does not appear to be compatible with States' obligations under international human rights law. Its influence is nevertheless still present in current extradition practice. It is reflected, for example, in the continued application of the principle of non-inquiry in a number of countries<sup>223</sup>; the practice of various forms of "irregular extradition", that is, the surrender of fugitives to another country without a formal extradition process<sup>224</sup>, and the reluctance of many countries to provide for, and implement, effective procedural safeguards and guarantees in the process leading up to the extradition decision<sup>225</sup>.

### 3. *Conditional extradition – assurances*

121. Under certain conditions, human rights bars to extradition may be overcome if the requested State obtains assurances from the requesting State. This has long been the practice, in particular, where the requested State opposes the death penalty. An undertaking by the requesting State not to seek or impose the death penalty, or not to execute a death sentence if it was already handed down, is normally deemed sufficient to enable the requested State to extradite in keeping with its obligations under international human rights law as well as national law provisions prohibiting surrender to capital punishment<sup>226</sup>. Assurances are also sometimes sought if the requested State is concerned about the quality of the trial awaiting a fugitive upon return, and extradition may be granted in such cases on the condition that representatives of the requested State are permitted to monitor the proceedings<sup>227</sup>. However, the requested State may extradite in compliance with its obligations under human rights law only if the assurances effectively eliminate the risk of exposing the person concerned to a violation of his or her rights<sup>228</sup>.

122. The requested State may also grant extradition on the condition that the person concerned will be returned to it after the trial to serve their sentence. As noted above, this form of conditional extradition may offer a satisfactory solution where civil law countries would otherwise be reluctant to extradite their own nationals<sup>229</sup>.

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<sup>222</sup> See J. Dugard and C. van den Wyngaert, above at fn. 61, at pp. 188–190, with references to case law in the United States of America, Canada and the United Kingdom, which "interprets extradition laws and treaties in favour of enforcement because this course is perceived to serve the interests both of justice and of friendly international relations".

<sup>223</sup> See above at paras. 94–97.

<sup>224</sup> See below at paras. 166–169.

<sup>225</sup> This issue will be discussed in more detail in Part IV below.

<sup>226</sup> See below at paras. 143–147.

<sup>227</sup> See below at para. 154.

<sup>228</sup> In the case of a danger of torture, cruel, inhuman or degrading treatment, this will not normally be the case. The same holds true for situations in which extradition would expose refugees or asylum-seekers to a risk of persecution. See below at paras. 134–137 and 240–241, respectively.

<sup>229</sup> See above at fn. 205.

## B. Human Rights Bars to Extradition

### 1. Torture, cruel, inhuman or degrading treatment or punishment

123. International human rights law provides for an absolute bar to extradition where it would expose the person concerned to a risk of torture. Article 3 of UNCAT provides:

(1) No 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.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

124. Torture is prohibited under Article 2 of UNCAT. Torture and other cruel, inhuman or degrading treatment or punishment are also prohibited under Article 7 of the ICCPR and under the provisions of various regional human rights instruments, such as, for example, Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 5(2) of the American Convention on Human Rights (1969), Article 2 of the Inter-American Convention to Prevent and Punish Torture (1985) and Article 5 of the African Charter on Human and Peoples’ Rights (1981).

125. The prohibition of torture, cruel, inhuman or degrading treatment is a peremptory norm of international law, or *jus cogens*<sup>230</sup>. This means, it is binding on all States, including those which have not yet become parties to relevant international conventions. It is also non-derogable; that is, it applies in all circumstances, including during armed conflict and in times of national emergency, even where national security or the survival of a State or regime are threatened, and regardless of the conduct of the person concerned<sup>231</sup>.

126. The principle that extradition is not permitted where the person concerned would be exposed to a risk of torture or other cruel, inhuman or degrading treatment or punishment is well established in the jurisprudence of international human rights bodies<sup>232</sup>. It has been reaffirmed, recently, in Article 4(2) of the Protocol to the European Convention on the Suppression of Terrorism (2003), which expressly provides that nothing in the Convention shall be interpreted as imposing on the requested State an obligation to extradite if the person subject to the extradition request risks being exposed to torture<sup>233</sup>.

#### a. International human rights law

127. The UN Human Rights Committee has examined the compatibility of extradition with the prohibition of torture or other cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR in two cases, both of which involved the death penalty. In

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<sup>230</sup> See above at fn. 220.

<sup>231</sup> See Human Rights Committee, *General Comment No. 29*, above at fn. 67.

<sup>232</sup> See references to the decisions of the UN Human Rights Committee, the UN Committee Against Torture and the European Court and Commission of Human Rights in the following sub-sections.

<sup>233</sup> Once the Protocol enters into force, this provision will become Article 5(2) of the European Convention on the Suppression of Terrorism. See also above at fn. 215.

*Kindler v. Canada*, the Committee held that a State party may itself be in violation of the ICCPR if, as a necessary and foreseeable consequence of a decision it takes relating to a person within its jurisdiction, that person's rights under the Covenant will be violated in another jurisdiction<sup>234</sup>. Extradition may be in violation of the ICCPR if there is a real risk of a violation of the rights under the Covenant of the person concerned<sup>235</sup>. In *Ng v. Canada* the Human Rights Committee found that execution by gas asphyxiation was contrary to internationally accepted standards of humane treatment, because it causes prolonged suffering and agony. It therefore amounted to treatment in violation of Article 7 of the ICCPR<sup>236</sup>. In its General Comment on Article 7, the Human Rights Committee stated that the death penalty must be carried out in such a way as to cause the least possible physical and mental suffering<sup>237</sup>.

128. The Committee Against Torture has also dealt with the issue of extradition to a risk of torture. In its decision *Chipana v. Venezuela*, it held that, for extradition to be in breach of the requested State's obligations under Article 3(1) of UNCAT, there must be specific reasons for believing that the person concerned is personally in danger of being subjected to torture<sup>238</sup>. The existence in the requesting State of a consistent pattern of gross, flagrant or mass violations of human rights in a country is not of itself a sufficient reason, while, conversely, the absence of such a pattern does not mean that a person is not in danger of being subjected to torture in his or her specific case<sup>239</sup>.

b. European Convention on Human Rights

129. Article 3 of the ECHR provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Under the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights, Article 3 imposes an absolute bar to extradition where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.

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<sup>234</sup> *Kindler v. Canada* (470/1991), 30 July 1993, UN doc. CCPR/C/48/D/470/1991, at para. 6.2.

<sup>235</sup> *Ibid.*, at paras. 13.1 and 13.2). The Human Rights Committee did not find that Canada's decision to extradite was in breach of Article 7 of the ICCPR, given that on the facts the period and treatment on death row and the manner of the proposed execution was not cruel, inhuman or degrading (para. 16). In this decision, the Human Rights Committee considered the European Court of Human Rights' decision in *Soering* (see below at fn. 240), but distinguished it from the case before it on material points related to the conditions on death row and on the fact that Canada had not received a simultaneous extradition request from another country (para. 15.3).

<sup>236</sup> *Ng v. Canada* (469/1991), 5 November 1993, UN doc. CCPR/C/49/D/469/1991, at para. 16.4. See also below at fn. 272.

<sup>237</sup> Human Rights Committee, *General Comment No. 20* (Article 7), UN doc. HRI/GEN/1/Rev.1, at 30 (1994), at para. 6.

<sup>238</sup> *Chipana v. Venezuela* (110/1998), 10 November 1998, UN doc. CAT/C/21/D/110/1998, at para. 6.2. See also the General Comment adopted by the CAT (1996), UN doc. HRI/GEN/1/Rev.6, at pp. 279–281, where it is stated that the risk of torture must be established “beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable” (at para. 6).

<sup>239</sup> *Ibid.*, at para. 6.3. The Committee Against Torture also declared itself “deeply concerned that the State party did not accede to the request made by the CAT that it should refrain from expelling or extraditing the person while her communication was being considered by the CAT and thereby failed to comply with the spirit of the Convention.” (para. 8).

130. In the leading case on extradition and human rights, *Soering v. United Kingdom*<sup>240</sup>, the European Court of Human Rights made it clear that, where extradition results in the breach of a Convention right, the responsibility of the requested State is engaged with respect to all and any foreseeable consequences of extradition suffered outside its jurisdiction<sup>241</sup>. The Court held that

[i]t would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.<sup>242</sup>

In view of the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person, the disproportionality to the gravity of the crime committed and the conditions of detention awaiting execution, the European Court of Human Rights found that the extradition of Mr Soering to face detention on “death row” in the US state of Virginia would amount to a breach of Article 3<sup>243</sup>.

131. Article 3 of the ECHR applies regardless of the conduct of the individual concerned, including where national security considerations come into play<sup>244</sup>, and it may be violated even if the infringements result from factors which do not engage the responsibility of public authorities<sup>245</sup>. Article 3 of the ECHR may preclude extradition if the person concerned suffers from sufficiently severe physical or mental illness<sup>246</sup>. In one decision, the European Commission on Human Rights held that extradition to prosecution in violation of

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<sup>240</sup> *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989. J. Dugard and C. van den Wyngaert, above at fn. 61, at p. 191, refer to this case as the “dramatic ‘breakthrough’ for extradition and human rights on the international scene”. The authors also note, at pp. 192–193, that provisions for the refusal of extradition where it would lead to human rights violations had been included in extradition treaties and national laws long before the decision in *Soering*.

<sup>241</sup> *Ibid.* at paras. 85 and 86.

<sup>242</sup> *Ibid.* at para. 88. The European Court of Human Rights has since affirmed this principle in a number of further decisions, including cases concerning expulsion and deportation. See for example, the cases of *Cruz Varas v. Sweden*, Application No. 15576/89, 20 March 1991; *Vilvarajah and others v. United Kingdom*, Application Nos. 13163/87; 00013164/87; 00013165/87; 00013447/87; 00013448/87, 30 October 1991; *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996; *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996, *Mamatkulov and Abdurasulovic v. Turkey*, Application Nos. 46827/99 and 46951/99, 6 February 2003. See also the admissibility decisions of the European Court of Human Rights in *Nivette v. France*, Application No. 44190/98, 14 December 2000 (partial decision) and 3 July 2001, and *Einhorn v. France*, Application No. 71555/01, 16 October 2001, at para. 25, and of the European Commission of Human Rights in *Aylor-Davis v. France*, Application No. 22742/93, 20 January 1994.

<sup>243</sup> *Soering v. United Kingdom*, above at fn. 240, at paras. 104–111. The Court also took into consideration the possibility of extraditing Mr Soering to Germany.

<sup>244</sup> See, for example, the decisions of the European Court of Human Rights in *Chahal v. United Kingdom*, above at fn. 242; *Ahmed v. Austria*, above at fn. 242.

<sup>245</sup> *D. v. United Kingdom*, Application No. 30240/96, 2 May 1997.

<sup>246</sup> *Bulus v. Sweden*, Application No. 9330/81, 35 DR 57 (1984).

the rule of speciality could constitute a violation of Article 3<sup>247</sup>. The European Court on Human Rights has also addressed the question of a possible violation of Article 3 if extradition were to expose the individual concerned to an irreducible life-sentence<sup>248</sup>.

c. National legislation and jurisprudence

132. In a number of countries, national law expressly provides for mandatory refusal of extradition where it would expose the individual concerned to a risk of torture<sup>249</sup>. The prohibition of extradition to a danger of torture has also been affirmed in national jurisprudence. In Switzerland, for example, the *Bundesgericht* held that Article 3 of the ECHR, in the same way as Article 3(2) of the European Convention on Extradition (1957), is a peremptory norm of international law, which must be taken into account in a decision to extradite, irrespective of whether or not Switzerland and the requesting State are bound by an extradition treaty or convention<sup>250</sup>. In Poland, the Supreme Court also held that the extradition authorities are bound to refuse extradition if there is a probability of treatment or punishment which would be in breach of Article 3 of the ECHR<sup>251</sup>. In the Netherlands, the Supreme Court advised the Government not to extradite where there was a serious possibility, in the circumstances of the case, that the person concerned would be subjected to torture in violation of Article 3 of UNCAT upon return to his country of origin<sup>252</sup>.

133. In the United States of America, the 9<sup>th</sup> Circuit Court of Appeals held that under the Foreign Affairs Reform and Restructuring Act of 1998 Government agencies are given a mandatory duty to implement Article 3 of UNCAT. In the extradition context, this means that the Secretary of State may not surrender any fugitive who is likely to face torture<sup>253</sup>.

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<sup>247</sup> *Altun v. Germany*, Application No. 10308/83, 36 DR 209 (1983).

<sup>248</sup> See the admissibility decisions of the European Court of Human Rights in *Nivette v. France*, above at fn. 242, and *Einhorn v. France*, above at fn. 242, at para. 27: “The Court does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Article 3 of the Convention. [...] Consequently, it is likewise not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention”.

<sup>249</sup> For example, Argentina (s. 8(e) of the Law No. 24.767 on International Cooperation in Criminal Matters); Australia (s. 22(3)(b) of the Extradition Act 1988); Austria (s. 19(1) and (2) of the Law on Extradition and Mutual Legal Assistance); Bulgaria (s. 439B(3) of the Code of Criminal Procedure); China (s. 8(g) of the Law on Extradition 2002); Finland (Article 9 of the Constitution); Latvia (s. 490(2)(7) of the Code of Criminal Procedure); Luxembourg (s. 8(1) of the amended Law of 13 March 1870 on Extradition of Foreign Criminals); Russian Federation (s. 1(1) of the Federal Law on the Ratification of the European Convention on Extradition); Spain (s. 4(6) of Law No. 4/1985 on Passive Extradition).

<sup>250</sup> *Bundesgericht*, decision of 22 March 1983, BGE 109 Ib 64, at 72.

<sup>251</sup> *Judgment of the Supreme Court of 29 July 1997*, II KKN 313/97, OSKNW 1997, no. 9–10, item 85, cited in M. Plachta, “Recent Developments in the Extradition Law Within the European Union, and the New Polish Domestic Legislation”, 2 *Yearbook of Polish European Studies* (1998), at p. 114.

<sup>252</sup> *Supreme Court*, 15 October 1996, NJ 1997, 533, and 17 December 1996, NJ 1997, 534, cited in B. Swart, “The Netherlands”, above at fn. 186, at p. 446.

<sup>253</sup> *Cornejo Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000). On the possibility of a habeas corpus review of a decision by the Secretary of State see above at para. 95 and below at paras. 188 and 201–202.



d. Assurances

134. The European Court of Human Rights has examined the question of assurances in cases where it considered the compatibility of extradition to a risk of capital punishment with the prohibition of torture, inhuman or degrading treatment or punishment under Article 3 of the ECHR. An undertaking by the authorities of the requesting State to inform the judge at the sentencing stage of the wishes of the requested State was found not to eliminate the risk of the death penalty being imposed<sup>254</sup>. By contrast, the Court regarded as sufficient an express undertaking by a US District Attorney not to charge any special circumstances which could give rise to the death penalty<sup>255</sup>, as well as affidavits sworn by a District Attorney and a diplomatic note from the US embassy, expressly stating that the death penalty would not be sought<sup>256</sup>.

135. However, problems arise not so much with regard to assurances in cases which involve a risk of capital punishment, where their use is an established and generally accepted practice. In such situations, the person concerned is returned to a formal process, where compliance with the assurances can be monitored, although the possibility for intervention by the requested State in case of a breach of the assurances is usually limited once the individual has been surrendered. The situation is different where extradition would deliver the person concerned directly into the hands of authorities claimed to be responsible for torture, cruel, inhuman or degrading treatment or punishment.

136. The Supreme Court of Canada has addressed the issue in a recent decision, contrasting assurances in cases of a risk of torture with those given where the person extradited may face the death penalty, and signalling

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>257</sup>.

137. Assurances by the requesting State that it will not expose the person concerned to torture, or to inhuman or degrading treatment or punishment will not normally suffice to exonerate the requested State from its human rights obligations, particularly where there is a

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<sup>254</sup> *Soering v. United Kingdom*, above at fn. 240, at para. 98.

<sup>255</sup> *Nivette v. France*, above at fn. 242, admissibility decisions of the European Court of Human Rights of 14 December 2000 (partial decision) and 3 July 2001.

<sup>256</sup> *Einhorn v. France*, above at fn. 242, admissibility decision. The European Commission of Human Rights also found a declaration under oath by a District Attorney sufficient to avert a serious risk of exposing the individual concerned to a treatment or punishment prohibited by Article 3 of the ECHR or Article 1 of Protocol No. 6 to the ECHR concerning the abolition of the death penalty (1982) (admissibility decision in *Aylor-Davis v. France*, above at fn. 242). In its recent decision in *Mamatkulov and Abdurasulovic v. Turkey*, above at fn. 242, the Court noted that the requesting State (Uzbekistan) had given assurances that it would not confiscate the applicants' assets nor subject them to torture nor sentence them to death. The Court did not make a pronouncement on whether or not it regarded these assurances as sufficient, having found that the applicants had not presented sufficient evidence for a violation of Article 3 of the ECHR to be established.

<sup>257</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 1 SCR 3, 11 January 2002, at para. 124.

pattern of such abuses in the State seeking the extradition. In such cases, the requested State is bound to refuse the surrender of the wanted person. As will be discussed in Part V below, the same holds true for the obligation of States not to expose refugees or asylum-seekers to a risk of persecution.

## 2. *Extradition and the right to life – death penalty*

### a. International and European human rights law

138. Under Article 6(1) of the ICCPR, “[e]very human being has the inherent right to life. [...] This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The right to life is non-derogable<sup>258</sup>. It is also guaranteed under a number of regional human rights conventions, such as, for example, Article 2 of the ECHR (1950), Article 4 of the American Convention on Human Rights (1969), Article 4 of the African Charter on Human and Peoples’ Rights (1981). A decision to extradite which would expose the person concerned to a risk of extrajudicial, summary or arbitrary execution would be contrary to the requested State’s obligations under international human rights law.

139. Since extradition concerns the surrender of a fugitive criminal to prosecution or the execution of a sentence already imposed, the question of a possible violation of the right to life in this context is often raised in the context of capital punishment<sup>259</sup>. Neither the ICCPR<sup>260</sup> nor the ECHR<sup>261</sup> prohibit capital punishment as such. However, both instruments have protocols on the abolition of the death penalty<sup>262</sup>, and there is a clear tendency towards its elimination from the range of lawful forms of criminal punishment<sup>263</sup>. As a consequence, an increasing number of States are precluded from extraditing a person to face capital punishment under their obligations stemming from international human rights law.

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<sup>258</sup> See Human Rights Committee, *General Comment No. 29*, above at fn. 67.

<sup>259</sup> However, both the Commission and the European Court of Human Rights have dealt with the question of the death penalty in the context of extradition mostly under the aspect of a potential violation of the prohibition of torture, cruel, inhuman or degrading treatment or punishment. See above at paras. 127–131 and 134.

<sup>260</sup> Article 6 of the ICCPR permits capital punishment for the most serious offences, and on the basis of a trial in which procedural guarantees and safeguards have been fully respected, although it prohibits the imposition of the death penalty for crimes committed by persons under the age of 18 and the execution of pregnant women.

<sup>261</sup> Article 2 of the ECHR provides that “everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

<sup>262</sup> Protocol No. 6 to the ECHR concerning the abolition of the death penalty (1982) and Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances (2002); Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (1989).

<sup>263</sup> See, for example, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990)). The death penalty has also been excluded from the punishments which may be imposed by the International Criminal Tribunals for the Former Yugoslavia and Rwanda as well as the International Criminal Court. Many countries have abolished the death penalty in their national law. Information on developments related to capital punishment is available, for example, from Amnesty International, at: <http://web.amnesty.org/rmp/dplibrary.nsf/index?openview>.

140. Both the Human Rights Committee<sup>264</sup> and the European Court of Human Rights<sup>265</sup> have held that extradition which exposes the person concerned to the death penalty does not of itself constitute a violation of the right to life. In such circumstances, the requested State must examine whether the conditions under which the death penalty is permitted are met. This requires an assessment of whether the proceedings leading to the imposition of the death sentence in the requesting State are in keeping with fair trial standards, including the right to a fair hearing by an independent tribunal, the presumption of innocence, minimum guarantees for the defence, the right to review by a higher tribunal, and the right to seek pardon or commutation of the sentence<sup>266</sup>.

141. In a recent decision, the Human Rights Committee noted the broadening international consensus in favour of abolition of the death penalty and, in States which have retained the death penalty, a broadening consensus not to carry it out<sup>267</sup>. The Human Rights Committee also noted that for countries which have abolished the death penalty there is an obligation not to expose a person to the real risk of its application, and that, therefore, they may not deport or extradite individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death without ensuring that the death sentence would not be carried out<sup>268</sup>.

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<sup>264</sup> The Human Rights Committee examined whether extradition would expose the person concerned to a real risk of a violation of Article 6(2) of the ICCPR. However, the Committee also recalled its General Comment on Article 6, which provides that “while States parties are not obliged to abolish the death penalty, they are obliged to limit its use” (*Cox v. Canada*, above at fn. 213, at paras. 16.1 and 16.2, with references to its decisions *Kindler v. Canada*, above at fn. 234, and *Ng v. Canada*, above at fn. 236).

<sup>265</sup> The European Court of Human Rights held that despite marked changes in the application of the death penalty, including the adoption and ratification of a number of States of Protocol No. 6 to the ECHR, Article 2 of the Convention had not yet been abrogated, and that Article 3 could not be interpreted as generally prohibiting the death penalty (*Soering v. United Kingdom*, above at fn. 240, paras. 101–103). The European Commission of Human Rights has held that extradition to a risk of capital punishment may raise issues under Article 1 of Protocol No. 6 to the ECHR (admissibility decision in *Raidl v. Austria*, above at fn. 221).

<sup>266</sup> See Human Rights Committee, *General Comment No. 6* (Article 6), at para. 7, UN doc. HRI/GEN/1/Rev.5. See also paragraph 5 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provides: “No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country”. ECOSOC resolution 1989/65, annex, 1989 UN ESCOR Supp. (No. 1) at 52, UN doc. E/1989/89 (1989).

<sup>267</sup> *Judge v. Canada* (829/1998), 13 August 2003, UN doc. CCPR/C/78/D/829/1998, at para. 10.3. In this decision, the Human Rights Committee found Canada to have violated Article 6(1) of the ICCPR by deporting a person to the United States where he was under a sentence of death without ensuring that the death penalty would not be carried out. The Human Rights Committee also referred to developments in Canada’s domestic law, including the decision of the Supreme Court in *United States v. Burns* (see below at fn. 280). Canada was also found to have violated Article 2(3) of the ICCPR by deporting the person concerned before he could exercise his right to appeal (at para. 10.8).

<sup>268</sup> *Ibid.*, at para. 10.4. The Human Rights Committee further held that the person extradited in breach of his rights under the ICCPR was entitled to an appropriate remedy which would include making such representations as are possible to the receiving State to prevent the carrying out of the death penalty. See also below at para. 210.

b. National legislation

142. It has long been the practice of States opposing the death penalty to refuse extradition, under national legislation as well as bilateral extradition agreements, where the person concerned may face the death penalty<sup>269</sup>.

c. Assurances

143. Under the jurisprudence of the European Court and Commission of Human Rights, the requested State does not act in violation of the ECHR if it seeks and obtains assurances which effectively eliminate the danger that the requested person will be subjected to treatment which is prohibited by the Convention. In a number of decisions concerning the death penalty, the European Court examined whether the assurances given are binding on the authorities of the requesting State, thus constituting an effective protection against a violation of the individual's rights upon return<sup>270</sup>. The UN Human Rights Committee held that the obligations arising under Article 6(1) of the ICCPR did not require Canada to refuse extradition without assurances that the death penalty would not be imposed<sup>271</sup>, but noted that if the decision to extradite without assurances had been taken arbitrarily or summarily, this would have violated the requested State's obligations under Article 6<sup>272</sup>.

144. National law in many countries provides for mandatory refusal of extradition, unless the requesting State gives assurances that it will refrain from seeking the death penalty against the individual concerned, or from enforcing it if a death sentence has already been handed down<sup>273</sup>. In practice, the issue often arises in extradition relations between abolitionist countries and the United States of America<sup>274</sup>.

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<sup>269</sup> See also above at paras. 108–110.

<sup>270</sup> As noted above at para. 134, these decisions deal with the conformity of extradition with Article 3 of the ECHR, not Article 2.

<sup>271</sup> *Kindler v. Canada*, above at fn. 234, at paras. 14.4 and 14.5; see also *Cox v. Canada*, above at fn. 213, at paras. 16.3 and 16.4. In its decision *Judge v. Canada*, above at fn. 267, which concerned deportation to the United States of a person who was under a death sentence there, the Human Rights Committee reiterated the obligation of States that have abolished the death penalty to ensure that the death penalty would not be carried out upon deportation or extradition (at paras. 10.4 and 10.6).

<sup>272</sup> *Kindler v. Canada*, above at fn. 234, at para. 14.6; see also *Cox v. Canada*, above at fn. 213, at para. 16.5. In *Ng v. Canada*, above at fn. 236, at paras. 15.6 and 15.7, the Human Rights Committee noted that the requested State had decided to extradite without seeking assurances after hearing extensive arguments in favour of doing so, and that, in a letter to the counsel of the person concerned, the Minister of Justice had, *inter alia*, referred to the absence of particular circumstances and the availability of due process and appeal against conviction. The Human Rights Committee concluded, therefore, that Canada had not violated Article 6 of the ICCPR.

<sup>273</sup> For example, Argentina (s. 8(f) of the Law No. 24.767 on International Assistance in Criminal Matters); Australia (s. 22(3)(c) of the Extradition Act 1988); Austria (s. 20(1) and (2) of the Law on Extradition and Mutual Legal Assistance); Canada, (s. 44(2) of the Extradition Act 1999); Finland (Article 9 of the Constitution); Germany (s. 8 of the Law on International Legal Assistance in Criminal Matters); Spain (s. 4(6) of the Law No. 4/1985 on Passive Extradition); Switzerland (s. 37(3) of the Federal Law on International Legal Assistance in Criminal Matters).

<sup>274</sup> See Amnesty International, *United States of America, No return to execution – The US death penalty as a barrier to extradition*, November 2001, AI Index: AMR 51/171/2001. See also S. Dillon and D.G. McNeil Jr., “Spain sets hurdle for extraditions”, *The New York Times*, 24 November

145. In Italy, for example, the Constitutional Court repealed the provisions of the Code of Criminal Procedure and the Extradition Treaty between Italy and the United States of America (1983) which permitted extradition on the condition of assurances considered to be sufficient by the Italian authorities, on the grounds that they were incompatible with the absolute prohibition of capital punishment under Articles 2 and 27(4) of the Italian Constitution<sup>275</sup>. In France, the *Conseil d'Etat* held in a number of decisions concerning extradition to the United States of America that applying the death penalty to a person whose extradition has been granted by the French Government would contravene the French *ordre public*<sup>276</sup>. Austria's insistence on including a provision to the effect that in cases of extradition a death sentence would not be imposed caused a delay of several years in the adoption of a new US–Austrian bilateral extradition treaty<sup>277</sup>.

146. Article 13 of the extradition agreement between the European Union and the United States of America, which was signed on 25 June 2003<sup>278</sup>, provides that extradition for an offence punishable with death in the requesting, but not the requested State, may be granted on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with, on condition that the death penalty if imposed shall not be carried out. Pursuant to Article 4(1)(k) of the agreement, EU Member States may apply the provision on capital punishment contained therein in place of, or in the absence of bilateral treaty provisions. While the wording of Article 13 of the agreement may seem to leave it to the discretion of European States whether or not to make extradition to the United States of America dependent on assurances, an obligation to seek such assurances exists for all EU Member States under Protocols No. 6 and 13 to the ECHR.

147. Outside Europe, too, courts in a number of countries have found extradition to a risk of capital punishment without assurances to be in breach of fundamental rights of the individuals concerned. Thus, the Constitutional Court of South Africa held that the handing over of a person to agents of the United States of America without first obtaining an undertaking from the US Government that the death sentence would not be imposed on him, or, if imposed, would not be executed, violated his right to human dignity, to life and his right not to be treated or punished in a cruel, inhuman or degrading way, as guaranteed under sections 10, 11 and 12(1)(d) of the South African Constitution<sup>279</sup>. In Canada, the Supreme Court found that in all but exceptional cases, extradition to a risk of capital

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2001; I. Black, “Extradition of terror suspects ruled out – EU will not expose prisoners to US death penalty”, *The Guardian*, 14 September 2002.

<sup>275</sup> *Venezia v. Ministero di Grazia e Giustizia*, Corte Costituzionale, Sentenza No. 223, 25–27 June 1996.

<sup>276</sup> See, for example, the decisions of the *Conseil d'Etat* in *Aylor*, 15 October 1993; *Stacy*, 8 April 1998; *Nivette*, 6 November 2000; *Einhorn*, 12 July 2001.

<sup>277</sup> Negotiations for the treaty, which was signed in January 1998, had begun in 1987. See Austrian Information Service, Washington D.C., Press release of 8 January 1998, available at: <http://www.austria.org/press/44.html>.

<sup>278</sup> See above at fn. 63.

<sup>279</sup> *Mohamed and another v. President of the Republic of South Africa and others*, CCT 17/01, 28 May 2001, at [74] 3.1. and 3.1.1.

punishment without assurances is contrary to the principles of fundamental justice as enshrined in s. 7 of the Canadian Charter of Rights and Freedoms<sup>280</sup>.

### 3. *Fair trial in the requesting State*

148. In the context of extradition, fair trial issues arise under two aspects. On the one hand, general principles of international law require that the individual concerned must be afforded adequate procedural guarantees during extradition proceedings in the requested State. This will be discussed in Part IV below.

149. On the other hand, the requested State must also assess whether its decision to extradite would expose the person concerned to a violation of the right to a fair trial, in terms of the treatment a fugitive is likely to receive upon surrender as well as with regard to the quality of a judgment already handed down. In international human rights law, the right to a fair trial is provided for in Article 14 of the ICCPR<sup>281</sup>. It is also guaranteed under various regional human rights instruments, such as, for example, in Article 6 of the ECHR, Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and Peoples' Rights, and Articles 6, 7, 14 and 16 of the Arab Charter on Human Rights.

150. In its decision *Cox v. Canada*, the Human Rights Committee examined whether extradition would expose the requested person to a real and present danger of a violation of specific provisions of the Covenant, including the right to a fair trial (Article 14) and the right not to be discriminated against (Article 26). The Committee noted that the compatibility of a State's law and practice with the Covenant could not be determined *in abstracto*. Rather, for the purposes of admissibility, a complainant must substantiate specifically that his or her rights are likely to be violated, and there will not be a genuine opportunity to challenge such violations in the courts of the country concerned<sup>282</sup>. In *Weiss v. Austria*, the Human Rights Committee found that the surrender of a wanted person in breach of a stay of extradition ordered by the *Verwaltungsgerichtshof* (Administrative Court, the supreme administrative jurisdiction in Austria) and the inability of the person concerned to appeal an adverse decision by the extradition court, while the State Prosecutor was able to do so, amounted to a violation of the right to equality before the courts as

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<sup>280</sup> *United States v. Burns* [2001] 1 SCR 283, 15 February 2001. In this decision, the Supreme Court reversed its previous jurisprudence, according to which the Minister of Justice was required to seek assurances only in exceptional cases. The Supreme Court held that "[...] an extradition that violates the principles of fundamental justice will always shock the conscience" (at para. 68). The Court affirmed the correctness of the "balancing approach" under s. 7 of the Canadian Charter of Rights and Freedoms ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.") applied in earlier decisions but explained that the factors needed to be weighed differently due to factual developments in Canada and relevant foreign jurisdictions with regard to capital punishment. For an analysis of this decision and earlier jurisprudence of the Supreme Court, see T. Rose, above at fn. 156, at pp. 200–208.

<sup>281</sup> Elements of the right to a fair trial, such as the presumption of innocence, are non-derogable. See Human Rights Committee, *General Comment No. 29*, above at fn. 67.

<sup>282</sup> *Cox v. Canada*, above at fn. 213, at para. 10.3. In the instant case, the risk of a violation was not found to have been substantiated.

guaranteed under Article 14(1) of the ICCPR, taken together with the right to an effective and enforceable remedy under Article 2(3) of the Covenant<sup>283</sup>.

151. The European Court of Human Rights has held that the extraditing State may act in breach of its obligations under the Convention if it surrenders a person to a situation where he or she would suffer a “flagrant denial” of a fair trial in the requesting country<sup>284</sup>.

152. Where the requesting State has already tried the wanted person in a manner that is incompatible with international human rights standards, their right to a fair trial is clearly violated<sup>285</sup>. As noted above<sup>286</sup>, it has long been accepted in extradition law that the requested State is entitled to refuse extradition if it is sought, for example, on the basis of a judgment handed down *in absentia* without possibility for a re-trial, or if the fugitive would be tried or has been convicted by a special court. In such cases, the requested State may grant extradition under the condition that a new trial with full guarantees be conducted<sup>287</sup>. Other refusal grounds in extradition law also serve to protect the individual’s right to a fair trial, including, in particular, the *ne bis in idem* principle and the bar to extradition where there is a risk of persecution or prejudice, as provided for under a discrimination clause.

153. In a number of countries, national legislation expressly prohibits extradition if the standards of criminal justice in the requesting State do not conform to international human rights law<sup>288</sup>. Under the UK Extradition Act 1989, extradition must be refused if it would be unjust or oppressive<sup>289</sup>. “Unjust” is directed to the risk of prejudice to the accused in the

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<sup>283</sup> *Weiss v. Austria* (1096/2002), 8 May 2003, UN doc. CCPR/C/77/D/1086/2002. The Human Rights Committee found that Austria had also acted in breach of its obligations under the Optional Protocol by extraditing the person concerned before allowing the Committee to address a request for interim measures in which he had alleged that he would suffer irreparable harm as a result of extradition. See also below at para. 210.

<sup>284</sup> *Soering v. United Kingdom*, above at fn. 240, at para. 113. See also the judgments of the European Court of Human Rights in *Drozd and Janousek v. France and Spain*, Application No. 12747/87, 26 June 1992, and *Mamatkulov and Abdurasulovic v. Turkey*, above at fn. 242, and the admissibility decision of the European Commission of Human Rights in *Aylor-Davis v. France*, above at fn. 242.

<sup>285</sup> See J. Dugard and C. van den Wyngaert, above at fn. 61, at p. 203.

<sup>286</sup> See above at para. 107.

<sup>287</sup> See J. Dugard and C. van den Wyngaert, above at fn. 61, at pp. 206–207, with references to US, Canadian and Swiss jurisprudence.

<sup>288</sup> For example, Austria (s. 19(1) of the Law on Extradition and Mutual Legal Assistance); Bulgaria (s. 439B(3) of the Code of Criminal Procedure); Canada (s. 44 of the Extradition Act 1999); Romania (s. 18 of the Law No. 296/2001 on Extradition); Russian Federation (Federal Law on the Ratification of the European Convention on Extradition); Switzerland (s. 2(1) of the Federal Law on International Legal Assistance in Criminal Matters).

<sup>289</sup> s. 12(2)(a) of the Extradition Act 1989 provides for refusal of extradition if it appears to the Home Secretary that it would be unjust or oppressive to return the person concerned (i) by reason of the trivial nature of the offence; (ii) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or (iii) because the accusation against him is not made in good faith in the interests of justice. This refusal ground is mandatory for extradition to States with whom there exist bilateral or multilateral treaties or agreements, designated Commonwealth countries and the Hong Kong Special Administrative Region. It is discretionary with respect to States to whom an Order in Council was made under the Extradition Act 1870 and is still in force, including, most importantly, the United States of America. A similar provision is contained in s. 44(1)(a) of the Canadian Extradition Act 1999. See also Article 13(1)(b) of the London Scheme for Extradition (1966 and 2002).

conduct of the trial, while “oppressive” relates to hardship resulting from changes in the period under consideration, the revival of charges previously dropped, mental or physical illness, or a sense of security induced in the person concerned by the belief that he or she was safe from prosecution<sup>290</sup>. In France, the judicial system of the requesting State and the risk that the fugitive may be prejudiced because of race, religion, political opinion or actions, are among the publicly stated criteria to be taken into consideration when determining an extradition request<sup>291</sup>.

154. Where there is a risk of violations of fair trial guarantees, extradition may be made conditional upon assurances by the requesting State and monitoring of the proceedings by officials of the requested State<sup>292</sup>. It has been noted, however, that it may be difficult for the latter to ensure that assurances of a fair trial will actually be observed<sup>293</sup>, and that there is no effective legal remedy for the State in the event of non-compliance with the assurances given<sup>294</sup>.

#### IV. EXTRADITION: PROCEDURAL QUESTIONS

##### A. General

155. Extradition conventions and agreements do not usually contain provisions on procedure. The law of the requested State determines the stages of the procedure as well as the competent authorities for reaching a decision on whether or not to grant extradition. While there are certain similarities and common features, extradition procedures may vary considerably from one country to another. Differences in evidentiary requirements and standards, for example, have already been referred to at paras. 48–55 above. Procedural safeguards and guarantees for the person whose extradition is requested also differ, and in order to assess the position of the individual in the extradition process, it is necessary to examine in detail the legal provisions and their implementation in any given country. The following sections present an overview of extradition procedures and point out some issues which are particularly relevant from the point of view of the individual concerned.

156. Extradition is a formal process, which involves sovereign acts of two countries. Extradition proceedings are initiated only after a formal request is made by the country seeking the arrest and surrender of the person concerned for the purposes of prosecution or

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<sup>290</sup> See A. Jones, above at fn. 80, at pp. 419–432, with reference to pertinent jurisprudence, including, in particular, the decisions in *R. v. Governor of Brixton Prison, ex p. Naranjan Singh* [1962] 1 Q.B. 211, and *Kakis v. Republic of Cyprus* [1978] 1 WLR 779 (HL).

<sup>291</sup> Communiqué of the *Conseil des Ministres*, 10 November 1982. See also above at para. 112.

<sup>292</sup> J. Dugard and C. van den Wyngaert, above at fn. 61, at pp. 206–208, with references to the extradition of Ziad Abu Eain from the United States to Israel under the condition that he would be tried by a civilian court and that he would be accorded all the fair trial rights required by human rights conventions, two Canadian cases (*Hurley*, *Pacificador*) in which extradition was made conditional upon assurances concerning fair trial rights, and a number of decisions taken by Swiss courts (see above at para. 98). G. Gilbert, above at fn. 2, at p. 48, notes that in cases where countries extradite without a pre-existing agreement, the requested State usually demands greater safeguards for the human rights of the fugitive.

<sup>293</sup> J. Dugard and C. van den Wyngaert, above at fn. 61, at p. 208.

<sup>294</sup> See R.J. Wilson, above at fn. 175, at pp. 4–5.



enforcement of a sentence. As noted at para. 56 above, this may be preceded by a request for the provisional arrest of the fugitive. Once the formal extradition request has been received, it is dealt with by the authorities of the requested State in accordance with applicable law, either through full extradition procedures, or, under certain circumstances, in accelerated or simplified procedures. In practice, however, States sometimes resort to other measures, which are aimed at circumventing the requirements of the extradition process.

### *1. Full extradition procedures*

157. In most countries, both the executive and the judiciary of the requested State are involved in extradition proceedings. A decision concerning a formal extradition request is usually reached in three stages:

- (i) During the initial, administrative phase, the minister responsible for receiving the extradition request examines it and determines whether it is admissible, according to the criteria applicable in the requested State. Usually, this stage of the proceedings consists of an assessment of formal requirements, but applicable legislation may also provide for an initial evaluation of the probability that extradition will be granted. If the request does not meet the relevant criteria, or if it is already apparent that a refusal ground applies, the competent minister may reject the request at this stage.
- (ii) If the minister decides to proceed, the extradition request is put before the judicial authority responsible for determining whether it satisfies the conditions set forth by the relevant national legislation and/or applicable extradition treaty. The judicial authority conducts the appropriate inquiries. This includes an assessment of any evidence presented by the requesting State in light of the evidentiary requirements in place. The extradition judge may also be required to examine whether there are any legal obstacles to extradition, including bars to extradition arising from the requested State's obligations under international human rights and refugee law. There is usually a possibility to appeal against the decision by the judicial authority.
- (iii) The judicial stage is normally followed by a final executive decision: the relevant minister determines whether or not to grant the request. In most countries, a finding by the competent judicial authority that the legal requirements for extradition are not met is binding on the executive; in such cases, the minister must refuse to extradite. Where extradition is authorised by the courts, the minister usually has discretion either to grant the surrender of the fugitive, possibly subject to conditions, or to refuse extradition. The law may provide for appeal or review of the final executive decision, although in a number of countries, this is not the case<sup>295</sup>.

158. In the majority of countries, the extradition process follows procedures along the lines described above. This reflects the widely held view that, while extradition should be subject to judicial control<sup>296</sup>, it is also a matter that ultimately is best decided by the

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<sup>295</sup> See below at paras. 199–204.

<sup>296</sup> The reasons for the involvement of the judiciary in extradition proceedings vary and range from concern for the rights of the fugitive to the view that the judiciary should back up the executive and shield it from diplomatic problems if extradition is rejected. See O. Lagodny, "Comparative Overview", in A. Eser, O. Lagodny and C. Blakesley (eds.), above at fn. 178, at p. 702.

executive of the requested country, as in many cases legal considerations only partly determine whether an extradition request will be granted or refused<sup>297</sup>.

159. In a number of countries, however, the extradition process differs – either in certain details or entirely – from the process described above. In Switzerland, for example, the law provides for an entirely administrative extradition procedure, with the possibility of an appeal to the *Bundesgericht* only after the Federal Justice Office has issued its final decision<sup>298</sup>. In Belgium, the judicial authorities provide an opinion (*avis*), but the Government is not bound by it<sup>299</sup>. In the Netherlands, the courts take binding decisions on some matters, while in others they are only competent to issue non-binding opinions<sup>300</sup>.

160. Elsewhere, the final decision to extradite is made by the courts. This is the case, for example, in Portugal<sup>301</sup>. In Argentina and in Paraguay, extradition is also decided by the judicial authorities, although the Foreign Minister, who receives the extradition request, may reject it under certain circumstances – most notably if it concerns a refugee<sup>302</sup>. In Bolivia, El Salvador and Venezuela, the respective Supreme Court is responsible for deciding on extradition requests. Some countries have not enacted any extradition legislation, and requests for the surrender of a fugitive are handled on the basis of applicable general principles of law as is the case, for example, in Uruguay.

161. The arrest of the person concerned is ordered by the judicial authorities of the requested State, either on the basis of a request for the provisional arrest of the wanted person submitted by the State seeking extradition, or following the initial administrative decision to proceed with a formal extradition request<sup>303</sup>. The law of the requested State determines which authority is entitled to order the arrest and subsequent detention, as well as the possibilities for judicial control of such measures.

## 2. *Waiver of extradition procedures*

162. In many countries, extradition law provides that formal extradition proceedings may be dispensed with if both the person concerned and the requested State consent. Multilateral extradition instruments also provide for the possibility of a waiver of extradition procedures. Article 21 of the Inter-American Convention on Extradition (1981) permits extradition without a formal proceeding, subject to this being legal in the requested State and the informed consent of the person sought. A similar provision is contained in Article 8(1) of the London Scheme for Extradition (1966 and 2002).

## 3. *Simplified extradition procedures*

163. The traditional extradition procedure is often time-consuming and perceived by States as cumbersome and costly. States have sought to counteract this by establishing privileged extradition relations with one another through agreements which provide for a

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<sup>297</sup> See above at para. 7.

<sup>298</sup> Section 56 of the Federal Law on International Mutual Assistance in Criminal Matters of 1981.

<sup>299</sup> In practice, an opinion against extradition is reportedly followed in the majority of cases. See I. Delbrouck, above at fn. 59, at p. 32.

<sup>300</sup> See below at para. 203.

<sup>301</sup> Sections 46–49 of the Law No. 144/99 on International Judicial Cooperation in Criminal Matters.

<sup>302</sup> See below at fn. 401; see also below at para. 183.

<sup>303</sup> See above at paras. 46–58.

simplified, and therefore accelerated procedure. Thus, under bilateral extradition treaties, evidentiary or other procedural requirements may be reduced or eliminated altogether<sup>304</sup>.

164. Within the European Union, two conventions permit extradition without the need for a formal procedure in certain circumstances. Under Article 66(1) of the Schengen Convention (1990), the requested State may authorise extradition without formal proceedings if this is not obviously prohibited under its laws, and on the condition that the person concerned agrees to their extradition in a statement made before a member of the judiciary after being examined by the latter and informed of their right to formal extradition proceedings. The wanted person may have access to a lawyer during such an examination<sup>305</sup>. The Convention on Simplified Extradition Procedures between the Member States of the European Union (1995) permits the surrender of a fugitive without the need for an extradition request to be presented, and without a formal extradition procedure being applied, if both the person concerned and the requested State consent<sup>306</sup>. As of 1 January 2004, extradition between member States of the European Union will be abolished altogether and replaced by a system of mutually recognised arrest warrants<sup>307</sup>.

165. Overall, there is a noticeable tendency towards simplified and accelerated extradition procedures. States usually stress that such expedited procedures are made possible by a mutual trust in the quality of procedures and, in particular, safeguards available to protect the rights of the individuals whose surrender is sought<sup>308</sup>. Concern has

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<sup>304</sup> See, for example, the bilateral treaties between Australia and a number of countries which contain a “no-evidence” rule, above at para. 51. An extradition treaty between the United Kingdom and Spain signed in November 2001 also provides for expedited procedures (see above at fn. 125). Special arrangements such as the “backing of warrants schemes” in place between Australia and New Zealand (see Parliament of the Commonwealth of Australia, above at fn.2, at paras. 2.21–2.23) or between the United Kingdom and Ireland allow for direct police cooperation in the return of wanted fugitives and provide for reduced evidentiary requirements. See A. Jones, above at fn. 80, at pp. 445–452. The extradition treaty signed on 31 March 2003 between the United Kingdom and the United States of America requires the United Kingdom to present evidence to show a “reasonable basis to believe that the person sought committed the offense for which extradition is requested” (Article 8(3)(c)), while the United States of America must only present “a statement of the facts of the offence(s)” (Article 8(2)(b)).

<sup>305</sup> The Schengen Convention (1990) also relaxes the procedural requirements in extradition relations between States parties through the use of the Schengen Information System (see above at para. 58) and the possibility of communicating extradition requests directly to the competent Ministry of the relevant State (see above at fn. 76).

<sup>306</sup> The person may consent to extradition following his or her provisional arrest, but before an extradition request is made; or after such a request has been presented, whether or not this was preceded by a request for provisional arrest, if the requested member State has made a declaration to that effect when ratifying the Convention. Consent must be given before a judicial authority, voluntarily and in full awareness of the consequences, and the person concerned has the right to legal counsel (Article 7 of the 1995 Convention). See also above at para. 67(i).

<sup>307</sup> See above at para. 20.

<sup>308</sup> See, for example, the Explanatory Report to the Convention Relating to Extradition between Member States of the European Union (1996), Official Journal C 191, 23 June 1997, General Considerations, (b), where it is noted that “the considerable similarities in the criminal policies of Member States, and, above all, their mutual confidence in the proper functioning of national justice systems and, in particular, in the ability of Member States to ensure that criminal trials respect the obligations stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms, justified a revision also of the fundamental aspects of extradition (conditions for extradition, grounds for refusal, rule of speciality, etc.).” See also the Explanatory Memorandum on

been expressed, however, that such confidence in the fairness of extradition may be lacking foundation, even within the European Union<sup>309</sup>, and that the streamlining of procedures significantly limits safeguards for the persons concerned<sup>310</sup>.

#### 4. *Disguised extradition and unlawful seizure of fugitives*

166. When a fugitive is to be transferred from one State to another for the purposes of criminal prosecution or enforcement of a sentence, extradition is the appropriate procedure. In practice, States also resort to other forms of surrendering persons or obtaining jurisdiction over them, many of which are illegal under international law. Thus, for example, measures such as deportation or expulsion may constitute extradition in disguise. The requested State may also simply surrender the wanted person without going through an extradition process. Methods employed to apprehend a person in the territory of another State include unlawful seizure, abduction or kidnapping, sometimes without the knowledge of the host State. In other cases, foreign agents operate with the acquiescence of, or in collaboration with, the authorities of the latter, for example, on the basis of security cooperation agreements. Concerns have been expressed that such practices may be on the rise, not least in the context of intensified anti-terrorism efforts since 11 September 2001<sup>311</sup>.

167. Such irregular forms of extradition are in breach of international legal principles. This was made clear, for example, by the European Court of Human Rights, which held that the arrest and deportation by France of an Italian national to Switzerland, from where he was subsequently extradited to Italy, constituted a breach Article 5(1)(f) of the ECHR, which requires the arrest or detention of a person with a view to deportation or extradition to be lawful – that is, it must be in keeping with domestic law and the ECHR and must not be arbitrary. The Court found that deportation in this case amounted in fact to a disguised form of extradition that could not be justified under the Convention, as it was designed to circumvent a ruling of a French court which had rejected an extradition request by Italy on the grounds that it was sought on the basis of a conviction *in absentia* without the possibility of a retrial<sup>312</sup>. In its conclusions and recommendations on the second periodic

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the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, COM(2001) 522 final/2, at p. 3, or the Press release of the UK Home Office concerning the November 2001 extradition treaty with Spain (above at fn. 125).

<sup>309</sup> See, for example, Liberty, *Briefing on the Extradition Bill, 2<sup>nd</sup> reading at the House of Commons*, November 2002, at para. 9, with reference to recent cases in which extradition from the United Kingdom to Italy, Portugal and France was refused because of fair trial. See also K. Landgren, above at fn. 132, at pp. 31–42.

<sup>310</sup> See above at para. 68.

<sup>311</sup> See Amnesty International, *United States of America, No Return to Execution*, above at fn. 274, at pp. 17–25; see also Amnesty International, *Pakistan: Arbitrary Transfers to US Custody*, AI-index: ASA 33/014/2002, 20 June 2002, which also refers to cases of Uighurs transferred by Pakistan to China without an extradition process. See also G.B. Newhouse, “The Long Arm of the Law”, 25:6 *Los Angeles Lawyer* (2002), at pp. 32–38, and the recent report by the Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (2003), available at: <http://www.lchr.org>.

<sup>312</sup> *Bozano v. France*, Application No. 9990/82, 18 December 1996. In this decision, the Court further held that the actions of the French Government were incompatible not only with the “right to liberty” but also with the “right to security of person”. See also the decisions on admissibility and merits of the Human Rights Chamber for Bosnia and Herzegovina in the cases of *Had’ Boudellaa*, *Boumediene Lakhdar*, *Mogamed Nechle and Saber Lahmar*, Cases No. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691, of 11 October 2002; *Mustafa Ait Idir*, Case No. CH/02/8961, of 4

report submitted by France in 1997 under Article 19 of UNCAT, the Committee Against Torture expressed concern at the practice whereby the police handed over individuals to their counterparts in another country, despite the fact that a French court had declared such practices to be illegal. The Committee considered that this was contrary to the duties of the State Party under Article 3 of UNCAT<sup>313</sup>.

168. National courts in a number of common law countries have also held that such measures are illegal and constitute an abuse of process. In the view of the High Court of Australia, there are “obvious objections to the use of immigration or expulsion powers as a substitute for extradition”<sup>314</sup>. A court in the United Kingdom held that the deportation from Zimbabwe to the United Kingdom, in which the British authorities had been involved, of a man wanted in the United Kingdom on terrorist charges was an abuse of process, which would render his remaining convicted and imprisoned an affront to the administration of justice<sup>315</sup>. The Constitutional Court of South Africa stated that deportation and extradition serve different purposes and that the differences in the procedures prescribed for either measure may be material in specific cases, particularly where the legality of the expulsion is challenged<sup>316</sup>. In the Netherlands, a court found that a case in which an individual was tricked by German and Dutch police officials into leaving Dutch territory so that he could be arrested and prosecuted constituted a flagrant violation of the constitution<sup>317</sup>. In another case, where the US authorities lured a person into travelling to Belgium where he was arrested, the Netherlands Government considered this to amount to abuse of process<sup>318</sup>.

169. Elsewhere, however, courts continue to rely on the principle known as *male captus bene judicatus*, whereby the means adopted in order to bring a person before a court which has jurisdiction over him or her are irrelevant. This can take the form of blatant violations of international law, such as in the case of *Alvarez-Machain*, a Mexican citizen who was kidnapped in Mexico by persons acting for the US Drug Enforcement Administration

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April 2003 and *Belkasem Bensayah*, Case no. CH/02/9499, of 4 April 2003. In these cases, the transfer of six Algerian nationals into the custody of the United States of America by Bosnia and Herzegovina in January 2002 without formal extradition proceedings was found to be in breach of various provisions of the ECHR, including Article 5(1)(f) of the ECHR and Article 1 of Protocol No. 6 to the ECHR on the abolition of capital punishment.

<sup>313</sup> Report of the Committee Against Torture, GAOR, 53<sup>rd</sup> Sess., Suppl. No. 44, UN doc. A/53/44, 16 September 1998, at para. 143(d). See also the decision of the Committee Against Torture in *Josu Arkauz Arana v. France*, UN Doc. CAT/C/23/D/63/1997, 5 June 2000.

<sup>314</sup> *Barton v. Commonwealth of Australia* [1974] 131 C.L.R. 477, cited in A. Jones, above at fn. 80, at p. 158.

<sup>315</sup> *Mullen, R. (on the application of) v. Secretary of State for the Home Department* [2002] EWCA Civ 1882, 20 December 2002, at [25]. In an earlier decision, another court held that deportation or other attempts to achieve extradition “by the back door” give rise to an order of prohibition, and committal proceedings should not take place as a result. *R. v. Bow Street Magistrates’ Court, ex p. Mackeson* [1981] 75 Cr.App. 199, cited in A. Jones, above at fn. 80, at pp. 159–160. In *R. v. Horseferry Road Magistrates’ Court, ex p. Bennett* [1994] 1 A.C. 42, the House of Lords confirmed that the High Court has authority to inquire as to the means adopted to bring the fugitive before it. This decision is cited in A. Jones, above at fn. 80, at pp. 151–155.

<sup>316</sup> *Mohamed and another v. President of the Republic of South Africa and others*, CCT 17/01, 28 May 2001, at paras. 42–43. In the instant case, however, the Court held that the distinction was not relevant.

<sup>317</sup> *The Hague District Court*, 29 June 1984, NJ 1985, 815, cited in B. Swart, “The Netherlands”, above at fn. 186, at p. 486.

<sup>318</sup> See B. Swart, “The Netherlands”, above at fn. 186, at p. 486.

(DEA) and brought to the United States of America to stand trial. The US Supreme Court held that his forcible abduction did not constitute a violation of the extradition treaty between the United States and Mexico, since the kidnapping of a wanted person was not prohibited under the terms of that treaty<sup>319</sup>.

## **B. The Position of the Individual in the Extradition Process**

170. The following overview of procedural issues pertaining to the extradition process in the requested State is by no means complete. It may nonetheless serve to illustrate the variety of factors, legal as well as practical, which have a bearing on the rights and safeguards available to the person whose extradition is sought. The position of the individual in law and the procedural rights provided vary from one country to another. These differences may be very significant<sup>320</sup>.

### *1. Procedural rights and safeguards*

171. As with extradition procedures generally, it is usually left to the requested State to determine the position of the individual in the extradition process. Two rare examples of clauses in regional extradition conventions which explicitly refer to procedural rights of the individual concerned are provisions in the 1995 and 1996 EU Conventions, according to which the fugitive shall have access to legal counsel for the purposes of waiving formal extradition procedures<sup>321</sup> and the entitlement to the speciality rule<sup>322</sup>, respectively.

172. Legislation in a number of countries provides for procedural rights and safeguards in the extradition process. This usually includes the right to be informed of the allegations made by the requesting State and to make representations with a view to rebutting them. Often, it also includes the right to a hearing before the extradition judge and to the services of an interpreter, if required. In some countries, the law provides for a right to legal counsel, although this may be restricted to certain types of crimes. Free legal representation may be available. Extradition legislation normally also provides for appeal and/or review at various stages of the procedure.

173. In practice, however, despite the fact that a determination by the requested State on a request for extradition clearly has a significant impact on the situation of the individual concerned, the extent to which procedural rights and safeguards are implemented is often limited. This is partly due to the traditional notion that extradition is a matter only between States, in which the individual has no standing<sup>323</sup>. It is also linked to the widely held opinion that the procedure before an extradition judge is not a criminal proceeding<sup>324</sup>.

174. Given that the judicial authorities of the requested State decide only whether the person concerned is eligible for extradition under the applicable law and/or treaty, not

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<sup>319</sup> *United States v. Alvarez-Machain*, 504 US 655 (1992). See also C. Blakesley, “The United States of America”, above at fn. 178, at pp. 581–588, with references to further cases.

<sup>320</sup> See O. Lagodny, above at fn. 296, at pp. 695–768.

<sup>321</sup> Article 7(2) of the Convention on Simplified Extradition Procedures between the Member States of the European Union (1995). See above at para. 67(i).

<sup>322</sup> Article 9(3) of the Convention relating to Extradition between the Member States of the European Union (1996). See above at para. 67(iii).

<sup>323</sup> See above at para. 119.

<sup>324</sup> A. Powers, above at fn. 55, at p. 286; O. Lagodny, above at fn. 296, at pp. 746–752.

whether he or she is guilty of the offence for which extradition has been sought, the guarantees available to individuals in domestic criminal proceedings do not normally apply. This concerns procedural safeguards under national as well as international law. The European Court and Commission of Human Rights have held in consistent jurisprudence that extradition procedures do not constitute a determination of an individual's civil rights or criminal responsibility, and therefore do not come within the scope of Article 6 of the ECHR, which guarantees the right to a fair trial<sup>325</sup>. In the United States of America, courts have held that extradition proceedings are preliminary hearings, to which constitutional guarantees do not extend<sup>326</sup>.

175. Elsewhere, it has been recognised that the extradition process is governed by the principles of procedural fairness. In Canada, the Supreme Court has described extradition proceedings as “quasi-criminal matters”<sup>327</sup> and recognised that constitutional guarantees of due process as well as the common law doctrine of abuse of process apply; this requires that the judicial phase of the extradition process be conducted in accordance with the procedural fairness which is part of the principles of fundamental justice<sup>328</sup>. Under the jurisprudence of the Canadian Supreme Court, the extent of applicable procedural rights is determined by the context and purpose of extradition<sup>329</sup>. In France, the *Conseil d'Etat* held that Article 6(3) of the ECHR applies in extradition proceedings<sup>330</sup>.

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<sup>325</sup> See the admissibility decisions of the European Commission on Human Rights in *H. v. Spain*, Application No. 10227/82, 15 December 1983; *Whitehead v. Italy*, Application No. 13930/88, 11 March 1989; *Raidl v. Austria*, above at fn. 221; *Aylor-Davis v. France*, above at fn. 242, and the decision of the European Court of Human Rights in *Mamatkulov and Abdurasulovic v. Turkey*, above at fn. 242.

<sup>326</sup> See, for example, the decision by the Court of Appeals for the Ninth Circuit in *Lopez-Smith v. Hood*, 121 F.3d 1322 (9<sup>th</sup> Cir. 1997). One consequence of the differential treatment of individuals whose extradition has been requested is the non-application of the presumption of bail which operates for defendants in typical domestic criminal proceedings. See A. Powers, above at fn. 55, at pp. 286–287 and 303–305. A presumption against bail in extradition proceedings also exists in Australia. Both in Australia and in the United States of America, it is very difficult to establish “special circumstances” which would permit the release on bail of the wanted person. This often results in hardship for the individuals concerned (see Parliament of the Commonwealth of Australia, above at fn. 2, at paras. 4.33–4.4.41).

<sup>327</sup> *United States of America v. Shulman* [2001] 1 SCR 616, at [44].

<sup>328</sup> *United States of America v. Cobb* [2001] 1. SCR 587; *United States of America v. Shulman* [2001] 1 SCR 616, at [2].

<sup>329</sup> The Supreme Court held that “the extradition differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair” (*Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779). The nature of the extradition hearing and the extent to which the principles of fundamental justice and procedural safeguards apply was examined by the Supreme Court in *United States of America v. Dynar* [1997] 2. SCR 462.

<sup>330</sup> *Gabor Winter*, 15 February 1980. Article 6(3) of the ECHR provides that everyone charged with a criminal offence shall, as a minimum, have the right (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

176. If an extradition request is refused, or if the requesting State fails to submit an extradition request within the prescribed time following provisional arrest, the competent authority must order the release from custody of the individual concerned. Procedural guarantees required for lawful deprivation of liberty apply<sup>331</sup>.

177. A refusal of extradition by the requested State does not normally preclude the State seeking extradition from submitting another request for the arrest and surrender of the same person on the same charges. An exception to this rule is Article 18 of the Inter-American Convention on Extradition (1981), which provides that once the request for extradition of a person has been denied, a request may not be made again for the same offence. Whether or not a refusal of extradition has *res judicata* effect for the requested State will depend on national law. In Switzerland, for example, the *Bundesgericht* has made it clear that a modification of a decision on the grant of legal assistance is not permitted unless there is a significant change in the factual circumstances or the applicable law<sup>332</sup>. Where a request for arrest with a view to extradition made through an Interpol “red notice” is rejected, this does not mean that the notice is withdrawn from the Interpol system, although the fact that assistance was refused is included in the file and made known to all Interpol members<sup>333</sup>.

## 2. *Raising objections to extradition*

178. Procedural rules determining which authority, at what stage of the extradition process, is responsible for examining an extradition request and deciding on the applicability of refusal grounds and/or bars to extradition under international human rights and refugee law are of utmost importance for the individual whose extradition is sought, as is the availability of avenues for appeal and/or review.

179. Depending on the procedure in place under the law of the requested country, extradition may be opposed at different stages of the process, including by way of a challenge to the legality of arrest and detention pending extradition; at the initial administrative stage; during judicial extradition proceedings; or at the final stage before the minister responsible for determining the request. In a number of countries, such objections may be raised at any stage during the proceedings. In others, opportunities to do so are limited under relevant legislation or as a matter of practice, if the authorities fail to implement extradition procedures as provided for under applicable law, thereby effectively depriving those concerned of the possibility to oppose their surrender to the requesting State.

### a. Arrest or detention for the purposes of extradition

180. The arrest and detention of a wanted person for the purposes of extradition is subject to the safeguards and guarantees which protect the right not to be arbitrarily deprived of one’s liberty. Thus, judicial proceedings related to the arrest or detention of the person whose extradition is sought may provide an opportunity for the latter to present information to show that the extradition request is inadmissible. Depending on the procedures in place,

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<sup>331</sup> See below at para. 181.

<sup>332</sup> *Bundesgericht*, decision of 21 May 1986, BGE 112 Ib 215.

<sup>333</sup> See Interpol’s views on Articles 16.3 and 16.5 of the ECHR, reproduced in: Council of Europe, *Arrest in the Context of the European Convention on Extradition, Human Rights and Other Requirements*, PC OC INF 22, 31 March 2000, available at <http://www.coe.int>, at para. 11. See also below at paras. 295–303.



this may be done during a hearing held by the magistrate who must decide whether a warrant of arrest should be issued, or on appeal or review against an order of arrest or detention for the purpose of extradition.

181. Article 5(1) of the ECHR, which guarantees the right to liberty and security of person, explicitly refers to extradition and permits arrest and detention for the purpose of extradition only if it is in accordance with a procedure prescribed by law. The European Court of Human Rights has held that extradition should be postponed until the legality of detention has been reviewed, since the result of that review could affect the legality of the extradition itself. The length of detention pending extradition must not exceed a reasonable time<sup>334</sup>. National law in many countries provides for the possibility of challenging arrest and detention in court, in keeping with the prohibition of arbitrary arrest and detention under Article 9 of the ICCPR. However, the UN Working Group of Arbitrary Detention has expressed concern that a large number of domestic extradition procedures “do not provide for a maximum period of detention within which extradition procedures must be completed”<sup>335</sup>. Lengthy periods of detention are common in extradition cases<sup>336</sup>.

b. Initial administrative stage

182. The initial administrative phase usually consists of an examination of formal requirements and a preliminary assessment of whether the request has a chance of being granted. The participation of the individual concerned is not normally foreseen, although the relevant minister is free to accept information which shows the existence of an obstacle to extradition relevant at this stage. In practice, this is likely to occur more frequently where a formal extradition request is preceded by a request for the provisional arrest of the wanted person. Where extradition proceedings are initiated after a formal request has been submitted, the wanted person may not learn of the existence of such a request until after the initial decision to proceed.

183. In some countries, the law explicitly provides for a rejection of the extradition request at this stage, if certain conditions are met. Thus, for example, in Argentina and Paraguay, an extradition request must be returned without further proceedings if it concerns

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<sup>334</sup> What length of detention is acceptable depends on the circumstances of the case. See, for example, the decisions of the European Court of Human Rights in *Quinn v. France*, Application No. 18580/91, 22 March 1995 (almost two years considered incompatible with Article 5); *Kolompar v. Belgium*, Application No. 11613/85, 24 September 1992 (detention of over two years and eight months considered justified); and the decisions of the European Commission on Human Rights in *Lynas v. Switzerland*, Application No. 7317/75, 6 October 1976 (extradition or deportation proceedings must be conducted with “requisite diligence”); *Osman v. United Kingdom*, Application No. 15933/89, 14 January 1991 (more than five years in detention were considered acceptable, given that the applicant himself had submitted several habeas corpus requests to the United Kingdom authorities).

<sup>335</sup> Working Group on Arbitrary Detention, Report to the Commission on Human Rights at its fifty-seventh session, UN doc. E/CN.4/2001/14, 20 December 2000, at para. 81.

<sup>336</sup> A. Powers, above at fn. 55, at pp. 303–304, notes that US courts have traditionally held that there is a presumption that bail will not be granted in an extradition case, although in some recent cases, courts have paid closer attention to the individual circumstances and the evidence submitted by the Government. A presumption against bail also exists under Australian extradition legislation. See Parliament of the Commonwealth of Australia, above at fn. 2, at paras. 4.33–4.47. See also G. Gilbert, above at fn. 2, at p. 72.

a recognised refugee and emanates from the country of origin<sup>337</sup>. In the United Kingdom, it would be considered an inappropriate use of the Home Secretary's discretion if an authority to proceed with extradition was issued despite the existence of an obstacle, such as, for example, the fact that the person concerned had already secured refugee status with respect to the requesting country<sup>338</sup>. In Switzerland, the person whose extradition is sought may present evidence to show that he or she was not present when the offence was committed, and in clear cases, the Federal police authorities will refuse the extradition request<sup>339</sup>.

c. Judicial extradition proceedings

184. In many countries, the judicial stage of the extradition process provides the individual concerned with an opportunity to oppose extradition on the basis of a refusal ground applicable under the relevant treaty, or because it would be contrary to a bar to extradition under national and/or international law.

185. In Austria, for example, the *Verfassungsgerichtshof* (Constitutional Court) recently made it clear that the court responsible for determining the admissibility of an extradition request must do so in consideration of all individual rights afforded to the person concerned under the law and the Federal Constitution, which includes individual rights stemming from international human rights instruments<sup>340</sup>. The *Verfassungsgerichtshof* has also held that the extradition court must examine *ex officio* whether there would be a risk of persecution upon surrender<sup>341</sup>. In Germany, too, the judicial authorities are under a constitutional obligation to consider all the circumstances of the case, including compliance of extradition with general rules of public international law, which are binding for Germany pursuant to Article 25 of the Constitution, and with inalienable constitutional principles of the German public order<sup>342</sup>. In the Czech Republic, the Constitutional Court has made it clear that the obligations of the Czech Republic resulting from human rights treaties – in the case in question, UNCAT and the ICCPR – take precedence over international obligations such as, in the particular case at hand, the European Convention on Extradition<sup>343</sup>.

186. The possibility for the individual concerned to raise certain objections to his or her extradition in the courts may, however, be limited. In Germany, for example, the *Oberlandesgericht* may hear the fugitive, although an oral hearing is not mandatory<sup>344</sup>. In practice, an oral hearing is exceptional, even if the person concerned claims that they will be persecuted in the requesting country<sup>345</sup>.

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<sup>337</sup> Argentina (s. 20 of the Law No. 24.767 of 1997 on International Cooperation in Criminal Matters); Paraguay (s. 7 of the Law No. 1938 of 2002 on Refugees).

<sup>338</sup> Section 7(4) of the Extradition Act 1989 provides that “[o]n receipt of [an extradition] request [under Part I of the Act] the Home Secretary may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act”. See I. Stanbrook and C. Stanbrook, above at fn. 138, at p. 173.

<sup>339</sup> Section 53 of the Federal Law on International Legal Assistance in Criminal Matters.

<sup>340</sup> *Verfassungsgerichtshof*, decision G151/02 of 12 December 2002.

<sup>341</sup> See K. Schwaighofer, *Auslieferung und Internationales Strafrecht*, Manz Verlag, Wien (1988), at p. 116.

<sup>342</sup> *Bundesverfassungsgericht*, decision of 9 November 2000, 2 BvR 1560/00.

<sup>343</sup> Judgment of the Constitutional Court, No. I. ÚS 752/02 of 15 April 2003.

<sup>344</sup> Section 30(3) of the Law on International Legal Assistance in Criminal Matters.

<sup>345</sup> O. Lagodny, above at fn. 296, at p. 709.

187. Even if the law prescribes a hearing before an extradition judge, its effectiveness may be limited due to restrictions concerning the issues which the courts may consider. In a number of countries, the judicial authorities' examination of whether extradition is lawful does not include certain refusal grounds or bars to extradition. Thus, for example, in Slovenia, refusal of extradition because the wanted person enjoys the right to asylum, or because extradition is sought for a political or military offence are within the sole competence of the Minister of Justice<sup>346</sup>. In Zambia, only the President may determine whether an offence is considered to be political<sup>347</sup>. In the Netherlands, the courts have no authority to decide on questions such as the discrimination clause<sup>348</sup>, humanitarian considerations<sup>349</sup>, or the reliability of assurances concerning the death penalty<sup>350</sup>; in these cases, as well as with respect to all policy questions, the courts may only issue non-binding opinions<sup>351</sup>.

188. Extradition courts in the United States of America and other common law countries usually refrain from considering possible obstacles to extradition related to the quality of criminal justice in the requesting State, its human rights situation or the treatment a person is likely to be subjected to, if extradited<sup>352</sup>. Objections to extradition based on such grounds may only be raised with the Secretary of State or relevant minister at the final executive stage. The purpose of the committal hearing before a US magistrate or judge is to determine whether the crime is extraditable, and whether there is probable cause to sustain the charge<sup>353</sup>.

189. Similarly, under the jurisprudence of the Canadian Supreme Court, the role of the extradition judge in Canada is limited to the determination of whether or not the evidence is sufficient to justify committing the fugitive for surrender<sup>354</sup>. Extradition objections related to the possibility of an unfair trial or the treatment awaiting a fugitive in the requesting State, if surrendered, are not primarily the concern of the extradition judge. The Supreme Court is of the view that such concerns are "for the most part premature at the committal stage" and should await consideration by the Minister and by the courts upon judicial review of the latter's executive decision<sup>355</sup>.

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<sup>346</sup> Section 530(2) of the Code of Criminal Procedure.

<sup>347</sup> Section 31 of the Extradition Act 1968.

<sup>348</sup> Section 10(1) of the Extradition Act 1967. See also the decision of the Netherlands Council of State in *Folkerts v. State Secretary of Justice*, 26 October 1978, 74 *International Law Reports* 284.

<sup>349</sup> Section 10(2) of the Extradition Act 1967.

<sup>350</sup> Section 8 of the Extradition Act 1967.

<sup>351</sup> With respect to human rights issues, the courts may take a decision concerning past violations, while the possibility of a threat of future human rights abuses to the person concerned is for the Minister of Justice to decide, with the courts' role restricted to giving an opinion. The Supreme Court has held, however, that this rule does not apply where the fugitive may be subjected to a violation of his or her right to a fair trial. *Supreme Court*, 29 May 1990, NJ 1991, 467; 16 December 1997, NJ 1998, 388, cited in B. Swart, "The Netherlands", above at fn. 186, at p. 463.

<sup>352</sup> On the application of the rule of non-inquiry in the United States of America and other common law countries, see above at paras. 94–97.

<sup>353</sup> *Cornejo Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000). A crime is extraditable if it is covered by the provisions of the relevant treaty; if the double criminality requirement applies; and if it does not come within the political offence exemption.

<sup>354</sup> See, for example, *United States of America v. Dynar*, [1997] 2. SCR 462; *United States of America v. Kwok*, [2001] 1 SCR 532, both with further references.

<sup>355</sup> *United States of America v. Cobb*, [2001] 1 SCR 587, at [42].

190. In the United Kingdom, the magistrate at the committal hearing has no authority to refuse committal on the grounds of unfairness, oppression, breach of natural justice or abuse of process<sup>356</sup>. These and other refusal grounds as provided for under the Extradition Act 1989, including the political offence exemption and the discrimination clause, may, however, be raised with the High Court on appeal from the order of committal. This will be dealt with below at para. 197.

191. The question of whether the person sought has actually committed the crimes imputed to him or her is not usually assessed during judicial extradition proceedings in the requested State, although such an examination by the extradition courts may be permitted, if this is justified on account of the special circumstances of the case<sup>357</sup>. In some countries, however, the extradition courts are barred from admitting evidence whereby the person sought wishes to show his or her innocence. This is the case, for example, in Australia, where s. 19(5) of the Extradition Act 1989 excludes evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which his or her surrender has been requested, which in turn makes it difficult for the person concerned to demonstrate the existence of other extradition objections, most notably, the discrimination clause<sup>358</sup>.

d. Final executive stage

192. Where applicable legislation provides for a final executive determination on an extradition request, the relevant minister must refuse extradition at this stage, if a mandatory refusal ground applies. In most countries, a decision by the extradition judge that the extradition request does not meet the requirements under the applicable treaty or legislation is binding on the executive. If the minister is not bound to refuse, by law or on the basis of a judicial determination, he or she may nevertheless decide not to issue an order of surrender, for example on the basis of a discretionary refusal ground, or because he or she deems it politically or otherwise inexpedient to extradite, or because other circumstances stand in the way of the surrender of the person concerned.

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<sup>356</sup> *Sinclair v. Director of Public Prosecutions* [1991] 2 All ER 366 (H.L.), cited in G. Gilbert, above at fn. 2, at p. 83.

<sup>357</sup> This is the case, for example, in Germany (see *Bundesverfassungsgericht*, decision of 9 November 2000, 2 BvR 1560/00, and the exception provided for in s. 10(2) of the Law on International Legal Assistance in Criminal Matters) or Switzerland (see *Bundesgericht*, decision of 17 December 1975, BGE 101 Ia 610, and the exception to this principle in s. 53 of the Federal Law on International Legal Assistance in Criminal Matters). A number of States parties to the European Convention on Extradition (1957) have reserved the right to require the requesting State to produce evidence establishing a sufficient presumption that the offence was committed by the person requested, and to refuse to extradite if the evidence is deemed insufficient (Andorra, Bulgaria, Denmark, Iceland and Norway). Sweden and the former Yugoslav Republic of Macedonia have reserved their right to refuse extradition under the European Convention on Extradition if the sentence or warrant submitted by the requesting State party is manifestly unfounded. See also above at fn. 79.

<sup>358</sup> See Parliament of the Commonwealth of Australia, above at fn. 2, at paras. 4.18–4.26. It has been noted that this provision seriously impairs the position of the individual in the extradition process, as it means that the magistrate considers the case on the assumption that the person committed the offence. See D. Chaikin, above at fn. 83, at p. 10. See also below at para. 331.

193. Where the courts are precluded from admitting certain types of evidence or considering particular grounds on which the person sought may oppose his or her extradition, the individual concerned may raise these matters with the relevant minister, once extradition has been declared legal by the court. In a number of countries, the law expressly provides that the minister must consider issues related to the treatment upon surrender.

194. In the United Kingdom, the House of Lords has held that there is no onus on the individual to show more than the balance of probability with respect to the likelihood of persecutory or discriminatory treatment in the requesting State; it is to be judged by the Home Secretary as a matter of common sense and common humanity, by reference to the gravity of the consequences of the decision to surrender or not to surrender<sup>359</sup>. In Austria, the Minister of Justice has a duty to assess whether the refusal ground of a risk of persecution or prejudice, or any bars to extradition under international law, and in particular, refugee law, are applicable<sup>360</sup>. In Australia, the Attorney General as the executive responsible may not order surrender if there is an extradition objection<sup>361</sup>, or if the person concerned will be subjected to torture, or if he or she may be sentenced to death or executed<sup>362</sup>. In Canada, similar provisions apply to the final decision by the Minister of Justice<sup>363</sup>.

### 3. *Avenues for appeal and/or review of decisions in the extradition process*

#### a. Extradition procedures involving judicial proceedings followed by a final administrative determination

195. National extradition legislation usually provides for appeal and/or review with respect to decisions taken at various levels of the extradition procedure. Where both the administrative and the judicial authorities are involved in the extradition process, the individual concerned usually has a right to appeal, or seek review of, the decision of the first-instance judicial authority, and sometimes also the final determination by the relevant minister. Avenues of appeal and/or review may be restricted under the relevant law, or as a matter of practice.

#### i. Availability of appeal and/or review: some examples

196. In Canada, the appellate courts have jurisdiction to hear appeals against an order of committal under s. 49 of the Extradition Act 1999, and applications for judicial review of the Minister's order to surrender pursuant to s. 57 of the same Act. The Supreme Court has held that the Court of Appeal has jurisdiction to hear issues arising under the Canadian

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<sup>359</sup> *R. v. Governor of Brixton Prison, ex p. Fernandez* [1971] 1 WLR 987 (HL), cited in A. Jones, above at fn. 80, at pp. 110–111.

<sup>360</sup> Section 19(3) and 34 of the Law on Extradition and Legal Assistance. This was confirmed by the *Verfassungsgerichtshof* in its decision G151/02 of 12 December 2002.

<sup>361</sup> “Extradition objection”, as defined in s. 7 of the Extradition Act 1988, includes the political offence exemption, the discrimination clause, and the refusal grounds of military offences and *ne bis in idem*.

<sup>362</sup> Section 22(3) of the Extradition Act 1988.

<sup>363</sup> Sections 44–46 of the Extradition Act 1999.

Charter of Rights and Freedoms as well as an inherent jurisdiction to control its own process, including through the application of the common law doctrine of habeas corpus<sup>364</sup>.

197. In the United Kingdom, judicial review provides for broad control of both the committal decision by the extradition magistrate and the final decision to surrender by the Home Secretary. On habeas corpus from the magistrate's order of committal, s. 11(3) of the Extradition Act 1989 gives the High Court power to refuse surrender if it would be wrong, unjust or oppressive<sup>365</sup>. At the final executive stage, the Home Secretary must, on the basis of s. 12(2) of the Act, consider issues related to fair trial and appropriate punishment in the requesting State, if "raised in a responsible manner, by reference to evidence and supported by reasoned argument. The greater the perceived risk to life or liberty, the more important it will be to give them detailed and careful scrutiny"<sup>366</sup>. The House of Lords made it clear that this requires an examination of the risks to the person concerned as an individual<sup>367</sup>. The Home Secretary's decision is reviewable if it is tainted with illegality, irrationality or procedural impropriety. Fresh evidence is admissible at all stages<sup>368</sup>. Review of the Home Secretary's decision has been described as the "principal safeguard against improper or unjust extradition"<sup>369</sup>.

198. In the former Yugoslav Republic of Macedonia applicable legislation provides for automatic judicial review of a determination whereby the extradition court rejects a request for extradition on the grounds that it does not meet legal requirements by the Supreme Court, which may confirm, cancel or alter the decision following a hearing of the Public Prosecutor<sup>370</sup>. A similar system is in place in Bosnia and Herzegovina, where the Appellate Division Panel of the Court examines rejection decisions by the a three-member panel of the Criminal Division of the Court<sup>371</sup>.

ii. Limitations on appeal and/or review: some examples

199. In a number of civil law countries, the law does not provide for an appeal against the judicial determination that extradition is admissible. This is the case, for example, in Germany, where there is no appeal against the decision of the *Oberlandesgericht*, although the person concerned may lodge a constitutional complaint with the *Bundesverfassungsgericht*. Whether this is also possible with respect to the final executive order to extradite – which cannot be appealed under the Law on International Legal

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<sup>364</sup> *United States of America v. Shulman*, [2001] 1 SCR 616, at paras [31]–[32]; see also *United States of America v. Kwok*, [2001] 1 SCR 532, at paras [27]–[58].

<sup>365</sup> *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42, cited in A. Jones, above at fn. 80, at pp. 164–167.

<sup>366</sup> *R. v. Secretary of State for the Home Department, ex p. Launder* [1997] 1 WLR 839. The Home Secretary made use of his power to refuse extradition on the grounds that it would be "oppressive" when he decided on 2 March 2000 not to order the return to Spain of Senator Pinochet. The latter had been committed by the extradition magistrate on 8 October 1999 on all charges. A habeas corpus application made on his behalf on 22 October 1999 was still pending at the time of the Home Secretary's decision not to extradite. See also above at fn. 211.

<sup>367</sup> *Ibid.*

<sup>368</sup> *Ibid.*

<sup>369</sup> A. Jones, above at fn. 80, at pp. 431–432, who also notes that, "[i]ncreasingly, substantial challenges are made to the decisions of the Secretary of State by way of judicial review, a practice unknown in UK practice fifteen years ago".

<sup>370</sup> Section 515(1) of the Criminal Procedure Code of the former Yugoslav Republic of Macedonia.

<sup>371</sup> Section 422(1) of the Criminal Procedure Code of Bosnia and Herzegovina.

Assistance on Criminal Matters – is debated<sup>372</sup>. In Austria, the *Verfassungsgerichtshof* recently repealed part of s. 33(5) of the Law on Extradition and Mutual Legal Assistance, which provided that there was no right of appeal against the decision on extradition made by the *Oberlandesgericht* (Court of Appeals). The lack of availability of a legal remedy was found to be at variance with the constitutional principle of legality (*Rechtsstaatsprinzip*)<sup>373</sup>.

200. In Australia, appeals are subject to significant restrictions. Under ss. 19(5) and 21(6)(d) of the Extradition Act 1988, the person concerned is not permitted to adduce evidence to show his or her innocence either at committal or on appeal. The shortcomings of this limitation were addressed by the Federal Court of Australia in a case which raised issues of possible abuse of process by the requesting State. The Court noted that, “[i]f it should ultimately prove to be the case that [the requesting Government] had deliberately failed to disclose material to the magistrate which ought to have been disclosed, and thereby misled both the magistrate and the learned primary judge on review, that would be a most serious matter”, but held that “[i]t would, however, be a matter which, under s. 22 of the Act, may be taken into account by the Attorney-General in deciding whether to exercise his discretion to permit [the appellants] to be surrendered.” The decision of the Attorney-General may be subject to judicial review under s. 39B of the Judiciary Act 1903<sup>374</sup>.

201. Judicial review in the United States of America is even more limited. The individual certified as extraditable by the committal magistrate or judge cannot appeal this determination directly, although collateral review is available through a petition of habeas corpus brought against the extradition order issued by the Secretary of State. Such review is limited to questions of jurisdiction, the validity of the applicable treaty, its relevance to the crime imputed to the person concerned, the probable cause standard and the application of the political offence exemption<sup>375</sup>.

202. In a number of countries, final executive decisions on extradition are not subject to appeal or review. Where this is combined with regulations which preclude the judicial authorities from considering certain refusal grounds and/or human rights bars to extradition, this effectively means unrestricted discretion for the relevant minister. This is the case, for example, in the United States of America, where the final determination on extradition by the Secretary of State is not subject to appeal or review. The only exception is the possibility of bringing a petition for habeas corpus on the grounds that the Secretary of State’s order to extradite is in breach of Article 3 of UNCAT<sup>376</sup>.

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<sup>372</sup> See T. Weigend, “Grundsätze und Probleme des deutschen Auslieferungsrechts”, *Juristische Schulung* (1990), at p. 110.

<sup>373</sup> *Verfassungsgerichtshof*, decision G151/02 of 12 December 2002. However, the individual who had contested the constitutionality of this provision, had already been extradited to the United States in early June 2003, despite an order to stay extradition issued by the *Verwaltungsgerichtshof* and a request for interim measures addressed to Austria by the Human Rights Committee. See also above at para. 150 and below at paras. 207–208.

<sup>374</sup> *Cabal v. United Mexican States* [2001] FCA 427 (18 April 2001).

<sup>375</sup> *Cornejo Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000), with references to earlier jurisprudence.

<sup>376</sup> *Cornejo Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000). See also above at paras. 95 and 133. In its earlier decision *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir. 1997), the Court of Appeals for the Ninth Circuit had noted that the Secretary’s final decision concerning whether to extradite was “a matter exclusively within the discretion of the executive branch and not subject to judicial review”.

203. In the Netherlands, too, the executive has unfettered discretion with regard to considerations of possible persecution or prejudice as a consequence of extradition, which are to be considered by the State Secretary of Justice, whose decision is not subject to appeal<sup>377</sup>. The person concerned may, however, seek an injunction from a civil court ordering the Government not to surrender him or her<sup>378</sup>.

204. The right to appeal or review of decisions taken during the extradition process may also be limited or non-existent as a matter of State practice. In Austria, for example, the final determination to extradite by the Minister of Justice is issued not in the form of an administrative order (*Bescheid*), as required by law, but communicated informally, with the result that the individual concerned cannot bring an appeal before the supreme administrative or constitutional jurisdictions<sup>379</sup>.

b. Other extradition procedures

205. In countries with different extradition procedures in place, the availability of appeal and/or review possibilities also varies. Thus, for example, in Switzerland, s. 55 in combination with s. 25 of the Law on International Legal Assistance in Criminal Matters provides for an appeal to the *Bundesgericht* from the final decision of the Federal Police Authority. The *Bundesgericht* exercises full judicial control over decisions to extradite taken by the administrative authorities. This includes obligations under international human rights and refugee law.

206. In France, the *Chambre d'Accusation* is required to give a legal opinion (*avis*) prior to the final decision of the executive, taken by the Prime Minister. This opinion is subject to review by the *Cour de Cassation* (Court of Cassation), while the final extradition determination, which is made by the Prime Minister, may be appealed to the *Conseil d'Etat*<sup>380</sup>. In its decision *Lujambio Galdeano* of 26 September 1984, the *Conseil d'Etat* clarified the respective responsibility of the two supreme jurisdictions in extradition proceedings: while the *Cour de Cassation* carries out judicial control of the procedure, the *Conseil d'Etat* examines the legality of the extradition decision in all other respects<sup>381</sup>.

c. Suspensive effect of appeals – legal measures to stay extradition

207. The right to appeal or review, even if provided for under applicable law, is sometimes rendered ineffectual if the available remedies are not endowed with suspensive effect, permitting the individual concerned to remain in the requested State during their appeal. This is the case, for example, in France, where the appeal against the Prime Minister's decision to extradite to the *Conseil d'Etat* does not have suspensive effect. It may also be a result of State practice, if the authorities proceed with extradition regardless of a judicial staying order. In a recent case of this kind in Austria, a US citizen was extradited despite the fact that the *Verwaltungsgerichtshof* had granted a request for suspensive effect

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<sup>377</sup> See also above at paras. 159 and 187.

<sup>378</sup> In practice, such an injunction is often sought. One example of a successful civil recourse against a decision to extradite is the decision of the *Hague District Court*, 28 October 1997, RV 1997, 99, cited in B. Swart, "The Netherlands", above at fn. 186, at p. 495.

<sup>379</sup> See the decision of the *Verfassungsgerichtshof* G151/02 of 12 December 2002.

<sup>380</sup> See O. Lagodny, above at fn. 296, at pp. 743–745.

<sup>381</sup> See E. Rolin, above at fn. 194, at p. 19.



with respect to a complaint brought before it against a decision to extradite made by the Minister of Justice<sup>382</sup>.

208. The importance of the availability of remedies which have suspensive effect on extradition is evident. In exceptional cases, a decision by a court in the requested State after surrender may still have an effect on the situation of the individual concerned<sup>383</sup>, but for the most part, the person concerned will not be able to derive any benefit from a decision confirming a risk of human rights violations issued after he or she has already been surrendered.

209. In a recent judgment, the European Court of Human Rights held that failure by the requested State to observe interim measures, issued by the Court pursuant to Rule 39 of its Regulations and ordering it to stay extradition, reduced to nothing the right to a remedy of the persons concerned with respect to their claim of a violation of Article 3 of the ECHR, and constituted a breach of Article 34 of the ECHR. Under this provision, States Parties to the ECHR undertake not to hinder in any way the effective exercise of the right of individuals claiming to be a victim of a violation of their rights under the ECHR or protocols thereto by a State Party to the Convention<sup>384</sup>. The European Court of Justice has also held that extradition should be postponed while the legality of arrest and detention was reviewed<sup>385</sup>.

210. A similar view was expressed by the Committee Against Torture, which stated that “[c]ompliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee”<sup>386</sup>. In a recent case, the Human Rights Committee found that Austria had breached its obligations under the Optional Protocol to the ICCPR by extraditing a person with respect to whom the Committee had issued a request for interim measures, thereby precluding it from addressing the question of whether extradition would cause irreparable

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<sup>382</sup> *Verwaltungsgerichtshof*, decision 2002/06/0073 of 13 June 2002. The *Verwaltungsgerichtshof* had granted suspensive effect on 24 May 2002, but extradition was effected on 9 June 2003. At the time of surrender, constitutional complaints proceedings were still pending before the *Verfassungsgerichtshof*. On 8 May 2003, the Human Rights Committee found that Austria had acted in violation of Article 14(1) and 2(3) of the ICCPR. See *Weiss v. Austria*, above at fn. 283. See also above at paras. 150 and 199 and below at para. 210.

<sup>383</sup> See, for example, the case of a Tanzanian national, whose deportation to the United States of America from South Africa for the purpose of trial for the attacks against US embassies in Kenya and Tanzania in 1999 was found to be unlawful by the Constitutional Court of South Africa, which held that he could only have been lawfully handed over to the US authorities after extradition proceedings, and on the basis of assurances by the United States that he would not be subjected to capital punishment (*Mohamed and another v. President of the Republic of South Africa and others*, CCT 17/01, 28 May 2001). The Constitutional Court ordered the judgment to be transmitted to the court in New York, where Mr. Mohamed was already on trial, and where he was subsequently sentenced to life imprisonment.

<sup>384</sup> *Mamatkulov and Abdurasulovic v. Turkey*, above at fn. 242. This judgment marked a departure from earlier jurisprudence which had not linked Article 34 of the ECHR with Rule 39 of the Regulations. See UNHCR, “Fact Sheet on Rule 39 of the Rules of the European Court of Human Rights (interim measures), UNHCR, *Manual on Refugee Protection and the European Convention on Human Rights*, April 2003, part 2.5.

<sup>385</sup> See above at para. 181.

<sup>386</sup> *Chipana v. Venezuela*, above at fn. 238, at para. 8.

harm<sup>387</sup>. The Human Rights Committee held that Austria was under an obligation to make such representations to the US authorities as may be required to ensure that the extradited person does not suffer any consequential breaches of his rights under the ICCPR, which would flow from his extradition in breach of Austria's obligations under the Covenant and the Optional Protocol<sup>388</sup>.

## V. EXTRADITION AND ASYLUM

211. Extradition and asylum overlap and intersect in various ways, if the person whose extradition is sought is a refugee or asylum-seeker, or if an asylum application is filed after the wanted person learns of a request for his or her extradition.

212. International refugee protection and criminal law enforcement are not mutually exclusive. International refugee law does not as such stand in the way of criminal prosecution or the enforcement of a sentence, nor does it generally exempt refugees and asylum-seekers from extradition. Yet in determining whether a refugee or asylum-seeker may be lawfully extradited, the requested State is bound to take into consideration the legal safeguards in place for those who flee persecution rather than prosecution, and who are, therefore, in need of international refugee protection. In particular, this means that any decision on an extradition request concerning a refugee or asylum-seeker must be in compliance with the principle of *non-refoulement*, as guaranteed under Article 33 of the 1951 Convention and customary international law.

213. Conversely, findings in the extradition process may have a bearing on the eligibility for international refugee protection of an asylum-seeker, or the status of a refugee who has already been recognised. An extradition request concerning an asylum-seeker may trigger exclusion considerations under Article 1F of the 1951 Convention. Information which comes to light during the extradition process may also set in motion proceedings leading to the revocation of the status of a recognised refugee on the basis of Article 1F (a) or (c) of the 1951 Convention. Such information may also cast doubt on the correctness of the initial refugee recognition, which in turn may result in the cancellation of refugee status.

214. Under certain circumstances, Article 32 of the 1951 Convention permits the expulsion of a refugee to a country other than the country in which their life or freedom would be threatened. As noted above, however, expulsion is not the appropriate procedure where a State intends to hand over a person to another State for the purposes of criminal prosecution or the enforcement of a sentence<sup>389</sup>.

215. The following sections examine the rules and standards applicable to extradition when those affected are refugees or asylum-seekers.

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<sup>387</sup> *Weiss v. Austria*, above at fn. 283, at para. 10.1. See also above at paras. 150 and 199.

<sup>388</sup> *Ibid.*, at para. 11.1. See also the Human Rights Committee's decision in *Judge v. Canada*, above at fn. 267.

<sup>389</sup> See above at paras. 155–156 and 166–169.

## A. The Principle of *Non-refoulement* and its Relevance for Extradition

### 1. *Non-refoulement* under the 1951 Convention and customary international law

216. The principle of *non-refoulement* – often referred to as the cornerstone of international refugee protection – is set out in Article 33(1) of the 1951 Convention as follows:

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

217. The principle of *non-refoulement* applies to any person who is a refugee under the terms of the 1951 Convention, that is, everyone who meets the inclusion criteria of Article 1A(2) of the 1951 Convention<sup>390</sup> and does not come within the scope of one of its provisions determining those who are either not in need<sup>391</sup> or not deserving<sup>392</sup> of international protection. It protects refugees whose status is recognised by a State under the 1951 Convention as well as those who are determined to be “mandate refugees” by UNHCR on the basis of its 1950 Statute<sup>393</sup>. Given the declaratory nature of refugee status recognition, the principle of *non-refoulement* also applies to those who meet the criteria of Article 1 of the 1951 Convention but have not had their status formally recognised, including, in particular, asylum-seekers<sup>394</sup>.

218. The prohibition of *refoulement* under the 1951 Convention is binding on all States which are parties to the 1951 Convention and/or the 1967 Protocol, and it applies to the conduct of their officials or those acting on their behalf, wherever it occurs<sup>395</sup>. As a recognised principle of customary international law, the prohibition of *refoulement* of

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<sup>390</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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it”.

<sup>391</sup> These are Article 1D (which applies to persons already receiving protection from organs or agencies of the United Nations other than UNHCR) and Article 1E (which applies to those recognised by the competent authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality).

<sup>392</sup> These are the so-called exclusion clauses of Article 1F, which apply to those deemed unworthy of refugee protection on account of having committed certain serious crimes or acts. On the linkages between extradition and exclusion under Article 1F of the 1951 Convention, see below at paras. 315–339.

<sup>393</sup> The Statute of UNHCR is annexed to Resolution 428 (V), adopted by the General Assembly on 14 December 1950. The relevant provisions for the recognition of mandate refugee status are paragraph 6 (inclusion criteria) and paragraphs 7(b–d) (exclusion).

<sup>394</sup> See E. Lauterpacht and D. Bethlehem, above at fn. 220, at paras. 87–99. This Opinion, which provides an in-depth examination of the scope and content of the principle of *non-refoulement* in international refugee law and customary international law, is also available at: <http://www.unhcr.org> See also UNHCR, *Handbook on Procedures and Criteria for Determination of Refugee Status*, Geneva (1992), at para. 28.

<sup>395</sup> See E. Lauterpacht and D. Bethlehem, above at fn. 220, at paras. 57–67.

refugees and asylum-seekers is also binding on States which have not yet become parties to these instruments<sup>396</sup>.

219. The only exceptions to the principle of *non-refoulement* are those provided for in Article 33(2) of the 1951 Convention:

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

220. Under this provision, a State may be permitted to expel or return a refugee or asylum-seeker to a country where they face persecution on grounds of overriding reasons of national security and public safety. Any exceptions to the principle must be construed restrictively and with caution. They are also subject to strict compliance with general principles of law, including due process of law, proportionality and necessity<sup>397</sup>.

221. Under no circumstances, however, is it permitted to send a person to a danger of torture or cruel, inhuman or degrading treatment or punishment. The prohibition of measures which would expose a person to a risk of such treatment is a peremptory norm of international law, or *jus cogens*. It imposes an absolute ban on any form of surrender<sup>398</sup>.

222. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) also provides for protection against *refoulement*. Under Article II(3) of the OAU Convention, no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened on the grounds of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order. The OAU Convention does not permit any exceptions to the prohibition of *refoulement*.

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<sup>396</sup> Ibid., at paras. 193–216, for a thorough analysis of the development of *non-refoulement* as a principle of customary international law. See also the Declaration of States Parties to the 1951 Convention adopted at the Ministerial Meeting on 12–13 December 2001, which acknowledged “the continuing relevance and resilience of this international regime of rights and principles comprising the 1951 Convention and 1967 Protocol, other human rights and regional refugee protection instruments, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.” (at preambular paragraph 4). See also the decision by the Swiss *Bundesgericht* of 29 May 1985, BGE 111 Ib 68, at p. 70.

<sup>397</sup> See E. Lauterpacht and D. Bethlehem, above at fn. 220, at paras. 145–192. The criteria for the application of Article 33(2) of the 1951 Convention in the context of extradition will be returned to below at paras. 233–239.

<sup>398</sup> See “Factum of the Intervenor, UNHCR, *Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada*, SCC No. 27790”, in 19:1 *International Journal of Refugee Law* (2002), pp. 141–157; see also above at fn. 220.

## 2. *Applicability of non-refoulement to extradition*

223. Though not explicitly referred to in Article 33(1) of the 1951 Convention, extradition is plainly covered by the phrase “expel or return in any manner whatsoever”<sup>399</sup>. Thus, the principle of *non-refoulement* fully applies to extradition. This has been recognised and reaffirmed by States on many different occasions.

224. In its Conclusion No. 17 (XXXI) of 1980 on “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*;

(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.

225. Article 6 of the Inter-American Convention on Extradition (1981) provides that “[n]o provision of this Convention may be interpreted as a limitation on the right of asylum when its exercise is appropriate”. Pursuant to the Joint Declaration on the right of asylum annexed to the Convention relating to Extradition between the Member States of the European Union (1996), the Convention is without prejudice either to the right of asylum as recognised under the Member States’ respective constitutions or to the application of the 1951 Convention. As noted above, discrimination clauses modelled on Article 33(1) of the 1951 Convention have been incorporated into a number of extradition conventions, international instruments concerning the suppression, prevention and punishment of acts of terrorism and other types of transnational crime, bilateral extradition agreements as well as national extradition laws<sup>400</sup>.

226. Many States have made express provision in national legislation for the non-extradition of refugees<sup>401</sup>.

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<sup>399</sup> See E. Lauterpacht and D. Bethlehem, above at fn. 220, at paras. 71–75.

<sup>400</sup> See above at paras. 88–93.

<sup>401</sup> For example, Algeria (Article 69 of the Constitution – no extradition of a political refugee who benefits from the right to asylum); Argentina (s. 20 of the Law No. 24.767 of 1997 on International Cooperation in Criminal Matters – an extradition request concerning a refugee is returned to the requesting State without further proceedings); Austria (s. 19(3) of the Law on Extradition and Mutual Legal Assistance – no extradition to fear of persecution or prejudice on account of origins, race, religion, membership of a particular ethnic or social group, or political opinion (“extradition asylum”); s. 34 of the same Law – Minister of Justice must take into account obligations under international law, especially those related to asylum); Belgium (s. 56(2) of the Law of 15 December 1980 on the Access to the Territory, Stay, Residence and Removal of Aliens – in no case may a recognised refugee be returned to the country which he or she fled because his or her life or freedom was threatened there); Belize (s. 14(1) of the Refugees Act 1991 – no extradition of a refugee if as a result such person may be subjected to persecution on account of race, religion, nationality, membership of a particular social group or political opinion, or their life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of that country); Bosnia and Herzegovina (s.

227. Jurisprudence in a number of countries also confirmed that the rule of *non-refoulement* applies to extradition. In France, for example, the *Conseil d'Etat* has held that general principles of law applicable with respect to refugees constitute an impediment to the surrender, in any manner whatsoever, of a refugee to the authorities of the country of origin

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415(1)(b) of the Criminal Procedure Code 2003 – no extradition of a person who has been granted asylum or is in the process of seeking asylum); Brazil (s. 33 of the Law No. 9.474 of 1979 on Mechanisms for the Implementation of the 1951 Convention – recognition of refugee status impedes the processing of any extradition request based on the facts which constitute the grounds for the granting of asylum); China (s. 8(c) of the Law on Extradition 2002 – no extradition of refugees); former Yugoslav Republic of Macedonia (s. 518(2) of the Code of Criminal Procedure – no extradition of a foreigner who enjoys right to asylum); Ghana (s. 1(1) of the Refugee Law 1992 – no extradition if as a result a refugee may be subjected to persecution on account of race, religion, nationality, membership of a particular social group or political opinion, or their life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of that country); Hungary (s. 14(1) of the Law on International Legal Assistance in Criminal Matters and s. 2(g) of the Asylum Act of 1997 – no extradition of refugees except where extradition was requested by a third country identified as safe); Latvia (s. 22(2) of the Law on Asylum Seekers and Refugees of 1998 – no extradition of refugees to a country where there is a threat of persecution); Liberia (s. 13(1) of the Refugee Act 1993 – no extradition if as a result a refugee may be subjected to persecution on account of race, religion, nationality, membership of a particular social group or political opinion, or their life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of that country); Namibia (s. 26 of the Namibia Refugee (Recognition and Control) Act 1999 – no extradition if as a result a refugee may be subjected to persecution on account of race, religion, nationality, membership of particular social group or political opinion, or their life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of that country); Nigeria (s. 1(1) of the National Commission for Refugees, etc. Decree 1989 – no extradition if as a result a refugee may be subjected to persecution on account of race, religion, nationality, membership of particular social group or political opinion, or their life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of that country); Paraguay (s. 7 of the Law No. 1938 of 2002 on Refugees – an extradition request concerning a refugee is returned to the requesting State without further proceedings); Peru (s. 5 of the Refugee Law 2002 – no extradition of a refugee to a country where their life, physical integrity or freedom would be in danger); Romania (s. 5(1)(b) of Law No. 296/2001 on Extradition – no extradition of persons who have been granted the right of asylum); Slovak Republic (s. 394(b) of the Code on Criminal Procedure – no extradition of a person who applied in Slovak Republic for refugee status or who was granted such a status); Slovenia (s. 530(2)(a) of the Code of Criminal Procedure and s. 6 of the Law on Asylum 1999 – no extradition of foreigners granted asylum in Slovenia); South Africa (s. 2 of the Refugee Act 1998 – no extradition if as a result a refugee may be subjected to persecution on account of race, religion, nationality, membership of particular social group or political opinion, or their life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of that country); Spain (s. 4(8) of Law No. 4/85 on Passive Extradition – no extradition if the person sought has been granted refugee status); Switzerland (Article 25(2) of the Federal Constitution – no extradition of refugees to a country where they will be persecuted; s. 5 of the Federal Law on Asylum – no forcible removal, in any manner whatsoever, to a country where the person's life, physical integrity or liberty is endangered or from where he or she would be refouled); Ukraine (s. 14 of the Law on Refugees 1994 – no extradition of a refugee to the country of persecution).

by the country which recognised refugee status<sup>402</sup>. In Slovenia, the Constitutional Court stated that a decision on granting asylum prevents any forcible removal or return of a person and therefore also extradition<sup>403</sup>.

228. In Switzerland, the *Bundesgericht* held that the extradition of a refugee is prohibited under Article 33 of the 1951 Convention and Article 3(2) of the European Convention on Extradition (1957), referring to the latter as “the concrete expression of the refugee law principle of *non-refoulement* in the context of extradition law”<sup>404</sup>. In another decision, the *Bundesgericht* allowed extradition under the condition that the situation of the person concerned would be monitored by Swiss officials upon surrender, but reserved its implementation until after a decision by the *Asylrekurskommission* (Asylum Appeals Commission) on an appeal against first-instance rejection of his asylum claim<sup>405</sup>. The *Bundesgericht* held that extradition would not be granted if refugee status was recognised on appeal, and that deferral of the implementation of the extradition order was necessary to avoid a conflict between obligations stemming from extradition treaties, on the one hand, and Switzerland’s obligations under the 1951 Convention, on the other<sup>406</sup>.

### 3. *Non-refoulement and extradition of refugees or asylum-seekers*

#### a. The principle of *non-refoulement* as a mandatory bar to extradition

229. The principle of *non-refoulement* under the 1951 Convention and customary international law establishes a mandatory bar to extradition where this would result in the surrender of a refugee or asylum-seeker to a country where their life, liberty or physical integrity would be in danger. It also precludes the requested State from extraditing if, as a

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<sup>402</sup> *Bereciartua-Echarri*, decision of 25 March 1988. This decision overturned previous jurisprudence of the *Cour de Cassation*, which had excluded extradition from the realm of *non-refoulement*, but in doing so had based itself on the legal nature of the measure affecting a refugee, not its consequences. In earlier cases concerning requests for the extradition of asylum-seekers who had, *inter alia*, claimed that their surrender would be in breach of Article 33 of the 1951 Convention, the *Conseil d’Etat* itself decided on the applicants’ refugee status as a preliminary question. Finding that the applicants were not refugees under the terms of the 1951 Convention, the *Conseil d’Etat* held that they could not rely on Article 33. See the decisions *Croissant*, 7 July 1978; *Gabor Winter*, 15 February 1980; *Lujambio Galdeano*, 25 September 1984; *Urizar Murgio*, 14 December 1987.

<sup>403</sup> Decision No. Up-78/00 of 29 June 2000.

<sup>404</sup> *Bundesgericht*, decision of 18 December 1990, 1.A127/1990/tg, case abstract No. *IJRL/0152*, 5:2 *International Journal of Refugee Law* (1993), at pp. 271–273. On the differences in scope between *non-refoulement* under Article 33 of the 1951 Convention and discrimination clauses in extradition law, see below at paras. 249–252.

<sup>405</sup> *Bundesgericht*, decision of 11 September 1996, BGE 122 II 373, at pp. 380–381.

<sup>406</sup> *Ibid.* The *Bundesgericht* held that if the wanted person meets the requirements for the recognition of refugee status, refusal of extradition must be based on Article 3(2) of the European Convention on Extradition (1957), which provides for criteria analogous to those of the 1951 Convention, and which are also retained in Article 3 of the Swiss Federal Law on Asylum. On concerns with respect to the acceptance of conditional extradition in circumstances where the person concerned may be subjected to treatment contrary to Article 3 of the ECHR and Article 33 of the 1951 Convention, respectively, see above at paras. 134–137 and below at paras. 240–241.

consequence, the refugee or asylum-seeker would be exposed to a risk of *refoulement* from the requesting State through re-extradition or any other form of surrender to a third State<sup>407</sup>.

230. The prohibition of *refoulement* of refugees or asylum-seekers is binding on States regardless of whether or not it is explicitly provided for in an extradition treaty or legislation. Article 33 of the 1951 Convention establishes a fundamental humanitarian norm, from which no derogation is permitted<sup>408</sup>. In the view of the Executive Committee, it is “progressively acquiring the character of a peremptory rule of international law”<sup>409</sup>.

231. For States Parties to the 1951 Convention or the 1967 Protocol, the obligation to protect refugees and asylum-seekers from *refoulement* prevails over any duty to extradite which they may have under a bilateral or multilateral extradition treaty with respect to a State requesting extradition. As described at para. 41 above, the precedence of protection against *refoulement* under the 1951 Convention over obligations arising from extradition treaties or conventions is based on States’ obligations under Article 103, in combination with Articles 55(c) and 56 of the UN Charter. The same provisions establish the primacy of the obligation to provide protection against *refoulement* under international human rights treaties over extradition duties between States.

232. States which have not yet become parties to the 1951 Convention and/or 1967 Protocol are bound by the prohibition of *refoulement* under customary international law<sup>410</sup>, in addition to any treaty obligations they may have under international or regional human rights law.

b. Exceptions to the *non-refoulement* bar to extradition – Article 33(2) of the 1951 Convention

233. The only circumstances in which the requested State may extradite a refugee within its jurisdiction to a country where they have a well-founded fear of persecution are those provided for in Article 33(2) of the 1951 Convention<sup>411</sup>. Thus, extradition may be granted if there are reasonable grounds for regarding the person concerned as a danger to the security of the requested country, or if he or she, having been convicted by a final judgment of a

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<sup>407</sup> See, for example, the decision of the Swiss *Asylrekurskommission*, EMARK 2001/4, which overturned a decision by the Federal Office for Refugees to return a Tunisian national to Morocco on the grounds of a risk that he would be extradited by the Moroccan authorities to Tunisia, where he would be at risk of political persecution. See also the decision of the French *Conseil d’Etat*, 10 April 1991, *Kilic*, in which a decision to extradite a recognised refugee to Germany was upheld, among other reasons, because extradition was granted only under the condition that he would not be surrendered to Turkey, in accordance with general principles of extradition law.

<sup>408</sup> This was affirmed, for example, by the Executive Committee in its Conclusion No. 79 (XLVII) 1996 on the International Protection of Refugees, at para. (i).

<sup>409</sup> Conclusion No. 25 (XXXIII) 1982, at para. (b). See also *Section III*, para. 5, of the Cartagena Declaration on Refugees of 1984, which concluded *inter alia* that the principle of *non-refoulement* “is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*”.

<sup>410</sup> See above at para. 218.

<sup>411</sup> In exceptional circumstances, the requested State may also be justified in extraditing a person determined to be a refugee in another State, if he or she manifestly comes within the scope of an exclusion clause of Article 1F of the 1951 Convention. This is referred to below at paras. 264 and 280.



particularly serious crime, constitutes a danger to its community. The application of Article 33(2) does not, however, entail the loss of refugee status.

234. The threshold required for an application of Article 33(2) of the 1951 Convention is high. The first category of exceptions to the principle of *non-refoulement*, whereby a refugee constitutes a “danger to the security” of a country, may apply only if his or her presence poses a very serious danger<sup>412</sup>. The refugee must be a threat to the foundations of the public order or the very existence of that State. This may be the case, for example, if a refugee engages in conduct aimed at overthrowing the government through violent or illegal means, or in political activities which may attract reprisals from other States against the host State, terrorist acts or espionage directed against the latter<sup>413</sup>. Such conduct must constitute a prospective danger for the requested country.

235. Similarly, for the second category under Article 33(2) of the 1951 Convention to be applicable, a refugee must pose a future risk to the community of the requested State on the basis of a final conviction for a particularly serious crime, including, for example, murder, rape, armed robbery or arson<sup>414</sup>. The “danger to the community” must be a very serious danger, and it must threaten the safety and well-being of the population in general<sup>415</sup>. The question of whether the person concerned poses a danger to the community only arises if he or she has been convicted of a particularly serious crime, and if this conviction has been arrived at in a procedure in which fair trial standards and guarantees have been respected<sup>416</sup>.

236. The requested State may extradite a refugee in application of Article 33(2) of the 1951 Convention only if his or her surrender is in keeping with the requirement of proportionality. Under this general principle of international law, extradition is not permitted if the danger to the individual outweighs the risk to the requested State. International law also requires compliance with the principle of necessity. This means that extradition is lawful only if it is an effective way of ensuring the security of the requested State, and if this cannot be achieved by a measure with less serious consequences for the individual concerned, such as, for example, prosecution in the requested State.

237. Any exception to the principle of *non-refoulement* is also subject to strict compliance with the principles of due process of law. The decision to extradite in application of Article 33(2) of the 1951 Convention must be based on sufficient evidence to support the finding of “reasonable grounds” for regarding the person concerned as a national security threat. The mere fact that a refugee’s extradition has been requested does not of itself warrant the loss of protection against *refoulement*. The request may have been

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<sup>412</sup> See “Factum of the Intervenor, UNHCR, *Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada*, SCC No. 27790”, above at fn. 398, at para. 55.

<sup>413</sup> See W. Kälin, above at fn. 140, at p. 131. See also A. Grahl-Madsen, above at fn. 148, who also lists acts endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned.

<sup>414</sup> See P. Weis, *The Refugee Convention, 1951*, UNHCR, Geneva (1995), at p. 246.

<sup>415</sup> E. Lauterpacht and D. Bethlehem, above at fn. 220. The authors note that the “danger to the community” requirement requires an assessment of the “nature and circumstances of the particularly serious crime for which the individual was convicted, when the crime in question was committed, evidence of recidivism or likely recidivism etc.” and contrast the safety and well-being of the population with the national security exception which is focused on the larger interests of the State (see paras. 191–192 of the Opinion).

<sup>416</sup> *Ibid.*, at paras. 186–189.

submitted with the intent to persecute the requested individual for their political opinions or other reasons. Where the requesting State is the country of persecution, any evidence presented by it should be treated with great caution, as the request may be based on fabricated charges or a conviction which of itself is not legitimate<sup>417</sup>.

238. In principle, a final conviction for a particularly serious crime by a requesting State other than the country of persecution may lead to a determination that the person concerned is a danger to the community, but only if it is of such a nature that it justifies the conclusion that the refugee represents a danger to the community of the host State<sup>418</sup>.

239. The exceptions to the principle of *non-refoulement* do not apply where the individual concerned would be exposed to a danger of torture, cruel, inhuman or degrading treatment. In such cases, the prohibition of extradition or any other form of surrender is absolute<sup>419</sup>.

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<sup>417</sup> See, for example, the decisions by the Thessaloniki Court of Appeal Council of 17 May 1993, No. 337/1993 and 10 June 1993, No. 382/1993, refusing extradition of two Turkish nationals, case abstracts *IJRL/0227* and *IJRL/0228*, 7:3 *International Journal of Refugee Law* (1995), at pp. 514–517.

<sup>418</sup> See A. Grahl-Madsen, above at fn. 148, at p. 239. The time which has passed since the final conviction as well as the conduct of the refugee in the country he or she is in will be relevant for determining whether a link can indeed be established between the conviction and the fact that the refugee constitutes a “danger to the community”. E. Lauterpacht and D. Bethlehem, above at fn. 220, state that Article 33(2) of the 1951 Convention must be read so as to address circumstances which are not covered by Article 1F(b) of the 1951 Convention, and, therefore, as “applying to a conviction for a particularly serious crime committed in the country of refuge, or elsewhere, *subsequent to admission as a refugee*, which leads to the conclusion that the refugee in question is a danger to the community of the country concerned” (at para. 149, emphasis in the original; see also para. 185 of the Opinion). In the context of extradition, this would mean that the requested State could not justify the surrender of the wanted person in application of an exception to the principle of *non-refoulement* by relying on a conviction for a crime in the State seeking extradition prior to admission to the country of refuge as a refugee. Such crimes would have to be considered under the (less exacting) criteria of Article 1F(b) of the 1951 Convention as a possible ground for exclusion from international refugee protection or cancellation of refugee status which should not have been made in the first place. Where the requested State is not the country of asylum and the person whose extradition is sought does not apply for asylum, however, the question of applying Article 1F(b) does not normally arise (on exceptions to this rule, see below at paras. 264 and 280). In such cases, the requested State could then not extradite the person concerned, even if the exceptional conditions set out in Article 33(2) of the 1951 Convention were met. This view is not supported by the wording of Article 33(2), which does not specify the time or place of the crime, while at the same time referring to the “country in which [the refugee] is”, rather than the country of refuge. On the views of the drafters of the 1951 Convention on this issue see A. Grahl-Madsen, above at fn. 148, at p. 239, who notes that the Swedish delegate considered this category of Article 33(2) to cover situations where a recognised refugee is convicted of a particularly serious crime committed after admission as a refugee in a State other than the country of origin or the country of refuge, while the French delegate was of the view that this exception to the principle of *non-refoulement* was applicable no matter where and when the crime was committed. However, any application of the exception to the principle of *non-refoulement* would require a thorough evaluation of all the circumstances of the case. In particular, the requested State must consider the possibility that the conviction may not be legitimate.

<sup>419</sup> See “Factum of the Intervenor, UNHCR, *Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada*, SCC No. 27790”, above at fn. 398. See also above at fn. 220.

c. Non-refoulement and assurances

240. As noted above, certain legal obstacles to extradition can be overcome if the requested State seeks and receives assurances to the effect that the wanted person will not be subjected to the treatment or punishment which would otherwise stand in the way of extradition. This is most common in extradition cases involving capital punishment, but may also permit surrender where the requested State is concerned about fair trial in the requesting State<sup>420</sup>.

241. However, where extradition would expose the wanted person to a risk of torture, cruel, inhuman or degrading treatment, neither assurances nor conditions imposed by the requested State will normally be sufficient to exonerate the latter from its obligations under international human rights law, particularly if there is a pattern of abuses in the requesting State<sup>421</sup>. This also holds with regard to the requested State's obligations under international refugee law and customary international law to respect the principle of *non-refoulement*, if the extradition request concerns a refugee. In cases where the extradition of a refugee is sought by a State other than the country of persecution, the requested State may surrender him or her only on the basis of assurances which effectively protect the person concerned against *refoulement* from the requesting State to another country<sup>422</sup>.

d. Non-refoulement and questions of procedure

242. Whether or not a person whose extradition is sought is a refugee constitutes an essential element in determining the conditions in which his or her surrender is lawful. This has consequences for the extradition procedure, both where the wanted person is a refugee, for whom a well-founded fear of persecution has already been established, and where the extradition request concerns an asylum-seeker, whose status needs to be clarified so as to enable the requested State to act in keeping with its international refugee protection obligations. This will be returned to in more detail below at paras. 315–339.

4. *Non-refoulement vis-à-vis refusal grounds and other principles of extradition law*

243. The principle of *non-refoulement* in international refugee law overlaps with a number of the grounds on the basis of which extradition law permits, and in certain circumstances requires, the refusal of extradition. This is the case, in particular, with respect to the political offence exemption, the discrimination clause and some of the refusal grounds related to notions of justice and fairness. The rule of speciality also offers protection against certain forms of persecution. When compared to the scope of the principle of *non-refoulement*, these safeguards under extradition law are broader in some aspects, yet more restricted in others. On the one hand, their application is not limited to refugees and asylum-seekers. On the other, however, they do not provide for protection in all situations where extradition may amount to *refoulement*.

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<sup>420</sup> See above at paras. 121, 143–147 and 154.

<sup>421</sup> See above at paras. 134–137.

<sup>422</sup> See, for example, the decision of the French *Conseil d'Etat* in *Kilic*, above at fn. 407.

a. Political offence exemption

244. As noted earlier, the political offence exemption was at least in part inspired by a conviction that those fighting for self-determination, democracy and human rights should be protected against extradition to prosecution for acts which were not regarded as common criminal offences<sup>423</sup>. In many instances, those benefiting from the political offence exemption are also refugees within the definition of Article 1 of the 1951 Convention<sup>424</sup>. However, non-extradition for political offences as traditionally conceived in extradition law and asylum are not identical.

245. The political offence exemption differs from the principle of *non-refoulement* both in scope and in its protection function. It privileges those who have committed certain types of offences, regardless of whether or not they have a well-founded fear of persecution or would be subjected to a danger to their life, freedom or physical integrity in the requesting State.

246. As seen above, the number of offences which may qualify as political has been reduced significantly in recent times<sup>425</sup>. Within the European Union, the political offence exemption to the surrender of fugitives sought by means of the European arrest warrant will be abolished from 1 January 2004<sup>426</sup>. To the extent that it is still applicable, however, the political offence exemption continues to form part of the safeguards available under extradition law to any person whose extradition is sought, including refugees and asylum-seekers.

247. Yet it is not the only refusal ground relevant to requests for the extradition of persons at risk of persecution on political grounds. Even as the freedom of States to refuse to extradite persons whom they consider to be political offenders has been progressively restricted, there has been an increasing recognition of the relevance to the extradition process of the fundamental rights of individuals. The discrimination clause as well as the traditional refusal grounds related to notions of fundamental justice and fairness, together with bars to extradition stemming from international human rights law are all pertinent to situations where the return of the individual concerned would be in breach of the principle of *non-refoulement*.

248. More worrying, from the point of view of international refugee protection, is the tendency of States to incorporate the above-described restrictions in the scope of application of the political offence exemption under extradition law into the interpretation and application of international refugee law, particularly in the context of exclusion from refugee protection under Article 1F(b) of the 1951 Convention. This issue is discussed below at paras. 315–339.

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<sup>423</sup> See above at para. 73. One commentator notes that the political offence exemption responds to “a desire to protect *bona fide* political dissenters from being treated as ordinary and, usually, as extraordinary criminals. The political offence exception, therefore, has a humanitarian function, and its effect is comparable to a right of asylum.” A. Helton, “Harmonizing Political Asylum and International Extradition”, p.458, quoted in K. Landgren, above at fn. 132, p. 34.

<sup>424</sup> For a discussion of the concept of “political offences” in extradition and refugee law, respectively, see above at paras. 75–87 and below at paras. 322–325.

<sup>425</sup> See above at paras. 82–85.

<sup>426</sup> See Council Framework Decision of 13 June 2002 on a European Arrest Warrant and the Surrender Procedures between Member States.

b. Discrimination clauses

249. The principle of non-extradition where the requested State has substantial grounds to believe that the requesting State intends to prosecute or punish the person concerned for political or otherwise discriminatory motives, or where their position would be prejudiced on certain grounds upon surrender, is by now widely recognised in extradition law<sup>427</sup>. It is closely linked with international refugee law, in that it covers situations where the requested State considers that the extradition request has been made for the purpose of persecution, rather than prosecution, or that the individual concerned would be subjected to discriminatory treatment. Again, however, the refusal ground under extradition law and the *non-refoulement* principle do not match entirely.

250. 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 within the scope of 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<sup>428</sup>. 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 encompasses any danger to their life, freedom or physical integrity on account of their race, religion, nationality, membership of a particular social group or political opinion.

251. Some extradition treaties and laws leave it to the discretion of the competent authority to refuse extradition on the grounds of the discrimination clause. By contrast, where the conditions for the application of the principle of *non-refoulement* are met, this imposes a mandatory bar to extradition.

252. 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<sup>429</sup>.

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<sup>427</sup> See above at paras. 88–93.

<sup>428</sup> See above at paras. 89–90 and 92.

<sup>429</sup> See, for example, Department of Immigration and Multicultural and Indigenous Affairs, *Interpreting the Refugees Convention – an Australian contribution* (2002), available at: <http://www.immi.gov.au>, at p. 49, concerning the relation between the discrimination clauses under extradition law and the principle of *non-refoulement*: “It should be noted that the position in Australian extradition law goes beyond the protection offered by the Refugees Convention, in that extradition objections [under section 7] (b) and (c) [of the Extradition Act 1988] constitute an absolute bar to extradition, even where a person has been excluded from Convention protection under Article 1F(b) for having committed a serious non-political crime.” Section 7(b) of the Extradition Act 1988 provides for refusal of extradition if “the person’s surrender has in fact been sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence not specified in the extradition request”. Under s. 7(c) of the Extradition Act 1988, extradition shall be refused if “on surrender, the person

c. Refusal grounds related to notions of justice and fairness

253. Under extradition law, the requested State shall refuse to extradite if the person concerned would be subjected to treatment which is contrary to its notions of justice and fairness<sup>430</sup>. This includes cases where extradition is sought on the basis of a conviction *in absentia* or by a special court which does not offer adequate guarantees of fair trial, or where the person concerned would be tried in such a court. As with most other refusal grounds under extradition law, these apply to all persons regardless of their status, if provided for under the applicable extradition treaty or legislation. Violations of fair trial guarantees may also constitute persecution within the meaning of the 1951 Convention, but this requires a link with one of the grounds set out in Article 1A(2) of the Convention.

d. Speciality

254. Under the rule of speciality, the requesting State is precluded from prosecuting a person for offences other than those for which extradition was granted, or to re-extradite him or her to a third State, unless the requested State consents<sup>431</sup>. This principle has long provided an important safeguard for the extradited individual, not least through its function of complementing and reinforcing the political offence exemption. The rule of speciality still applies under most extradition treaties and national laws<sup>432</sup>. As a protection tool for refugees and asylum-seekers affected by extradition, however, it falls short of the principle of *non-refoulement*.

255. This is due to the fact that the scope of the speciality rule is limited: the only obligation it imposes on the requested State is that of refraining from prosecuting the wanted person for crimes other than those for which he or she was extradited. The speciality rule does not cover any other treatment which may amount to persecution. It is not concerned with the quality of justice in the requesting State, nor does it apply to expulsion or deportation to a third State, where there may be a risk of persecution. Thus, the speciality rule alone does not provide adequate protection to refugees and asylum-seekers.

256. This was confirmed, for example, by the Swiss *Bundesgericht*, which 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<sup>433</sup>. In Germany, the *Bundesverfassungsgericht* held that assurances by the requesting State that the speciality principle will be respected

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may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions”.

<sup>430</sup> See above at para. 107.

<sup>431</sup> See above at paras. 64–68.

<sup>432</sup> With regard to recent developments enabling States to waive the entitlement to the rule of speciality without the consent of the individual concerned, see above at paras. 67–68 and, in particular, fn. 125.

<sup>433</sup> *Bundesgericht*, decision of 18 December 1991, 1A.127/1990/tg, above at fn. 404. The *Bundesgericht* further held that the only exceptions to non-extradition are those provided for under Article 1F and Article 33(2) of the 1951 Convention.

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<sup>434</sup>.

#### 5. *Non-refoulement and human rights bars to extradition*

257. International human rights law precludes the requested State from extraditing someone if as a result they would be exposed to violations of their right to life, liberty and physical integrity, or a denial of fundamental guarantees of fair trial<sup>435</sup>. Human rights bars to extradition do not depend on a link between the risk of such treatment and any specific grounds, such as those required under the 1951 Convention or discrimination clauses in extradition law, thus providing protection in situations which may not be covered under extradition or refugee law.

258. The prohibition of torture or other cruel, inhuman or degrading treatment or punishment applies without exception, regardless of the conduct of the individual concerned or considerations of national security, including in situations of armed conflict or public emergency. Accordingly, in circumstances where a refugee or asylum-seeker would face a risk of such treatment upon surrender, they cannot be extradited, even if the conditions of Articles 1F or 33(2) of the 1951 Convention are otherwise met. In such situations, the prohibition of *refoulement* is absolute<sup>436</sup>.

259. In some countries, however, effective mechanisms for the implementation of human rights guarantees are lacking. This may affect the consequences of decisions concerning the ending of refugee status or withdrawal of protection against *refoulement*. Pursuant to the proportionality principle under international law, the authorities of the requested State would need to have regard to the absence of effective human rights protection when determining, for example, whether a refugee may be extradited in application of the exception to *non-refoulement* provided for in Article 33(2) of the 1951 Convention.

### **B. Questions of Procedure**

260. As already indicated, the interaction between extradition and asylum raises a number of questions related to the appropriate relation between procedures in either area, as well as the procedural safeguards and guarantees which must be in place in the extradition process to reflect the special situation of refugees and asylum-seekers.

261. From an international protection point of view, the two principal concerns are

- to ensure that the extradition process provides for adequate and effective safeguards against violations of the principle of *non-refoulement*, and

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<sup>434</sup> *Bundesverfassungsgericht*, 4 May 1982, 1 BvR 1457/81. The Federal Minister of Justice had suggested that the principle of speciality provided an effective safeguard against political persecution. A similar view was expressed in the explanatory memorandum to s. 6 of the German Law on International Legal Assistance in Criminal Matters (*Bundestags-Drucksache* 9/1338).

<sup>435</sup> See above at Part III.

<sup>436</sup> See “Factum of the Intervenor, UNHCR, *Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada*, SCC No. 27790”, above at fn. 398. See also E. Lauterpacht and D. Bethlehem, above at fn. 220, at paras. 222-252, and other references above at fn. 220.

- to avoid the interplay between extradition and asylum procedures having the effect of limiting the procedural standards and guarantees available to asylum-seekers during refugee status determination.

### 1. *Extradition and recognised refugees*

#### a. Requests for the extradition of a recognised refugee

262. Extradition requests may concern persons determined to be refugees (i) by the requested State itself; (ii) by a State other than the requested State, including the State seeking the refugee's extradition; or (iii) by UNHCR. As seen above, many countries have enacted legislation which prohibits the extradition of a refugee<sup>437</sup>. In some cases, the relevant provisions explicitly refer only to extradition relations with the country of origin. Yet the prohibition of extradition which would amount to *refoulement* applies with respect to any country where the person concerned has a well-founded fear of persecution, including where this danger results from the possibility of re-extradition or any other form of removal to a third country where he or she would face persecution.

##### i. The country of asylum as requested State

263. Under the principle of *non-refoulement*, the requested State is bound to refuse a request for the extradition of a person whom it has recognised as a refugee, if extradition is sought by the country of origin or any other country with respect to which a well-founded fear of persecution has been established. Extradition to such a country may be permitted only in the exceptional circumstances set out in Article 33(2) of the 1951 Convention, provided all other requirements under the applicable treaty or national extradition law as well as international human rights law are met. As noted above, this requires a thorough examination of the motivation of the extradition request and any evidence submitted. If extradition is refused, the protection needs of the individual concerned may require the requested State to provide a reason other than the refugee's status when explaining the refusal to the requested State.

##### ii. A country other than the country of asylum as requested State

264. The requested State must also abide by the prohibition of *refoulement* when it decides on the extradition of a person who has been granted refugee status in another State. A determination by a State that a person is a refugee under the 1951 Convention is not only binding on the authorities of the country concerned but also extraterritorially, at the very least with respect to other States Parties to the 1951 Convention. Refugee status as determined in one State Party may be called into question by another only in exceptional cases when it appears that the person concerned manifestly does not fulfil the requirements of the 1951 Convention because facts become known showing that he or she comes within the terms of an exclusion provision of the 1951 Convention<sup>438</sup>.

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<sup>437</sup> See above at fn. 401.

<sup>438</sup> See Executive Committee, Conclusion No. 12 (XXIX) – 1978 on the Extraterritorial Effect of the Determination of Refugee Status, at para. (g). 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. See also below at para. 280.



265. In practice, States deal with such cases in different ways. Some countries consider themselves bound by the foreign refugee status recognition and apply the provisions of their national law which prohibit the extradition of refugees. Others require a transfer of refugee status in such cases. Yet others do not regard a refugee status determination by another State as binding and conduct their own inquiries into the danger of persecution. In determining the extradition request, they are bound by their own obligation to respect the principle of *non-refoulement* under international refugee law, human rights law and customary international law.

266. The fact that the wanted person was recognised as a refugee by another State should, at a minimum, alert the requested State to their special status and the need to ensure that they are not exposed to a danger of persecution if extradited. The requested State should contact the authorities of the country which recognised the person concerned as a refugee to obtain the full facts of his or her case, and to enable that country to exercise diplomatic protection, if it so wishes.

267. Thus, for example, in Germany, the *Bundesverfassungsgericht* held that refugee recognition by another State Party to the 1951 Convention is not legally binding for the German extradition authorities; however, 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 *Bundesverfassungsgericht*, 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<sup>439</sup>.

268. Cases of this kind are often triggered by an Interpol “red notice” which gives rise to the provisional arrest of refugees travelling outside the country in which their status was recognised<sup>440</sup>. Examples of such cases include that of Mohamed Solih, an Uzbek writer and opposition leader recognised as a refugee by Norway, who was arrested in the Czech Republic on the basis of an Interpol “red notice” in November 2001, and whose extradition was requested by Uzbekistan. In December 2001, a Czech court refused his extradition and he returned to Norway<sup>441</sup>. In another case, Germany refused extradition to Belarus of

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<sup>439</sup> *Bundesverfassungsgericht*, decision of 14 November 1979 (1 BvR 654/79). Commenting on this decision, W. Kälin, above at fn. 140, at p. 93, notes that the country of asylum has acquired the right to extend diplomatic protection to the refugee and to guard him or her from surrender to the country of origin; the requested State must therefore inform the country asylum so as to enable it to make representations on behalf of the refugee if it so wishes, and if it is opposed to his or her extradition, the requested State should respect its will and refrain from extraditing him or her.

<sup>440</sup> On the use of Interpol as a channel to transmit requests for arrest with a view to extradition and related protection concerns see below at paras. 306–314.

<sup>441</sup> See P. Kozakova, *Muhammed Salih returns to Norway*, Transitions Online, 15 December 2001, available at: <http://www.dfn.org/focus/uzbekistan/salih-return.htm>; Writers in Prison Committee, International Pen, *ALERT: Extradition hearing against writer refused, he returns to Norway*, 2 January 2002, available at: <http://www.ifex.org/alerts/view.html?id=9922>.

Natalia Sudliankova, a journalist and recognised refugee in the Czech Republic<sup>442</sup>.

269. If the State requesting extradition is also the country which recognised the person concerned as a refugee, but the latter alleges that extradition to that country would expose him or her to a risk of *refoulement*, the requested State should provide him or her with an opportunity to substantiate this claim<sup>443</sup>.

iii. Persons determined to be refugees under UNHCR's mandate

270. Similar considerations as apply to refugees recognised by a country other than the requested State are also relevant in situations where a request for extradition concerns a "mandate refugee", that is, a person determined to be a refugee by UNHCR on the basis of its Statute. A determination of refugee status by UNHCR constitutes a statement to the effect that the person is in need of international refugee protection, and that protection against *non-refoulement* applies<sup>444</sup>. This must be taken into consideration by the extradition authorities in the requested State<sup>445</sup>.

b. Objections to extradition based on refugee status: procedural aspects

271. As described in Part IV above, extradition procedures differ from one country to another. The opportunities for the individual concerned to oppose his or her extradition may vary greatly, depending on the different stages at which decisions are made, the authorities involved, and the possibilities for the individual concerned to participate in the proceedings, raise objections to his or her extradition and submit evidence to that end. The availability or not of avenues for appeal and/or review is also crucial. Unless explicitly provided for in national legislation, the same procedures apply for refugees as for any other individual whose extradition has been requested. In a number of countries, however, the particular situation of refugees is reflected in specific provisions in national extradition laws.

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<sup>442</sup> Reporters sans Frontières, Press releases of 16 October 2002 (*Arrested Belarus journalist and political refugee may be deported*) and 21 October 2002 (*Belarus journalist freed*), available at: [http://www.rsf.org/article.php3?id\\_article=4066](http://www.rsf.org/article.php3?id_article=4066).

<sup>443</sup> See also below at para. 292.

<sup>444</sup> In some countries, determinations of refugee status by UNHCR are accepted as binding by national authorities. In France, s. 2 of the Law No.1952-893 of 25 July 1952, the OFPRA recognises the refugee status of any person with regard to whom UNHCR has exercised its mandate pursuant to Articles 6 and 7 of its Statute. Pursuant to s. 51(2) of the German Aliens Act, mandate refugee status recognition by UNHCR has binding effect on the German authorities, if UNHCR conducts refugee status determination on behalf of a State (for example, on the basis of a Memorandum of Understanding or other agreement), or if the host country has endorsed an individual decision by UNHCR by means of issuing a Convention Travel Document or granting other rights enshrined in the 1951 Convention.

<sup>445</sup> On the basis of UNHCR's supervisory role under the Statute, in conjunction with Article 35 of the 1951 Convention, its determinations have a certain validity. See V. Türk, "UNHCR's supervisory responsibility", 14.1 *Revue québécoise de droit international* (2001), at pp. 135–158. As a minimum, States which disagree with UNHCR's decisions would need to provide a reasoned justification for doing so. As noted by G.S. Goodwin-Gill, above at fn. 166, at p. 370, "[...] 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."

i. Inadmissibility of requests for the extradition of a recognised refugee

272. Refugee status is one of the factors which may preclude the authorities of the requested State from proceeding with the extradition request from the country of persecution, as explicitly provided, for example, in Argentina, Brazil or Paraguay. In many countries, where the law does not provide for the inadmissibility of such extradition requests but prohibits the extradition of a refugee, the competent authority may decide to reject extradition at the initial stage, if it is already aware of this eventual obstacle<sup>446</sup>.

ii. Consideration of refugee status in the extradition process

273. The prohibition of extradition of refugees to a country where they would be at risk of persecution is part of the legal requirements which must be met for the extradition request to be granted. Usually, it is one of the aspects of the legality of extradition to be examined by the competent magistrate or judge. It is also one of the criteria to be taken into account by the minister who takes the final decision to grant or refuse extradition.

274. This raises the question of the effect of a refugee status determination made in the asylum procedure for the extradition authorities. In some countries, recognition of refugee status by the asylum authorities is binding on the courts and administrative organs competent to deal with extradition requests. This is the case, for example, in Switzerland, where the *Bundesgericht* has made it clear that recognition of refugee status by the asylum authorities is binding on all federal and cantonal authorities: neither the administrative authorities nor the court may re-examine the person's refugee status<sup>447</sup>. In France, the *Conseil d'Etat* has held that decisions by the *Commission de recours des réfugiés* (CRR, Refugee Appeals Commission) are binding and must be recognised by the administrative courts<sup>448</sup>. A positive refugee status determination is also binding for the extradition authorities in Spain, where s. 4(8) of the Law No. 4/1985 on Passive Extradition further specifies that a rejection of an asylum claim does not impede the refusal of extradition after the asylum claim has been rejected<sup>449</sup>.

275. By contrast, s. 4 of the Asylum Procedure Law in Germany explicitly provides that a refugee status determination is not binding for the purposes of extradition. The *Bundesverfassungsgericht* 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

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<sup>446</sup> Thus, for example, in one case in Germany, where the administrative authorities had stated that from their point of view, there was a threat of political persecution with regard to the person whose extradition was sought, and who had been recognised as a refugee in France, and that there was a "high probability" that extradition would not be granted, the extradition court repeatedly refused to order the individual's detention. *Oberlandesgericht Brandenburg*, decision of 28 May 1997, 2 Ausl (A) 7197 (unreported), cited in O. Lagodny, above at fn. 296, at pp. 705–706, fn. 26. See also above at paras. 180–181.

<sup>447</sup> *Bundesgericht*, decision of 13 March 1989, BGE 115 V 4, at 6/7.

<sup>448</sup> *Conseil d'Etat*, Ass., 15 March 1988, *Bereciartua-Echarri*. See also R. Rolin, above at fn. 194, at pp. 93–94.

<sup>449</sup> See also the First Additional Provision to the Law No. 5/1984 on Asylum, which provides that the rejection of an asylum claim for whatever reason does not preclude the extradition authorities from refusing extradition in accordance with applicable legislation, on the basis that the acts in question constitute an offence of a political character or, even if they are ordinary crimes, that the extradition request was made for political motives.

German authorities or the authorities of another country and refugee recognition is to be considered as evidence of a danger of persecution<sup>450</sup>. The *Bundesverfassungsgericht* further held that there is no burden of proof on the individual whose extradition is requested with respect to the danger of political persecution in the requesting State, although he or she has a duty to contribute, to the extent possible, to the determination of the facts of the case<sup>451</sup>.

276. Where the final decision on extradition is taken by the executive, the relevant minister is usually bound by a negative determination by the judicial authorities, but has wide discretion whether or not to refuse extradition if the courts have not found a legal obstacle. As noted above, this may be the only stage of the extradition procedure at which objections to extradition related to a fear of persecution or threats to the life, liberty or physical integrity of the person concerned are examined<sup>452</sup>. Whatever the authority that takes the final decision on extradition, however, it must observe the requested State's obligation to respect the principle of *non-refoulement*. In Austria, this is explicitly stated in s. 34(1) of the Law on Extradition and Mutual Legal Assistance, which requires the Minister of Justice to have regard to Austria's obligations under international law, and in particular, international refugee law<sup>453</sup>.

277. The availability of possibilities for appeal and/or review also affects the position of a refugee in extradition proceedings. Depending on the applicable law, these may be very limited. A particularly worrying situation arises where asylum-related considerations may only be raised at the final stage of the extradition process, and especially where possibilities for review of the final executive decision are limited or non-existent. This is the case, for example, in the United States, where judicial review of the Secretary of State's extradition order is limited to claims that extradition would be in breach of Article 3 of UNCAT<sup>454</sup>. A similar situation exists in the Netherlands, where the courts' role with regard to the applicability of the discrimination clause or a risk of human rights violations other than those related to a fair trial in the requesting State is limited to issuing a non-binding opinion, whereas the Minister's final decision is not subject to appeal or review<sup>455</sup>.

c. Effect of findings in extradition proceedings on refugee status

278. Information which comes to light in the course of extradition proceedings concerning a recognised refugee may warrant a review of his or her status. Depending on the circumstances of the case, such information may set in motion proceedings to determine whether refugee status should be cancelled or revoked. Cancellation means a decision to invalidate refugee status on the grounds that it should not have been granted in the first place, with effect from the time when it was originally granted (*ab initio* or *ex tunc*)<sup>456</sup>.

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<sup>450</sup> *Bundesverfassungsgericht*, decision of 14 November 1979 (1 BvR 654/79). See also *Bundesverfassungsgericht*, decision of 25 February 1981 (1 BvR 413, 768, 820/80).

<sup>451</sup> *Bundesverfassungsgericht*, decision of 14 November 1979 (1 BvR 654/79).

<sup>452</sup> See above at paras. 184–191.

<sup>453</sup> See also *Verfassungsgerichtshof*, decision of 12 December 2002, G151/02.

<sup>454</sup> *Cornejo Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000). See also above at para. 197.

<sup>455</sup> See the decision of the Netherlands Council of State in *Folkerts v. State Secretary of Justice*, 26 October 1978, 74 *International Law Reports* 284. On the possibility of seeking an injunction by a civil court ordering the Government not to extradite see above at para. 203.

<sup>456</sup> On the legal criteria for cancellation, see S. Kapferer, *Cancellation of Refugee Status*, UNHCR, Department of International Protection, Research Series No. 2003/03, March 2003, available at:

Revocation means withdrawal of refugee status with effect for the future (*ex nunc*), because the person concerned has engaged in conduct which comes within the scope of the exclusion clauses of Article 1F(a) or (c) of the 1951 Convention<sup>457</sup>. In either case, the requested State will be justified in ending international refugee protection only if its decision is made as the result of proceedings in which the principles of due process and procedural fairness have been respected.

279. This requires, *inter alia*, that there be sufficient evidence to cancel or revoke refugee status. The quality of the evidence submitted by the State requesting the extradition of a refugee must be thoroughly assessed, particularly where that State is the country of origin, but also where extradition has been requested by another State, if the person concerned claims that surrender to such a State would expose them to persecution, or to re-extradition or removal by other means to a country where their life, freedom or physical integrity would be at risk. In view of the differences in evidentiary standards and rules which apply to procedures under extradition law and international refugee law, respectively, such evidence must be evaluated independently in the asylum context<sup>458</sup>.

280. Only the State which issued the decision which recognised the wanted person as a refugee is entitled to cancel or revoke it, provided that the requirements for doing so under relevant national legislation and general principles of law are met. Where the requested State is not the country of asylum, extradition of a refugee sought for a serious non-political crime within the scope of Article 1F of the 1951 Convention is, in principle, permitted only if one of the exceptions to the principle of *non-refoulement* as set out in Article 33(2) of the 1951 Convention is applicable<sup>459</sup>. As noted above at para. 264, the determination of refugee status in one State Party to the 1951 Convention is binding, at the very least for all other States Parties, unless in exceptional cases where the person concerned manifestly comes within the scope of Article 1F of the 1951 Convention. In such circumstances, the principle of *non-refoulement* under the 1951 Convention does not apply, and the requested State would be justified in extraditing even if the foreign refugee status determination remains formally valid, provided that the criteria for the application of the relevant exclusion clause are met and that the person concerned will not be exposed to a risk of torture, cruel, inhuman or degrading treatment or punishment<sup>460</sup>. In determining whether an exclusion

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<http://www.unhcr.org>. See also UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 2003, at paras. 13–16.

<sup>457</sup> In view of the geographical and temporal restrictions provided for in Article 1F(b), the exclusion ground of a “serious non-political crime” cannot give rise to revocation. If a recognised refugee commits such acts, this may, however, bring him or her within the realm of Article 32 (expulsion) or Article 33(2) (exceptions to the principle of *non-refoulement*). See UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 456, at paras. 11–12 and 17.

<sup>458</sup> See also below at paras. 318–339.

<sup>459</sup> See above at paras. 218 and 233–239.

<sup>460</sup> See above at paras. 217 and 264. See also Executive Committee, Conclusion No. 12 (XXIX) – 1978 on the Extraterritorial Effect of the Determination of Refugee Status, at para. (g). On the criteria for the application of the exclusion clauses, see UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003 and UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 456. See also G. Gilbert, “Current issues in the application of the exclusion clauses”, in E. Feller, V. Türk and F. Nicholson, above at fn. 394, at pp. 425–478; and the Special Issue on Exclusion, 12 *International Journal of Refugee Law*, Special Supplementary Issue (2000). On the linkages between extradition and exclusion for serious non-political crimes under Article 1F(b) of the 1951 Convention, see below at paras. 318–339. On the

clause may be applicable, the requested State would need to consider all circumstances of the individual case<sup>461</sup>.

## 2. *Extradition and asylum-seekers*

### a. *Non-refoulement and asylum-seekers*

281. As noted above, the principle of *non-refoulement* applies to persons who meet the criteria of the refugee definition under Article 1 of the 1951 Convention, but who have not had their status formally recognised – including, in particular, asylum-seekers. In some countries, the extradition of asylum-seekers is explicitly prohibited<sup>462</sup>, whereas in others, the application of *non-refoulement* provisions concerning recognised refugees is extended to asylum-seekers. In a number of countries, *non-refoulement* clauses in extradition or aliens legislation which impose a general bar to the removal, including by way of extradition, of any person whose life or freedom would be at risk in the requesting country, are also applied to asylum-seekers.

282. However, UNHCR is aware of a number of instances in various countries in which asylum-seekers have been extradited despite the fact that their status had not yet been determined, in breach of the principle of *non-refoulement*. In such cases, the requested State usually acts on the basis of political and/or security considerations, which sometimes result in pressures on the judiciary or interference with the judicial process.

283. If the person whose extradition is sought has applied for asylum, the requested State must determine whether he or she is indeed a refugee within the terms of the 1951 Convention. This raises questions concerning the appropriate relation between extradition and refugee status determination procedures. States have adopted different approaches, which provide for varying levels of protection against *refoulement*.

### b. The relation between extradition and asylum procedures: approaches in national law and practice

284. In a number of countries, the law specifically prescribes the suspension of extradition proceedings concerning asylum-seekers until their claim has been determined. In Brazil, s. 34 of the Law No. 9.474 of 1979 on Mechanisms for the Implementation of the 1951 Convention provides that an asylum application will suspend, until its final determination, any pending administrative or judicial extradition proceedings based on the facts which constitute the grounds for the granting of asylum. Pursuant to s. 35 of the same Law, the fact that an asylum application has been submitted must be communicated to the extradition authorities. Pursuant to s. 5(2) of the Law No. 5/1984 on the Right to Asylum in Spain, an asylum claim suspends ongoing extradition proceedings, or the execution of a decision to extradite, until the final determination on refugee status. This provision only refers to the final decision at the administrative stage, however, and extradition may proceed before the person concerned has exhausted judicial appeals.

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absolute prohibition of *refoulement* to a risk of torture, cruel, inhuman or degrading treatment, see above at paras. 217 and 239, with further references.

<sup>461</sup> See above at paras. 278–279 and below at para. 304.

<sup>462</sup> See, for example, s. 394(b) of the Code of Criminal Procedure of the Slovak Republic; see also s. 415(1)(b) of the Criminal Procedure Code of Bosnia and Herzegovina.

285. In many States, the question is not explicitly addressed in either extradition or asylum legislation. In such cases, the two procedures can be carried out independently. In view of the implications which a positive refugee status determination has with respect to extradition, however, it is frequently the practice to suspend the extradition process. This is the case, for example, in Argentina, Denmark, El Salvador, Finland, Germany, Hungary, Lithuania, Mexico, Norway, the Slovak Republic, Slovenia, Sweden or Switzerland.

286. In some countries, where it is recognised that extradition is not permitted if it amounts to *refoulement*, extradition procedures are not therefore suspended, but the risk of *refoulement* must be assessed prior to granting the surrender of the wanted person. In the United Kingdom, for example, courts have held that an asylum application and an extradition request can be processed in parallel up to, but not including, a final decision to order the person's surrender. In one recent decision, a UK court rejected a request for the suspension of extradition proceedings until the asylum claim of the person concerned was adjudicated and held that in the interests of justice, extradition and asylum proceedings should take their normal course. The court noted that both procedures were somewhat lengthy and involved different issues, and that there was a need in each case to proceed with as much expedition as is reasonably possible<sup>463</sup>. The UK Extradition Bill, which is currently under consideration by Parliament, explicitly provides that a person must not be extradited before the asylum claim is finally determined<sup>464</sup>.

287. Elsewhere, the asylum procedure is suspended if extradition proceedings are initiated. This is the case, for example, in the United States of America, where the Board of Immigration Appeals (BIA) prefers to hold asylum proceedings in abeyance while extradition proceedings are pending, since it considers that asylum proceedings would "complicate" the extradition process and that their deferral is necessary to allow for "orderly procedure"<sup>465</sup>. The Court of Appeals for the Ninth Circuit found that in doing so the BIA acted "reasonably and within its scope of authority", and noted that "because the applicant ha[d] neither been adjudicated to be extraditable nor issued a warrant of extradition by the Secretary of State in her discretion, the issue of whether a conflict between the Refugee Act and the 1931 Treaty [on extradition between the United States of America and Great Britain arose was] not ripe for review"<sup>466</sup>.

288. Even if the law provides for protection against *refoulement*, the practice may be different. In Austria, for example, s. 19(3) of the Law on Extradition and Mutual Legal Assistance precludes extradition if the person concerned would be exposed to persecution on account of his or her origin, race, religion, membership of a particular ethnic or social

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<sup>463</sup> *R. (on the application of Karpichkov and another) v. Latvia and the Republic of South Africa and another*, Queens Bench Division (Administrative Court), CO/2553/2000, 26 April 2001.

<sup>464</sup> Sections 39(3) and 121(3) of the Extradition Bill 2003. The Bill, as amended in the Grand Committee of the House of Lords on 10 September 2003, is available at: <http://www.publications.parliament.uk/pa/ld200203/ldbills/104/2003104.pdf>.

<sup>465</sup> See *Barapind v. Reno*, 225 F.3d 1100 (9<sup>th</sup> Cir. 2000), with reference to the BIA's decision in *Perez-Jimenez*, 10 I&N Dec. 309, 314 (1963). The Court also cited the BIA's view, expressed in *Perez-Jimenez*, that asylum proceedings would "actually have served no useful purpose", once a warrant of extradition was issued by the Secretary of State, and noted – with references to *McMullen v. INS*, 788 F.2d 591 (9<sup>th</sup> Cir. 1986) and *Quinn v. Robinson*, 783 F.2d 776 (9<sup>th</sup> Cir. 1986) – that courts have generally accepted the BIA's suspension of asylum proceedings pending the completion of the extradition process, although without comment.

<sup>466</sup> See *Barapind v. Reno*, 225 F.3d 1100 (9<sup>th</sup> Cir. 2000).

group, nationality or political opinion in the requesting State, or if their situation were otherwise seriously prejudiced for one of these reasons. The law refers to this as “extradition asylum”. Under s. 21(1) of the Asylum Act 1997, asylum-seekers are protected against rejection at the border or forcible return until a final determination of their asylum application has been made. These provisions notwithstanding, the *Oberlandesgericht* in Vienna has held that under Austrian law, the fact that asylum proceedings are still pending does not, in general, impede extradition<sup>467</sup>.

c. What is the appropriate procedure?

289. Whenever an extradition request is received, the relevant authorities must examine whether it meets the formal and substantive requirements under the applicable extradition treaty or legislation, and, in particular, whether a refusal ground or bar to extradition under national or international law applies. This requires an examination of all circumstances pertaining to the situation of the individual concerned. A central element to be considered is the requested State’s obligation to respect the principle of *non-refoulement* under international refugee law, human rights law and customary international law, and in many countries also under national constitutions and/or legislation.

290. As a consequence, procedures in extradition cases concerning asylum-seekers need to be structured so as to enable the requested State to honour its international refugee protection obligations. In particular, this means that

- the final determination on the asylum claim must, in principle, precede the decision on extradition;
- the asylum claim and the extradition request should be examined in separate procedures, in accordance with respective criteria and requirements; and
- the fact that an extradition request has been submitted cannot render an asylum application inadmissible without further proceedings, nor is it of itself a sufficient basis for rejecting an asylum application as manifestly unfounded.

i. Final determination on asylum prior to decision on extradition

291. Where an extradition request concerns an asylum-seeker, the requested State will not be in a position to establish whether extradition is lawful unless the question of refugee status is clarified. The determination of whether or not the person concerned has a well-founded fear of persecution must therefore precede the decision on extradition. This does not of itself require the suspension of the extradition procedure. It does mean, however, that the decision on extradition should only be made after the final determination on refugee status, even if extradition and asylum procedures are conducted in parallel.

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<sup>467</sup> Decision of 12 November 2001, as related in the European Court of Human Rights’ decision *Bilasi-Ashri v. Austria*, Application No. 3314/02 26, 26 November 2002. This case concerned the Egyptian asylum-seeker Mohamed Bilasi-Ashri, whose extradition from Austria was requested by Egypt. The court rejected the request insofar as it was sought for political offences, but conditionally granted extradition for the remaining offences. The case was brought before the European Court of Human Rights. It was struck out of the list of cases following Mr Bilasi-Ashri’s release from detention pending extradition after the Egyptian authorities informed Austria that they did not accept the conditions set out in the extradition order.



292. The extradition of an asylum-seeker may be sought by a State other than the alleged country of persecution. Under international refugee, human rights and customary international law, the requested State is obliged to assess the risks which may flow from the surrender of the wanted person. In particular, it must determine whether extradition would result in a danger of *refoulement*, either in the requesting State itself or as a result of re-extradition or any other form of removal from that State. The requested State may extradite an asylum-seeker only if it is established that he or she would have access to an asylum procedure in keeping with the principles of the 1951 Convention in the requesting State and the latter assumes responsibility for assessing his or her claim, or if extradition is made conditional upon the return of the asylum-seeker to the requested State after the completion of criminal proceedings. In such cases, the surrender of the wanted person and the suspension of the asylum procedure in the requested State would be compatible with the latter's obligations under international refugee law<sup>468</sup>.

293. In all other cases, the extradition of an asylum-seeker should not be ordered, let alone carried out, while asylum proceedings, including at the appeal or review stage, are pending. This is necessary not least in view of the possibility that an extradition request may in fact constitute an attempt by the requesting State to obtain the surrender of the person concerned for reasons other than the proper administration of criminal justice.

ii. Separate determination of asylum application and extradition

294. In a number of countries, the question of whether or not the requested person has a well-founded fear of persecution is assessed as part of the extradition determination. This is the case where the extradition process is conducted independently of any refugee status determination procedures and a status determination by the asylum authorities is not considered to be binding on the extradition authorities<sup>469</sup>.

295. The decision on the asylum application may also be incorporated into the extradition procedure under relevant legislation. This may be combined with restricted possibilities for appeal or review with respect to the asylum determination. Thus, for example, under s. 105(3) of the Canadian Immigration and Refugee Protection Act 1999, the decision to extradite an asylum-seeker for a non-political crime which is punishable by at least ten years' imprisonment is deemed also to be a determination to exclude him or her under Article 1F(b) of the 1951 Convention. Asylum-related objections may be raised only at the final executive stage of the extradition process, before the Minister of Justice<sup>470</sup>. The Extradition Act does not provide for an appeal against the order of surrender, which is reviewable only if leave for judicial review is granted<sup>471</sup>.

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<sup>468</sup> See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, at paras. 12–18 and 50(c).

<sup>469</sup> This may be the situation as provided for under national law, as for example in Germany (see above at para. 267) or the result of practice, as for example in the United States of America and Austria (see above at paras. 287 and 288, respectively).

<sup>470</sup> Section 105(4) of the Immigration and Refugee Protection Act 2001; ss. 44 and 46 of the Extradition Act 1999.

<sup>471</sup> Section 57 of the Extradition Act 1999. Thus, by including the determination on refugee status in the extradition process, the person concerned is deprived of his or her right to appeal and review as provided for under asylum legislation.

296. The authorities responsible for deciding on extradition requests do not normally have expert knowledge and experience in refugee matters. Although applicable extradition treaties or legislation usually require that asylum-related considerations be taken into account in extradition proceedings, such an examination often focuses primarily, if not entirely, on issues linked to aspects of the prosecution or punishment of the person concerned. While this is important, it cannot be regarded as an adequate substitute for asylum procedures in which all factors relevant to the asylum claim are assessed by specialised asylum authorities.

297. As seen above, the extradition process often provides only limited possibilities for individuals to raise objections to their extradition based on a fear of persecution in the requesting country. In many countries, the judicial authorities are not entitled, or not willing, to consider issues of this kind, while the final executive stage does not normally include a hearing. The decision by the relevant minister is often highly political and, in some countries, not subject to appeal or review.

298. Under applicable principles of law, the requested State is bound to provide access to fair and effective procedures to determine an applicant's claim to refugee status, except where individual determination of status is impracticable in mass influx situations. This obligation flows from the right to seek and enjoy asylum under Article 14 of the Universal Declaration of Human Rights, and, for States Parties to the 1951 Convention and the 1967 Protocol, from their obligation to fulfil their treaty obligations in good faith<sup>472</sup>. The incorporation of the decision concerning the asylum application into the determination on an extradition request 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. Such restrictions give rise to concern, particularly since the decision to extradite may mean that the person concerned is handed over directly to the authorities responsible for their persecution. In view of the risks involved, the rules of procedural fairness require stronger rather than reduced safeguards.

299. From an international refugee protection point of view, therefore, extradition and asylum determination procedures should be kept separate. The decision on whether or not an asylum-seeker whose extradition is sought meets the refugee definition under the 1951 Convention should be taken by the asylum authorities, in full application of the procedure established for that purpose, including its avenues for appeal and/or review. In cases where extradition is sought by a State other than the country of persecution, it would also be for the asylum authorities to determine, prior to a decision on the extradition request by the extradition authorities, whether surrender to that country would expose the asylum-seeker to a risk of *refoulement* and whether the asylum procedure in the requested State should be suspended. However, the two processes may have an impact on each other, as information which comes to the attention of the authorities in the context of either procedure may influence the outcome of the other<sup>473</sup>.

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<sup>472</sup> See M. Bliss, "‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses", in 12 *International Journal of Refugee Law*, Special Supplementary Issue (2000), at pp. 94–96 (with references to UNHCR, Note on International Protection, UN doc. A/AC.96/898, 3 July 1998, at para. 15, and applicable international and regional human rights instruments).

<sup>473</sup> See below at paras. 303–304.

iii. Admissibility and examination of asylum claims submitted by a person whose extradition is sought

300. The considerations set out in the preceding sections also apply where the claim for refugee status is made after the person concerned has learned of the request for his or her extradition. Such applications should not be viewed from the outset as aimed at forestalling extradition to legitimate prosecution. A request for extradition may well alert the person concerned to the fact that he or she is at risk of persecution. Prior to granting extradition, the requested State must establish whether the surrender of the wanted person to the requesting State would amount to *refoulement*. As this can only be done on the basis of a thorough assessment of the circumstances of the case, a substantive consideration of the claim is required.

301. It follows that a request for the extradition of an asylum-seeker cannot be the basis for rejecting an asylum application as inadmissible without further proceedings. Linking the existence of an extradition request with the admissibility of a claim for asylum would be at variance with international refugee law, as it would limit eligibility for international protection in a manner not foreseen by the 1951 Convention. This also holds where the extradition request emanates from a State which is deemed a “safe third country” or “safe country of origin” under the requested State’s asylum legislation; in such cases, the individual concerned must be given an opportunity to rebut the presumption that he or she would not be at risk of persecution if sent to that State<sup>474</sup>.

302. Likewise, the fact that an extradition request precedes an application for asylum is not of itself a sufficient basis for rejecting the claim as manifestly unfounded, even if the State requesting extradition is considered to be a “safe country of origin” or a “safe third country” under applicable asylum legislation, or where that State is the country which recognised the applicant as a refugee. A determination on extradition should not be made before a decision on the asylum claim has been reached in proceedings during which the individual concerned has been given an opportunity to present evidence in support of the well-foundedness of his or her fear of persecution, and to rebut any presumption that the claim is manifestly unfounded. For the reasons outlined above, such evidence should be considered by specialised asylum authorities. The asylum procedure should also provide the individual concerned with a possibility to have a negative decision reviewed prior to extradition<sup>475</sup>.

d. Mutual influences between extradition and asylum determination procedures

303. The refugee status of the requested person is an essential element to be taken into account in the extradition process. Conversely, the contention by the requesting State that an asylum-seeker is responsible for criminal offences as well as any other information which may come to light in the context of extradition proceedings may have a bearing on the latter’s application for refugee status, if the alleged activities come within the scope of an exclusion clause of the 1951 Convention or otherwise affect the applicant’s eligibility for international protection. In such cases, it will need to be established, as part of the refugee

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<sup>474</sup> See above at para. 292. See also UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, above at fn. 468, at paras. 12–18 and 38–40.

<sup>475</sup> *Ibid.*, at para. 32.

status determination procedure, whether the person concerned is fleeing persecution or legitimate prosecution.

304. The application of an exclusion clause, in particular, requires a full consideration of an asylum claim, during which all elements must be assessed – those concerning the inclusion criteria of Article 1A(2) as well as any factors supporting exclusion under Article 1F of the 1951 Convention<sup>476</sup>. The individual concerned must be informed of the evidence in support of exclusion and be given an effective opportunity to respond and present evidence to rebut it. This will normally require an interview, at which the assistance of an interpreter must be provided, if required. Procedural fairness demands that the person concerned has an opportunity for appeal or review of the decision to exclude him or her from international protection. The appeal or review should have suspensive effect<sup>477</sup>.

### 3. *The role of UNHCR in extradition procedures affecting refugees and/or asylum-seekers*

305. UNHCR does not normally have a formal role in extradition proceedings concerning refugees and/or asylum-seekers. In practice, UNHCR's interventions with the authorities of the requested State on behalf of refugees or asylum-seekers are often essential in ensuring respect for the principle of *non-refoulement*. There are also instances, however, where the extradition authorities do not permit UNHCR access to refugees and/or asylum-seekers. Given UNHCR's international protection mandate, States should notify UNHCR in all cases where extradition requests affect persons of concern. A more formal role for UNHCR in cases where refugees or asylum-seekers are subject to extradition proceedings which involve Interpol might also be appropriate.

### 4. *Interpol "red notices"*

306. As noted above, extradition proceedings concerning refugees who are arrested in a country other than the country of asylum are often initiated on the basis of arrest notices transmitted through Interpol channels. Interpol is an inter-governmental organisation, which was established in 1923 for the purpose of promoting international cooperation between police authorities<sup>478</sup>. Through its network, Member States – currently numbering 181<sup>479</sup> – may exchange information and communicate requests for assistance in law enforcement related to international crime. In the context of extradition, the Interpol network gives Member States the possibility to issue international "wanted" notices for fugitives, also known as "red notices"<sup>480</sup>.

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<sup>476</sup> On the criteria for the application of the exclusion clauses of Article 1F of the 1951 Convention, see the references above at fn. 460.

<sup>477</sup> See M. Bliss, above at fn. 472, at pp. 105–106, with further references. On evidentiary requirements in extradition proceedings, see above at paras. 46–55. See also above at para. 279 and below at paras. 329–334.

<sup>478</sup> Article 2 of the Interpol Constitution sets out the aims as follows: "(1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights; (2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes".

<sup>479</sup> Information available at: <http://www.interpol.int/Public/Icpo/Members/default.asp>.

<sup>480</sup> See above at para. 57.

a. Political offences

307. Article 3 of the Constitution of Interpol provides that “it is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character”. If a request for the arrest of a person presented by a member State contravenes this provision, the Interpol General Secretariat must refuse to issue a “red notice”, or revoke it, if it has already been issued. The General Secretariat may also cancel a “red notice” if the requested State’s refusal to extradite is based on the political offence exemption or general principles of criminal law such as *ne bis in idem*. The Supervisory Board for the Control of Interpol’s Archives may also ask for “red notices” to be cancelled<sup>481</sup>.

308. In a resolution adopted in 1984, Interpol has set out its approach with regard to the definition of “political offence” for the purposes of the implementation of Article 3 of its Constitution<sup>482</sup>. Under the rules of procedure to be applied by the National Central Bureaux and the General Secretariat, the predominance theory applies to determine whether an offence is political, military, religious or racial in character, and each case must be examined separately, with due consideration for the specific context<sup>483</sup>. The rules also clarify the respective responsibilities of Interpol and Member States. Thus, if the General Secretariat agrees to issue a “red notice”, States may nevertheless consider that the charges are based on political offences and refuse to assist the requesting State. Conversely, if Interpol refuses to record a request for assistance, Member States may transmit it through other channels<sup>484</sup>.

309. Requests aimed at prosecuting those accused of “terrorist” crimes are also processed under the above-described rules, particularly in terms of applying the predominance theory. Serious, violent offences (such as serious attacks against human life or physical safety, hostage-taking and kidnapping, serious attacks against property (bomb attacks etc.), unlawful acts against civil aviation (hijacking of aircraft) are considered not to qualify as

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<sup>481</sup> See Interpol’s views on Article 16(3) and (5) of the European Convention on Extradition 1957, above at fn. 333, at para. 11. In this submission, Interpol also emphasises: “It is not due to the nature of a red notice that some States fail to request extradition. That can happen regardless of which document or procedure will have led to provisional arrest. The point of view of Interpol in this matter is that States must respect their commitments in extradition cases, otherwise the whole system of co-operation runs the risk of losing credibility and collapsing completely. These are issues that go beyond the question of red notices and their legal value.”

<sup>482</sup> Resolution No. AGN/53/RES/7 on the Application of Article 3 of the Constitution, adopted by the General Assembly, meeting in Luxembourg from 4–11 September 1984, available at: <http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN53/Resolutions/AGN53RES7.asp>.

<sup>483</sup> Ibid., Part I, (2) and (3). In Part II, the rules contain further guidance on the interpretation of political, military, religious or racial offences. The criteria to be taken into account include the offender’s motives, the connection of the offences with the political life of the offender’s country or the cause for which they are fighting, and the place where the offences are committed.

<sup>484</sup> See also Interpol Fact Sheet: Legal framework governing action by Interpol in cases of political, military, religious or racial character, available at: <http://www.interpol.int/Public/ICPO/Legal/Materials/FactSheets/FS07.asp>. A refusal to issue a “red notice” may also be overturned by Interpol’s General Assembly at the request of the Member State concerned. This was done, for example, in October 2002, when the General Secretariat reinstated the “red notice” for the former Prime Minister of Kazakhstan, Akhezan Kazhegeldin, which had been revoked in June 2002 on the basis that it was based on political charges. “Interpol re-issue of red notice on former Kazakhstan Prime Minister”, Interpol Press Release, 24 October 2002.

“political offences” within the meaning of Article 3 of the Constitution. Interpol does not apply the theory of predominance to requests for assistance concerning the prevention of terrorism, although it has been stated that the decision to circulate such information must be based on intelligence indicating that the individual might be involved in the perpetration of a terrorist offence, rather than simply, for instance, on his membership of a political movement<sup>485</sup>.

b. Validity of “red notices”

310. Interpol’s rules of procedure for the application of Article 3 also provide that the refusal of one or more countries to act on a request for assistance circulated by a National Central Bureau or by the General Secretariat, “does not mean that the request itself is invalid and that it automatically comes under Article 3 of the Constitution. However, if certain countries refuse extradition, this is reported to the other National Central Bureau in an addendum to the original note, indicating that the offender has been released. When a person is arrested with a view to extradition, the wanted notice remains valid, unless the requesting country decides otherwise, until the person concerned has been extradited”<sup>486</sup>.

c. “Red notices” and international refugee protection

311. Refugees who are arrested on the basis of an Interpol “red notice” outside the country of asylum are often in a precarious situation. Situations in which a request for the arrest and subsequent surrender of a refugee is rejected by one or more States, but where the Interpol “red notice” nevertheless remains in force are particularly worrying. In such cases, the persons concerned continue to be at risk of *refoulement* every time they travel to another country.

312. Article 3 of the Interpol Constitution contains a political offence exemption, but neither the Constitution nor Interpol’s rules of procedure provide for safeguards in cases where the person whose arrest and subsequent extradition is sought may be exposed to persecution or other human rights violations. The charges on which “red notices” concerning refugees are based may be a pretext used by States for obtaining the return of opponents living abroad<sup>487</sup>.

313. While refugees are not exempt from the operation of criminal law, their special situation must be taken into consideration in the context of cooperation for the purposes of international law enforcement, particularly where this involves transfer to another country. Both the Member States’ national police authorities and Interpol itself are bound to respect the principle of *non-refoulement*. This should be reflected in the rules of procedure at the national as well as the international level. One could envisage a provision whereby the General Secretariat would be able to revoke a “red notice” on request from the country of asylum and/or UNHCR. Adequate safeguards with regard to confidentiality would be required.

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<sup>485</sup> See Interpol Fact Sheet, above at fn. 484.

<sup>486</sup> Resolution No. AGN/53/RES/7, above at fn. 482, at Part I, (9).

<sup>487</sup> See, for example, A. Karatnycky, “When ‘criminal’ is political – Repressive regimes are manipulating Interpol”, *Washington Times*, 19 December 2000.

314. At the very least, the country in which a refugee has been arrested on the basis of a “red notice” must give due consideration both to their refugee status and to any previous decisions to refuse extradition. The requested State should consult with the country of asylum and, where appropriate, countries which have refused extradition. UNHCR should be informed in such cases, in view of its international protection mandate and supervisory function under its Statute, in conjunction with Article 35 of the 1951 Convention.

### C. Extradition and Exclusion

315. One of the areas in which the linkages between extradition and asylum are particularly close is that of exclusion from international refugee protection of persons who meet the criteria of the refugee definition as contained in Article 1A(2) of the 1951 Convention but are deemed undeserving of such protection. Article 1F of the 1951 Convention provides:

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

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

316. There are numerous points of connection between extradition and exclusion from international refugee protection:

- The non-extradition of political offenders has long been linked to the notion of asylum, and the interpretation of the concept of “political offence” for the purposes of extradition has had a significant impact on the application of Article 1F(b) of the 1951 Convention.
- Evolving definitions of crimes under international criminal law are relevant both for extradition and for exclusion, particularly under Article 1F(a) of the 1951 Convention.
- The establishment under international law of a duty to extradite or prosecute (*aut dedere aut judicare*) for some of the crimes covered by Article 1F of the 1951 Convention affects the consequences of exclusion and therefore the application of the proportionality requirement in exclusion proceedings.
- Findings in extradition proceedings may have a bearing on asylum procedures and *vice versa*. This raises a number of issues concerning, for example, evidentiary standards and requirements, or the appropriate weight to be given in one procedure to a determination made in the course of the other.
- As noted above, the extradition of a person determined to be a refugee in another State may exceptionally be justified if he or she manifestly comes within the scope of Article 1F of the 1951 Convention and therefore does not fulfil the requirements of the refugee definition contained therein<sup>488</sup>.

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<sup>488</sup> See above at paras. 264 and 280.

317. The following sub-sections examine issues which arise at the interface of extradition and exclusion for serious non-political crimes, questions of standards of proof and evidence, as well as extradition, exclusion and terrorism. Questions related to exclusion from international refugee protection and cancellation or revocation of refugee status as a result of findings in the extradition process have been addressed above at paras. 303–304 and 278–280, respectively.

1. *The relation between extradition and exclusion for serious non-political offences under Article 1F(b) of the 1951 Convention*

318. Historically, and in terms of the underlying concepts, there is a close link between the principle of non-extradition for political offences and asylum. For some time, protection against extradition for political offenders was regarded as the essence of asylum. The corresponding view that those who were escaping prosecution for ordinary crimes should not benefit from international protection as refugees found its way into international refugee and human rights instruments after 1945. “Ordinary criminals who are extraditable by treaty” were excluded from protection under the Constitution of the International Refugee Organization (1946)<sup>489</sup>. Article 7(d) of the UNHCR Statute also provides for exclusion of those who have committed “crimes covered by the provisions of treaties of extradition”. Article 14(2) of the Universal Declaration of Human Rights provides that the right to seek and enjoy asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes”.

319. These earlier formulations were not retained in Article 1F(b) of the 1951 Convention. The drafters of the Convention sought to ensure, *inter alia*, that common criminals fleeing prosecution rather than persecution should not qualify for refugee protection under the Convention. They did not, however, clarify the relation between exclusion from refugee status because of a serious non-political crime and extradition. Based on the *travaux préparatoires* to the 1951 Convention, some commentators conclude that Article 1F(b) was meant to be directly linked to extradition, so that it would automatically apply to any crime that could give rise to the surrender of a fugitive under extradition law<sup>490</sup>. Others are of the view that the two concepts, though related, are nevertheless distinct, and that the applicability of Article 1F(b) of the 1951 Convention should not be made dependent on the question of whether or not the person is extraditable<sup>491</sup>. UNHCR also notes that, while the designation of certain crimes as non-

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<sup>489</sup> See Annex I, Part II.

<sup>490</sup> See, for example, J. Hathaway, *The Law of Refugee Status*, Butterworths, Toronto (1991), who considers that Article 1F(b) of the 1951 Convention is “simply a means of bringing refugee law into line with the basic principles of extradition law” (at p. 221), and that only offences which are still justiciable in the country in which they have been committed may give rise to exclusion (at p. 222). A. Grahl-Madsen, above at fn. 148, at pp. 291–292, states that Article 1F(b) should not be applied to crimes which are either too unimportant to warrant extradition or no longer justiciable, and that this interpretation would bring the exclusion clause into line with Article 14(2) of the Universal Declaration of Human Rights as well as with Paragraph 7(d) of the UNHCR Statute.

<sup>491</sup> See, for example, G.S. Goodwin-Gill, above at fn. 166, at p. 104, who states that “the commission of a serious non-political crime may be sufficient reason for exclusion because [...] the very nature and circumstances of the crime render it a basis for exclusion in itself, regardless of extradition, prosecution, punishment or non-justiciability”. W. Kälin and J. Künzli, above at fn. 140, at pp. 70–74, point out that confining the applicability of Article 1F(b) of the 1951 Convention to extraditable crimes would lead to absurd results. See also J. Fitzpatrick, “The Post-Exclusion Phase:



political in extradition treaties is significant in determining the political element of a crime in the Article 1F context, this should nevertheless be considered in light of all relevant factors<sup>492</sup>. A comparative analysis shows that maintaining the distinction is preferable for a number of reasons.

a. Extradition and exclusion: different purposes and criteria

320. Extradition and exclusion have different purposes and are governed by different criteria and considerations. Extradition is concerned with the surrender of a fugitive for criminal prosecution or the enforcement of a sentence, with a view to avoiding those seeking to evade justice by leaving the country being able to do so with impunity. It is a form of international legal assistance between States. Although there is increasing recognition in extradition law of the obligation to protect certain fundamental rights of the individual concerned, the traditional view of extradition as a matter entirely between States still influences practice.

321. By contrast, exclusion is based on the notion that those who have committed certain serious crimes are not deserving of international refugee protection. The exclusion clauses of Article 1F of the 1951 Convention provide for an exception to States' protection obligations towards persons who, in all other respects, fulfil the inclusion criteria of the refugee definition under the 1951 Convention. Its application deprives them of the rights and benefits they would otherwise be entitled to under the 1951 Convention.

b. Definition of "political offences"

322. The qualification of acts imputed to the individual concerned as "political offences" has important consequences. In extradition law, the political offence exemption creates an exception to any duty to extradite which the requested State may have with respect to the requesting State under the applicable extradition treaty or legislation. In refugee law, the political nature of the crime removes it from the scope of the exclusion clause of Article 1F(b) of the 1951 Convention, and perpetrators of such crimes still qualify for refugee protection, if they meet the inclusion criteria of Article 1A(2).

323. As noted above, the notion of a "political offence" is not defined in extradition law. Different tests and methods have been developed with a view to determining, in particular, whether a "relative political offence" – that is, a common crime committed out of a political motive or with a political purpose – can be regarded as a "political offence"<sup>493</sup>. The same questions arise under refugee law, which does not contain a definition either. Courts considering the scope of the concept of "non-political offences" for the purposes of exclusion regularly examine relevant decisions in extradition law. Jurisprudence on Article 1F(b) of the 1951 Convention makes it clear, however, that although extradition law provides useful guidance, there are also important differences.

324. In New Zealand, the Refugee Status Appeals Authority held that the serious non-political crime exception is analogous to extradition, but not equivalent to it, and that

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Extradition, Prosecution and Expulsion", in 12 *International Journal of Refugee Law*, Special Supplementary Issue (2000), at pp. 272–292. G. Gilbert, above at fn. 476, at pp. 447–450.

<sup>492</sup> UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 460, at para. 42.

<sup>493</sup> See above at paras. 77–80.

extradition cases dealing with the political offence exemption, while informative, “must be treated with caution”<sup>494</sup>. A US Court of Appeals noted that the political offence determination in extradition proceedings and the serious non-political crime assessment in immigration proceedings are separate and distinct inquiries<sup>495</sup>. The Federal Court of Canada held that, while the political offence exemptions in the two areas of law “serve to complement each other, there are important differences between the two”<sup>496</sup>.

325. Based on a thorough analysis of earlier extradition cases, the UK House of Lords found that “a substantial point of difference between extradition and asylum is that where the former is in issue the political nature of the offence is an exception to a general duty to return the fugitive, whereas in relation to asylum there is a general duty not to perform a *refoulement* unless the crime is non-political”<sup>497</sup>. The High Court of Australia adopted a similar approach, noting the recognition, in earlier jurisprudence, of the overlap between the exemption from extradition and the exception from refugee status, yet stating that, “in using judicial opinion expressed in the context of extradition cases, it is important to remember the significant differences that exist between the operation of the law of extradition and the grant of asylum to refugees”<sup>498</sup>.

c. Extraditable offences vs. excludable acts

326. If the acts in question are non-political or common crimes, they may be extraditable offences within the terms of the applicable extradition treaties or legislation. It does not immediately follow, however, that the same acts also constitute excludable crimes under Article 1F(b) of the 1951 Convention. They may not, for example, be “serious” non-political crimes, as required under that provision. This threshold is not defined in the 1951

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<sup>494</sup> Refugee Appeal No. 29/91 *Re. SK* (17 February 1991). The RSAA also noted that there is “a very real possibility that extradition cases have developed within their own particular treaty or statutory contexts [...] and without any or sufficient discussion of the standard of political justifiability, democratic ideals and the developing international law of human rights, as evidenced, for example, by the Universal Declaration on Human Rights or the ICCPR.”

<sup>495</sup> *McMullen v. Immigration and Naturalization Service* 788 F.2d 591 (9<sup>th</sup> Cir. 1986), cited in *Barapind v. Reno* 225 F.3d 1100 (9<sup>th</sup> Cir. 2000).

<sup>496</sup> *Gil v. Canada (Minister of Employment and Immigration) (C.A.)* [1995] 1 FC 508 (21 October 1994). See, in particular, the list of nine points of difference between extradition and refugee law provided by Hugessen J.A.

<sup>497</sup> *T. v. Secretary of State for the Home Department* [1996] 2 All ER 865 (22 May 1996), per Lord Mustill. In this case, the UK House of Lords held that “a crime is a political crime for the purposes of Article 1F(b) of the Geneva Convention if, and only if: it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the Government of a State or inducing it to change its policy; and there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target, on the other, and in either event, whether it was likely to involve the indiscriminate killing or injuring of members of the public.”

<sup>498</sup> *Minister for Immigration and Multicultural Affairs v. Singh* [2002] HCA 7 (7 March 2002), per Kirby J.

Convention. State practice varies, but in most countries, a certain level of seriousness must be reached for the exclusion clause to apply<sup>499</sup>.

327. In some countries, the definition of “political offences” in the extradition context is made directly applicable to the interpretation of Article 1F(b) of the 1951 Convention<sup>500</sup>. This is problematic, however, as States may designate relatively minor offences as extraditable crimes in their extradition legislation or treaties governing extradition relations between them<sup>501</sup>. The linking of the two areas may also result in a direct incorporation into the application of refugee law of the “de-politicisation” of certain acts for the purposes of extradition. This, too, is likely to lead to inappropriate results. While most acts which are prohibited under international anti-terrorism instruments and “de-politicised” for the purposes of extradition – such as, for example, hijacking of aircraft or indiscriminate bomb attacks – will normally come within the scope of Article 1F(b) of the 1951 Convention, international refugee law nevertheless requires an assessment of the context and circumstances of the individual case, and an examination of the proportionality of exclusion<sup>502</sup>.

328. Even in cases where a crime does qualify as a “non-political offence” in both areas of law, this does not necessarily mean that its perpetrator will be both extradited and excluded. Extradition as well as exclusion may be precluded for reasons unrelated to the nature of the crime. This may be due, for example, to non-compliance with formal requirements under extradition law, or on the basis of other refusal grounds, or because the consequences of exclusion from refugee protection would be disproportionate to the seriousness of the crime. Another reason may lie in different evidentiary standards and requirements which apply, respectively, to extradition and exclusion, or the fact that the extradition process may not permit the person concerned to invoke defences which would have to be considered in exclusion proceedings.

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<sup>499</sup> Crimes such as murder or attempted murder, armed robbery or rape are generally considered to be serious non-political crimes, as are acts of violence which indiscriminately endanger the life and physical integrity of civilians.

<sup>500</sup> See, for example, s. 91T of the Australian Migration Act 1958 (as amended), which refers to the definition of “political offence” in s. 5 of the Extradition Act 1988.

<sup>501</sup> An example of a multilateral extradition agreement with low thresholds is the Convention relating to Extradition between the Member States of the European Union (1996), which defines as extraditable offences crimes which are punishable by deprivation of liberty or a detention order for a maximum penalty of at least one year under the law of the requesting Member State, and at least six months under the law of the requested Member State. As noted above at para. 62, fiscal offences may also constitute extraditable offences.

<sup>502</sup> See, for example, W. Kälin and J. Künzli, above at fn. 140, at pp. 67–68 and 74–76, who also refer to the possibility that an act which may be defined as “terrorism” under applicable international instruments may have been “the only means of opposing very grave encroachments by the government authority in a State where the rule of law does not prevail”. In such cases, international refugee law allows for the possibility that the person concerned is deserving of international refugee protection despite having committed a serious crime. On the conditions in which the crime hijacking may exceptionally be considered a non-political crime and therefore justify non-exclusion, see UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 460, at paras. 85–86; see also UNHCR, Guidelines on the Application of the Exclusion Clauses, above at fn. 460, at para. 27.

## 2. Standards of proof and evidentiary requirements

329. Article 1F of the 1951 Convention establishes “serious reasons for considering” as the threshold to be reached for exclusion. This is not a familiar standard in legal systems, nor does it provide a clear and precise test<sup>503</sup>. In the absence of guidance in the 1951 Convention, common law States have applied varying standards, usually well below the criminal standard of proof of guilt “beyond a reasonable doubt”. These include, for example, “lower than the balance of probabilities”<sup>504</sup>, “probable cause”<sup>505</sup> or “evidence point[ing] strongly to [...] guilt”<sup>506</sup>. Courts in civil law countries have also held that actual proof or conviction of a crime is not needed in order to exclude a person from protection under the 1951 Convention<sup>507</sup>. In asylum procedures, there are normally no limitations as to what kind of information is admissible as evidence for the purposes of exclusion<sup>508</sup>. In order to establish the “serious reasons” threshold of proof, however, such evidence must be clear and credible<sup>509</sup>. Moreover, the “serious reasons for considering” standard must be established through a process which offers the individual concerned adequate procedural guarantees and safeguards<sup>510</sup>.

330. How this compares to the standard of proof in extradition law depends on the requirements under the applicable extradition treaty and/or national legislation. As noted earlier, these vary from one country to another, and even within one and the same country, different standards of proof may apply depending on the applicable legal basis for extradition. As a general rule, however, the requesting State need not prove that the fugitive is guilty of the offence for which extradition is sought. This is to be determined in the course of the trial awaiting him or her upon surrender.

331. In a number of common law countries, extradition may not be granted unless the requesting State establishes a *prima facie* case against the fugitive. Whether this standard is higher or lower than the “serious reasons” threshold for exclusion will depend on the meaning of *prima facie* for the purposes of extradition in the requested State, in combination with other factors, most notably the rules concerning the type and format of admissible evidence<sup>511</sup>.

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<sup>503</sup> See UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 460, at para. 107; M. Bliss, above at fn. 472, at p. 115.

<sup>504</sup> Federal Court of Canada, in *Ramirez v. Canada* [1992] 2 FC 306 and numerous other cases since.

<sup>505</sup> New Zealand, RSAA in *Refugee Appeal No. 29/91 Re. SK* (17 February 1992).

<sup>506</sup> United Kingdom, Court of Appeal in *T. v. Secretary of State for the Home Department* [1995] Imm AR 142.

<sup>507</sup> See, for example, in France: *Conseil d’Etat, Ressaf*, 15 May 1996; Switzerland: Asylum Appeals Commission (*Asylrekurskommission*), decision No. 1999/12 of 14 September 1998.

<sup>508</sup> See M. Bliss, above at fn. 472, at pp. 117–127.

<sup>509</sup> See UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 460, at paras. 108–109; UNHCR, Guidelines on the Application of the Exclusion Clauses, above at fn. 460, at para. 35; see also Lawyers Committee for Human Rights, “Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective”, in 12 *International Journal of Refugee Law*, Special Supplementary Issue (2000), 317, at p. 329.

<sup>510</sup> See M. Bliss, above at fn. 472, at p. 99.

<sup>511</sup> Thus, for example, the Extradition Act 1999 admits hearsay and any other document submitted by the requesting State to establish the *prima facie* standard, while Canadian courts understand their role in the extradition process as a modest one, which does not include an assessment of the quality of justice or the human rights situation in the requesting State, nor a consideration of defences which

332. For example, where the law of the requested country requires the requesting State to present evidence which, standing on its own, would suffice for a jury to convict the person concerned, based on evidence consisting of sworn affidavits of direct witnesses, the “serious reasons” standards may well be reached. Even then, however, there may be circumstances in which such evidence is fabricated and submitted by the requesting State with persecutory intent.

333. By contrast, where extradition may be granted without the need for the requesting State to present any evidence in support of the allegations made against the wanted person, this will very likely not be sufficient for exclusion. This is the case, for example, under Article 12 of the European Convention on Extradition (1957), where a statement of the offences imputed to the wanted person, together with a copy of the arrest warrant or judgment and information to identify him or her, are sufficient. Extradition agreements between States may also provide for a “no evidence” rule, or relaxed evidentiary standards<sup>512</sup>. Caution is also warranted with respect to findings of extraditability where the person whose extradition is requested is not entitled to present evidence concerning his or her innocence during the judicial phase of the extradition process<sup>513</sup>, or where the courts are not entitled, or not willing, to consider issues related to possible persecution or other human rights violations in the requesting country<sup>514</sup>.

334. In such cases, evidence which is sufficient for the grant of extradition may well not meet the “serious reasons” standard for exclusion. On the other hand, information which would be inadmissible in extradition proceedings under the rules of evidence in the requested State may serve to establish “serious reasons for considering” that an excludable crime has been committed. As with the “political offence” criterion examined in the preceding section, requirements related to the standard of proof and the admissible evidence in either procedure may render a person excludable, but not also extraditable, and *vice versa*. Again, linking exclusion directly to the requirements which apply under extradition law would limit the determination of whether or not a person is a refugee in ways which are not in keeping with the 1951 Convention.

### 3. *Extradition, exclusion and terrorism*

335. As seen above, acts which are defined as “terrorism” in regional anti-terrorism conventions and prohibited under international instruments dealing with terrorism are designated as “non-political” crimes and as extraditable offences<sup>515</sup>. In many cases, conduct commonly regarded as “terrorism” also comes within the scope of Article 1F of the 1951

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could be raised at trial unless the applicable treaty provides otherwise (see the decisions of the Canadian Supreme Court in *Canada v. Schmidt* [1987] 1 SCR 500; *United States of America v. Kwok* [2001] 1 SCR 532; *United States of America v. Cobb* [2001] 1 SCR 587). A finding of a *prima facie* case against the person whose extradition is sought cannot, therefore, be said always to be equivalent to the “serious reasons for considering” threshold of Article 1F of the 1951 Convention. See also above at paras. 46–55.

<sup>512</sup> See above at paras. 47–54.

<sup>513</sup> See above at paras. 191.

<sup>514</sup> See above at paras. 187–190.

<sup>515</sup> See above at paras. 82–85.

Convention and may give rise to exclusion from international refugee protection<sup>516</sup>.

336. It has been suggested that Article 1F(c) of the 1951 Convention is an appropriate basis for excluding those who have committed terrorist crimes<sup>517</sup>. This provision applies to persons for whom there are serious reasons for considering that they are guilty of acts contrary to the purposes and principles of the United Nations. In its Resolution 1373 (2001) of 28 September 2001, the Security Council declared that “acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”<sup>518</sup>. A similar provision is contained in Security Council Resolution 1377 (2001) of 12 November 2001<sup>519</sup>.

337. There is still no generally accepted definition of what constitutes an act of international terrorism. Moreover, Article 1F(c) of the 1951 Convention in itself is vague and raises difficulties of interpretation. UNHCR understands this provision to apply only to persons acting on behalf of States or quasi-States, because the United Nations’ purposes and principles are intended to be a guide for States in their relations with each other<sup>520</sup>. In the view of UNHCR, Article 1F(c) is “only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence”<sup>521</sup>. In cases involving a terrorist act, the decisive criterion is whether the act “impinges on the international plane – in terms of its gravity, international impact, and implications for

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<sup>516</sup> On the applicability of Article 1F to acts of terrorism, see UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 460, at paras. 79-84; UNHCR, Guidelines on the Application of the Exclusion Clauses, above at fn. 460, at paras. 25-27.

<sup>517</sup> See, for example, reports submitted to the Committee established pursuant to Security Council Resolution 1373 (2001) of 28 September 2001 (“Counter-Terrorism Committee”) by Finland, UN doc. S/2001/1251, 28 December 2001 (reference is made to the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, GA Res. 51/210, 16 January 1997); or Canada (UN doc. S/2001/1209, 14 December 2001), which refers to the Supreme Court’s decision in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982. In this decision, the majority held that there is a strong indication that Article 1F(c) of the 1951 Convention will apply where a widely accepted international agreement or UN resolution explicitly declares that the commission of certain acts is contrary to the UN purposes and principles (with reference, *inter alia*, to GA Res. 51/210, 16 January 1997, Annex, Article 2); and that this designation should be considered determinative where such declarations or resolutions represent a reasonable consensus of the international community. See also Commission of the European Communities, Commission Working Document on “The relationship between safeguarding internal security and complying with international protection obligations and instruments”, COM(2001) 743 final, 5 December 2001, at para. 1.1.1.

<sup>518</sup> SC Res. 1373, UN SCOR 56<sup>th</sup> year: 2001, 4385<sup>th</sup> mtg, UN doc. S/Res/1373/2001, at operative para. 5.

<sup>519</sup> SC Res. 1377, UN SCOR 56<sup>th</sup> year: 2001, 4413<sup>th</sup> mtg, UN doc. S/Res/1377/2001, Annex, at para. 4, where the Security Council “stressed that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations”.

<sup>520</sup> See, for example, UNHCR, “Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s Perspective”, November 2001, at para. 14.

<sup>521</sup> UNHCR, Guidelines on the Application of the Exclusion Clauses, above at fn. 460, at para. 17.

international peace and security.”<sup>522</sup> UNHCR therefore considers that because of its vague character, Article 1F(c) should be applied with caution<sup>523</sup>.

338. In most cases, Article 1F(b) of the 1951 Convention will be more appropriate as a basis on which to determine whether criminal acts regarded as terrorism should give rise to exclusion from international refugee protection. This provision applies where there are serious reasons for considering that the person concerned has committed a serious non-political offence outside the country of refuge prior to admission to that country as a refugee. Jurisprudence in a number of countries shows that this exclusion clause provides an adequate tool for avoiding the institution of asylum being abused by persons who are not deserving of international refugee protection<sup>524</sup>. Generally, conduct which creates indiscriminate danger to the life and physical integrity of people, and which is disproportionate with regard to its political purpose will not be regarded as a political offence<sup>525</sup>.

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<sup>522</sup> Ibid.; see also UNHCR, Background Note See UNHCR, Guidelines on the Application of the Exclusion Clauses, above at fn. 460, at para. 49.

<sup>523</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, at paras. 163 and 179. See also UNHCR, Guidelines See UNHCR, Guidelines on the Application of the Exclusion Clauses, above at fn. 460, at para. 17.

<sup>524</sup> See W. Kälin and J. Künzli, above at fn. 140, at p. 76: “Using the principles of Article 1F(b) applicable to offenders of common crimes in cases of terrorist acts will allow for results to be reached which are both satisfactory and in line with legitimate interests of States to combat international terrorism and, at the same time, help to protect persons against very serious political persecution even if they, in fact, have used violence.” The authors also note, at footnote 142, that “this approach will make it unnecessary to resort to a problematic use of Article 1F(c) declaring terrorism as contradicting the goals of the United Nations and thus expanding the sense of this clause far beyond its proper meaning.”

<sup>525</sup> See, in particular, *T. v. Secretary of State for the Home Department*, [1996] 2 All ER 865 (22 May 1996). This case concerned an active member of the *Front Islamique du Salut* (FIS) who had been involved in a bomb attack at an airport near Algiers which killed ten people. Expressing agreement with the Court of Appeal’s rejection of the Immigration Appeal Tribunal’s reasoning according to which indiscriminate bombing equalled terrorism and could therefore not be political, the majority in the House of Lords held: “We too think it inappropriate to characterise indiscriminate bombings which lead to the deaths of innocent people as political crimes. Our reason is not that all terrorist acts fall outside the protection of the [1951] Convention. It is that it cannot be properly said that these particular offences qualify as political. In our judgment, the airport bombing in particular was an atrocious act, grossly out of proportion to any genuine political objective. There was simply no sufficiently close or direct causal link between it and the appellants’ alleged political purpose. It offends common sense to suppose that FIS’s cause of supplanting the government could be directly advanced by such an offence.” See also decisions of courts in Canada (*Gil v. Canada (Minister of Employment and Immigration)* (CA) [1995] 1 FC 508); France (see, for example, the decisions of the *Conseil d’Etat* in *Croissant*, 7 July 1978; *Winter*, 15 February 1980; *Lujambio Galdeano*, 26 September 1984); United States of America (*INS v. Aguirre-Aguirre*, 119 S.Ct. 1439 (1999)). See also UNHCR, Background Note on the Application of the Exclusion Clauses, above at fn. 460, at para. 81.

339. Designations of “non-political” offences for the purpose of extradition should not be made directly applicable to exclusion under Article 1F(b) of the 1951 Convention. Instead, principles and criteria applicable under extradition law should be applied to exclusion only by analogy, and to the extent that they are compatible with the nature and purpose of determinations under refugee law, which need to take full account of all the circumstances of the individual case<sup>526</sup>.

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<sup>526</sup> See W. Kälin and J. Künzli, above at fn. 140, at pp. 67–68 and 74–76. See also above at fn. 502.