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

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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 18th 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

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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.

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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-19th 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.

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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.

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- **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

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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.

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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

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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.

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