

Introduction

1 In the exercise of its function of international protection, the Office is frequently called upon to concern itself with cases in which the extradition of a refugee is requested. Cases of this kind involve a number of complex questions which will be examined in the following paragraphs.

2 There has traditionally been a close relationship between non-extradition for political asylum. It was in the general context of asylum that non-extradition for political offenses developed as one of the fundamental principles of extradition law. Indeed in Europe at one period (i.e., the nineteenth century) asylum was considered to be essentially the refusal of extradition for political offenses. The extent to which the principle of non-extradition for political offenses is nowadays sufficient to meet the special situation of the refugee will be considered in paragraphs 9 to 11 below.

3 A request for the extradition of a refugee may relate to a person who has been formally recognized as such or to a person who, although not so recognized, may nevertheless fulfil the criteria for refugee status. The last-mentioned situation could arise in countries that have not yet become parties to the 1951 United Nations Refugee Convention or to the 1967 Protocol, or in countries that still maintain the geographical limitation in respect of their obligations under these instruments. Refugee status may also not have been determined either because the person concerned has not formally applied for refugee status, or because his application for refugee status is still pending.

4 An extradition request may under certain circumstances indicate - by reason of the facts presented - that the person whose extradition is requested is not a bona fide refugee. If the request is made in respect of a serious common crime, it may also indicate that the person concerned, although otherwise meeting the criteria of the refugee definition, is excluded from refugee status under Article 1 F(b) of the 1951 Convention.

5 According to Article 1 F(b), the provisions of the Convention shall not apply to any person with respect to who there are serious reasons for considering that he has committed "a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". While the exact meaning of the term "serious non-political crime" may be the subject of differing views, it is clear that not all extraditable offenses are so serious a character as to involve exclusion from refugee status.

6 The question whether a person whose extradition has been requested in respect of a common law offence should be protected against extradition as a refugee thus arises (a) if the extradition request does not indicate that the person is excluded from refugee status for having committed a serious common crime, and (b) if by reason of the principles of non-refoulement the person should not be returned to the requesting State.

7 Requests for the extradition of a refugee are most frequently addressed to the State where the refugee has his habitual residence. In a number of cases with which the Office has had to concern itself in recent years, however, extradition has been requested from a State where the refugee was present on a purely temporary basis. In these cases the refugee had already been the subject of a similar extradition request - which had been rejected - in his country of habitual residence. The need in such circumstances for the refugee to undergo renewed extradition proceedings - sometimes accompanied by prolonged periods of detention - necessarily involves considerable hardship. Moreover, the danger of being exposed to such renewed extradition proceedings in another country may seriously impede the refugee's freedom of movement by obliging him to remain in his country of habitual residence.

8 In the cases referred to in the preceding paragraph, the refugee had been formally recognized as such by the authorities of his country of habitual residence, and his refugee status was duly taken into account by those authorities when rejecting the extradition request. Cases of this kind, i.e., where the refugee has been formally recognized as such by his State of habitual residence, therefore also involve the question of the extraterritorial effect of the determination of refugee status which was already considered by the Committee at its twenty-ninth session.

The protection of refugees against extradition under the traditional principles of extradition law

9 While the institution of extradition is intended to facilitate the exercise of penal jurisdiction by States, a number of principles have been developed in the law of extradition aimed at protecting the basic interests of the individual whose extradition is requested. The extent to which these principles are adequate to meet the special situation of the refugee will now be considered.

10 Where the extradition of a refugee is requested in respect of a political offence, the refugee will be protected against extradition according to the principle of non-extradition for political offenses which figures in the great majority of extradition treaties. Extradition treaties, however, only very rarely give a definition of what constitutes a political offence, and the matter is normally left to be determined by the requested State according to criteria which, as is known, are not uniform. Thus certain States, in determining whether or not an offence can be characterized as political, have regard exclusively to its nature and immediate consequences. Other States apply a more flexible criteria and consider that an offence may, under certain conditions, be regarded as political if committed for a political motive, even though the offence itself does not have a political character. In other States again, regard is had to whether in respect of a given offence the political or the common law element predominates.

11 Nevertheless, despite the more flexible criteria that may be applied by various States in characterizing an offence as "political", the principle of non-extradition for political offenses is not in itself sufficient to provide the refugee in all cases with protection against extradition to a country where he has reason to fear persecution. Where, by reason of the criteria applied by the requested State or its evaluation of the facts alleged, an offence is not characterized as a political but as a common law offence, the refugee may indeed be exposed to the danger of extradition.

12 According to the principle of double criminality, extradition will not be granted unless the offence for which it is requested constitutes an offence under the laws of both the requesting and the requested State. The principle of double criminality is of particular importance in protecting the basic interests of persons whose extradition is requested and, insofar as it is applicable, would also protect refugees against extradition. The principle would not, however, exclude the extradition of a person who fears persecution in the requesting State if the act alleged constitutes an offence under the law of both the requesting and the requested State.

13 According to the principle of specialty, extradition shall not be granted unless there is a guarantee that the requesting State will only prosecute and/or punish for the offence specified in the extradition request and not for any other offence.

14 The view has been expressed that, if the requested State is satisfied that the principle of specialty will be observed, this will remove any obstacle that may exist to the extradition of a refugee. It is, however, questionable whether in the case of a refugee the protection afforded by the principle of specialty can be regarded as adequate. While the principle excludes prosecution and/or punishment for an offence other than the one for which extradition was granted, it cannot give effective protection against excessive punishment or prejudicial treatment for any of the reasons relevant to refugee status.

15 The traditional principles of extradition law are of course given due consideration by States when examining requests for the extradition of refugees. These principles moreover, within their respective limits, may indeed provide refugees with important legal guarantees. Due to their specific and clearly defined scope, however, these principles do not always provide the refugee with the necessary protection which, in the final analysis, can only be provided by the refusal of extradition by virtue of the principle of non-refoulement.

The principle of non-refoulement in the context of extradition

(A) General

16 The principle of non-refoulement, which is the cornerstone of asylum, prohibits the return of a person to a territory where he has reason to fear persecution. Having regard to the nature and purpose of the principle - fundamental importance of which has been repeatedly stressed by the Executive Committee - there is no inherent reason why it should not also apply with respect to extradition. Indeed, the protection of a refugee cannot be regarded as complete unless he is also protected against extradition to a country where he has reason to fear persecution.

(B) Statement of the principle of non-refoulement in international instruments

17 Insofar as their actual wording is concerned, statements of the principle of non-refoulement figuring in various international instruments are wide enough to cover extradition. This applies in particular as regards the wording of Article 33, paragraph 1 of the 1951 Convention, viz.;

"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".^[1]

18 In interpreting the terms of Article 33, paragraph 1, from the standpoint of its possible application to extradition, the judicial practice of different countries has tended to vary. In Belgium it has been considered that by reason of Article 33, paragraph 1 a refugee may not be extradited to his country of origin [2] In Austria it has been considered, in a judgement of the Supreme Court, that a refugee may not be extradited to his country of origin by virtue of an application by analogy of the principle defined in Article 33 and in order to avoid a violation of the internationally recognized rights of refugees [3] In France on the other hand, it has been considered that Article 33 does not prohibit extradition but only expulsion or refoulement, which measures are legally different [4] Despite this interpretation, however, the French authorities do not in practice extradite refugees to their country of origin.

(C) Article dealing with non-extradition in the Draft Convention on Territorial Asylum

19 The Draft Convention on Territorial Asylum, which was considered by a Group of Government Experts in 1975, contained an article on "non-extradition" [5] worded as follows;

"Article 3. Non-extradition

"No person shall be extradited to a State to the territory of which he may not be returned by virtue of Article 2." (i.e., the article of the Draft Convention that states the principle of non-refoulement.

20 The discussions of the group of experts on this draft article are of particular interest from the standpoint of the applicability of the principle of non-refoulement in the context of extradition. The report of the group of experts (A/10177) is therefore reproduced in extenso, viz.

"78. The Discussion on this article involved an exchange of views on various general problems affecting extradition in relation to asylum and non-refoulement. One expert believed that the article might not be necessary, since the matter was already covered by the principle of non-refoulement, and he pointed out that Article 33 of the 1951 Convention used the words 'in any manner whatsoever', which could be construed as covering extradition. Another expert inquired whether it might not be possible to include a reference to extradition in Article 2 of the Draft Convention. It was pointed out, however, that doubts had been expressed regarding the applicability of Article 33 of the 1951 Convention to extradition, which seemed to indicate that an Article like the present one was necessary.

"79. One expert, while recognizing the clear necessity for the article, believed that the mere reference to article 2 of the Convention was not appropriate and that the circumstances in which an asylum could not be extradited should be clearly spelt out and, in this connection he referred to article 4 of the Caracas Convention on Territorial Asylum.

"80. It was generally recognized that the article might give rise to difficulty from the standpoint of existing extradition treaties and in particular treaties of a bilateral character. Some experts believe that this matter should be dealt with by the introduction of a special provision in the article or elsewhere in the Convention to provide for the resolution of a possible conflict of treaty obligations. Others felt that this question could be left open as the relationship between different treaties had already been regulated in very great detail in article 30 of the Vienna Convention on the Law of Treaties which, although not yet in force [6] reflected the existing position under international customary law.

"81. When the article was examined at the second reading, a majority of experts considered that it should be deleted."

21 In deciding to delete draft Article 3, the experts would thus appear to have been mainly concerned with the need to give some further thought to the technical problems that might result from the adoption of such a provision. Their non-acceptance of the draft Article would not appear to be based in any way on the notion that a refugee should not be protected against extradition to a country to which, according to the principle of non-refoulement, he should not be returned. During the United Nations Conference on Territorial Asylum, held in Geneva from 10 January to 4 February 1977, an amendment was brought in by certain delegations proposing the reintroduction of the draft Article in the following wording:

"A person shall not be extradited to the territory of any State if the requested State has serious reason to presume that the request for extradition for an ordinary offence has been made for the purpose of persecuting, prosecuting or punishing that person for any of the reasons stated in Article 2, paragraph 1, or that person's position may be prejudiced for any of these reasons". [7]

(D) Application of the principle of non-refoulement to extradition in the practice of States

22 The notion that the principle of non-refoulement is also applicable in regard to extradition has found increasing confirmation in recent years in the provisions of various multilateral conventions adopted on the regional and universal levels, in a number of bilateral extradition agreements, and in the constitutions and ordinary legislation of a number of States in different areas of the world.

(I) Multilateral Conventions

23 The European Convention on Extradition adopted on 13 December 1957 contains a provision which is of a special significance in regard to the non-extradition of refugees. Article 3 of the Convention provides that;

"1. Extradition 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."

"2. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons" (emphasis added)

"3. ...

"4. ...

24 Article 3 of the European Convention of Extradition formed the model for a later provision figuring in the European Convention on the Suppression of Terrorism adopted on 27 January 1977. According to Article 5 of the last-mentioned Convention;

"Nothing in this convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons."

25 A provision identical with Article 5 of the European Convention on the Suppression of Terrorism figures in Article 9 of the United Nations Convention on the Taking of Hostages adopted by the General Assembly on 12 December 1979.

26 The various conventions on the unlawful seizure of aircraft and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons do not impose upon States an unqualified obligation to extradite offenders [8] Instead, the contracting States are given the option of extraditing or themselves prosecuting the offenders, according to the principle of *aut dedere/ aut punire*. One of the reasons for this choice is precisely to allow contracting States to refuse extradition and to grant asylum, if this is considered justified. An examination of State practice in this regard shows that, in cases involving bona fide refugees, States have chosen to refuse extradition and to prosecute the offender under their own legislation.

27 On the American continent, mention should be made of the Convention to prevent and punish Acts of Terrorism taking the form of Crimes against Persons and related Extortion that are of International Significance, adopted by the Organization of American States on 2 February 1971. This Convention provides for the extradition of persons alleged to have committed any of the crimes enumerated in Article 2 which for purposes of extradition are considered to be common crimes [9] Article 6 of the Convention, however, provides that;

"None of the provisions of this Convention shall be interpreted so as to impair the right of asylum".

28 A provision mentioning asylum in the specific context of extradition also figures in the Draft Inter-American Convention on Extradition Approved by the OAS Inter-American Juridical Committee on 1 February 1977. Article 13 of the draft Convention provides that;

"No provision of this Convention shall be interpreted as a limitation on the right of asylum when applicable"[10]

(Ii) Bilateral extradition agreement

29 Article 3 of the European Convention on Extradition, referred to above, provided a model for similar provisions figuring in a number of bilateral extradition agreements concluded between a number of countries within and outside Europe[11] . Reference may also be made to the Extradition Agreement between Austria and Hungary of 25 February 1975, and that between Austria and Poland of 27 February 1978, both of which contain provisions [12] excluding extradition in the person whose extradition is sought enjoys asylum in the territory of the requested States.

(Iii) National constitutions and ordinary legislation [13]

30 The provisions relating to asylum which figure in the Constitutions of a number of countries could be interpreted as excluding extradition in the case of persons qualifying for asylum. The extradition of refugees and persons to whom asylum has been granted is, moreover expressly prohibited by the constitutions of number of States; Algeria^[14], Egypt^[15]15, Jordan^[16]16, Libya^[17]17, Sudan^[18], Syria^[19]19, Tunisia^[20]20, United Arab Emirates^[21]21, Yemen Arab Republic^[22]

31 As regards ordinary legislation, reference may be made to the provisions concerning the surrender of fugitive offenders figuring in the legislation of various Commonwealth countries. The Scheme for the Rendition of Fugitive Offenders adopted by the Meeting of Commonwealth Law Ministers in 1966 contained a model provision excluding the surrender of fugitive offenders to other Commonwealth countries in circumstances relevant to refugee status, viz.;

"9 - (1) ...

"(2) The return of a fugitive offender will be precluded by law if it appears to the competent judicial or executive authority -

(A) that the request for his surrender although purporting to be made for a returnable offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinion, or

(B) that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion. ^[23]23"

32 Provisions following this model have been adopted in the legislation of a number of Commonwealth countries both as regards the surrender of fugitives within the Commonwealth and extradition to countries outside the Commonwealth^[24]

33 Mention should also be made of the Austrian Extradition Law of 4 December 1979, which specifically exclude extradition if the person whose extradition is requested would be exposed in the requesting State to persecution by reason of his origin, race, religion, membership of particular ethnic or social group, his nationality or political opinion^[25]

Conclusions

34 From the explanations given in the preceding paragraphs, the following conclusions can be drawn;

(A) Cases in which the extradition of a refugee is requested give rise to special problems if the requesting State is one in relation to which the refugee may have reason to fear persecution;

(B) The traditional principle of extradition law, viz. the principle of non-extradition for political offenses, the principle of double criminality and the principle of specialty do not in themselves give the refugee sufficient protection against extradition to a country where he may have reason to fear persecution;

(C) An extradition request made in respect of a common crime may, under certain conditions, indicate that the person whose extradition is requested is not a bona fide refugee or is excluded from refugee status;

(D) Where, however, the circumstances of the case do not lead to this conclusion, the refugee should be fully protected against extradition to a country where he has reason to fear persecution, by virtue of the generally accepted principle of non-refoulement;

(E) The view that the principle of non-refoulement is applicable with respect to extradition has found increasing acceptance in recent years in multilateral and bilateral treaties relating to extradition, and in the constitution and ordinary legislation of a number of States;

(F) It is desirable that States that are already bound by extradition treaties seek to ensure that such treaties are applied with due regard to the principle of non-refoulement;

(G) In line with the developments mentioned in paragraph (e) above, it is desirable that full effect be given to the principle of non-refoulement in all future treaties relating to extradition and as appropriate in national legislation on the subject;

(I) Where a request for the extradition of a refugee is addressed to a State where the refugee finds himself on a purely temporary basis, extradition having previously been refused by the refugee's State of habitual residence, every effort should be made to ensure that the proceedings are carried out expeditiously and that the period during which the refugee is required to remain

in detention is reduced to the minimum. Moreover, the determination of refugee status by the authorities of the refugee's State of habitual residence should be treated as an important element when examining the extradition request.

[1] Emphasis added. Similarly, General Assembly resolution 8 (I) on the Question of refugees adopted on 2 February 1946:

"No refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts, including adequate information from the government of their countries of origin... shall be compelled to return to their country of origin". (Emphasis added)

Similarly, the 1967 United Nations Declaration on territorial Asylum, Article 3, paragraph 1:

"No person referred to in Article 1, paragraph 1, shall be subjected to measure such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution". (Emphasis added)

Cf. also OAU Convention relating to the Specific Aspects of Refugee Problems in Africa, Article II (3);

"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 for the reasons set out in Article 1, paragraphs 1 and 2".

[2] Court of Appeal of Brussels, Judgement of 31st August 1962.

[3] Judgement of 24th May 1958, Os 31/58/12.

[4] Opinion of the Paris Chambre d'accusation of 20 December 1978, cf. also Statement by the French Minister of Justice of 5th December 1977. Debats Parlementaires, Senat, 1977, page 3523.

[5] Prepared by a group of non-governmental experts, which had met in Bellagio/Geneva in 1971/1972.

[6] The Convention entered into force on 27 January 1980.

[7] A/CONF.78/C.1/L.105. Owing to lack of time, however, the amendment could not be considered by the Conference.

[8] Convention on Offenses and Certain other Acts Committed on Board Aircraft, Tokyo, 14 September 1963 (Article 16); Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970 (Article 7); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Montreal, 23 September 1971 (Article 7); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York 14 December 1973 (Article 7).

[9] Kidnapping, murder and other assaults against the life or personal integrity of those persons to whom the State has the duty to give special protection, according to international law as well as extortion in connection with such crimes.

[10] Unofficial translation from the Spanish.

[11] Belgium - Federal Republic of Germany Extradition Agreement of 17 January 1958, Article 3; Austria - Federal Republic of Germany Extradition Agreement of 22 September 1958, Article 3; Israel - Switzerland Extradition Convention of 31 December 1958, Article 3; Austria - Israel Extradition Convention of 10 December 1961, Article 4; Israel - Sweden Extradition Agreement of 10 September 1963, Article 7; Federal Republic of Germany - Tunisia, Extradition Agreement of 19 July 1966, Article 3; Canada - Israel Extradition Agreement of 10 March 1967, Article 4; Austria - Canada Extradition Agreement of 11 May 1967, Article 4.

[12] Article 3(2) and Article 4(2) respectively.

[13] The constitutional and legislative provisions referred to in this section are intended to provide examples of State practice and are not necessarily exhaustive.

[14] Constitution of 1976 (Article 70).

[15] Constitution of 1971 (Article 53).

[16] Constitution of 1952 (Article 21).

[17] Constitution of 1969 (Article 11).

[18] Constitution of 1973 (Article 44).

[19] Constitution of 1973 (Article 34).

[20] Constitution of 1959 (Article 17).

[21] Provisional Constitution of 1971 (Article 38).

[22] Constitution of 1970 (Article 31).

[23] CMMD 3008.

[24] viz. Australia: Extradition (Foreign States) Act 1966 (No. 76 of 1966); Extradition (Commonwealth Countries) Act 1966 (No. 75 of 1966); Barbados: Extradition Act, 1979 (No. 21 of 1979); Kenya: Extradition (Commonwealth Countries) Act 1968 (No. 65 of 1968); Lesotho: Fugitive Offenders Act (No. 38 of 1967) ; Seychelles: Extradition (Commonwealth Countries) Act 1979 (No. 3 of 1979); Singapore: Extradition Act 1968 (No. 14 of 1968); United Kingdom: Fugitive Offenders Act, 1967 (Ch. 68); Zambia: Extradition Act 1968 (No. 47 of 1968).

[25] Austlieferungs-und Rechtshilfegesetz of 4 September 1979, Bundesgesetzblatt, No. 529 of 1979.

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