



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

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

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

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

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

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I. BACKGROUND AND CONTEXT

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

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

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

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

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

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

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

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

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

II. EXTRADITION AND THE PRINCIPLE OF NON-REFOULEMENT

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

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

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

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

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

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

B. Extradition procedures concerning refugees

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

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

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

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

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

Extradition request concerning a refugee recognized by the requested State

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

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

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

⁷⁶ See also above at para. 25.

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

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

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

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

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

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

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

Extradition request concerning a refugee recognized by UNHCR

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

⁸⁰ See above at para. 15.

⁸¹ See above at paras. 16–20.

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

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