

CHAPTER VI

RECONCILING EXTRADITION WITH NON- REFOULEMENT

Human rights must be considered while determining the extradition request. The foundation for the discrimination clauses in most of the extradition treaties are laid by the perspectives of human rights. However, the traditional view was governed by the principle that states have the exclusive power to deal with the matters of extradition. Individual here was only considered as an object under international law, which is unable to assert his own human rights, and can only oppose the extradition on grounds that it was violative of the treaty, for example, the offence committed was not covered under the treaty.⁶⁹¹ However, this traditional notion has changed, under international law. An analysis of the case study in the fourth chapter clearly points to this view.

Human rights do not stand in the way of extradition.⁶⁹² Extradition is an important method of ensuring that those who have committed crimes are held accountable and justice is ensured. It is an instrument for cooperation between states, so that those who have committed crimes cannot escape the law. When a valid extradition request is made by a State, The requested state would face a conflict between the principles of non-refoulement and extradition. In such cases a direct conflict arises between the conflicting provisions under international law.

VI.1 HIERARCHY OF OBLIGATIONS

It is important to understand the hierarchy of obligations under international law, and which obligation must be accorded greater importance.

⁶⁹¹David A. Sadof, “Bringing International Fugitives to Justice: Extradition and its Alternatives”, (Cambridge University Press, 1st ed., 2016).

⁶⁹² Soering v. the United Kingdom, Eur.Ct. H.R., Application No. 14038/88, Judgment of 7 July 1989

VI.1.i Conflict between extradition agreements and conventions

A state would face conflicting obligations under its extradition treaty, and human right convention. The state would have a duty to extradite on the basis of a valid extradition request, but the state is also bound to refuse extradition in certain cases. Various conventions have attempted to resolve this conflict. Art. 28 of the European convention on Extradition⁶⁹³ clearly state that its provisions would supersede any treaty or agreement dealing with extradition between state parties.⁶⁹⁴

Art. 30 of the Vienna Convention on Law of Treaties⁶⁹⁵ lays down the rules to govern the functioning of two treaties on the same issue, which can be summed as, treaties which are passed later will prevail over the ones which are passed in an earlier date and the more specific ones will prevail over the general treaties.⁶⁹⁶

VI.1.ii Conflict between extradition obligation and obligation under other international treaties

The aforementioned rules would only apply in cases where both the treaties deal with the same subject matter. A state would often face conflicting obligations under its extradition treaty, and human right convention. The human rights on which the status of *jus cogens* or peremptory norms of international law has been conferred, some of the Articles like Art. 53 and 64 of the Vienna Convention on Law of Treaties⁶⁹⁷ would apply. Obligations provided in any treaty are void if it is in conflict with the principle of *jus cogens*.⁶⁹⁸ A state is always prohibited from extraditing an individual to the state where he might be tortured or subjected to cruel, inhuman or degrading

⁶⁹³European Convention on Extradition, 13 December 1957, ETS 24. (in force 18 April 1960) [Hereinafter European Convention on Extradition].

⁶⁹⁴Kapferer, *supra note* 118.

⁶⁹⁵Vienna Convention on the Law of Treaties, Art. 53, opened for signature 23 May 1969, 1155 U.N.T.S. 331, (in force 27 January 1980) [hereinafter VCLT] Article 53 Treaties Conflicting With A Peremptory Norm Of General International Law (Jus Cogens)

If a treaty conflicts with a peremptory norm of international, it will be void. Peremptory norms of international law is a norm which is recognized and accepted by the international community as a whole and form a norm which cannot be derogated from, and can only be modified by a subsequent norm of similar character.

⁶⁹⁶ Kapferer, *supra note* 118.

⁶⁹⁷ VCLT, *supra note* 695.

⁶⁹⁸ Hossain, *supra note* 443.

punishment. As this has attained the status of *jus cogens*, it would always prevail over a state's obligation to extradite the offender. However, in relation in human right obligations which have not yet attained the status of *jus cogens*, Art, 55(c)⁶⁹⁹ and 56⁷⁰⁰ of the U.N. Charter obligates State's to protect and promote human rights. Furthermore, Art. 103⁷⁰¹ of the U.N. Charter states that in case of conflict between the obligations of the U.N. Charter and under any other international instrument, the obligation under the U.N. will prevail.⁷⁰² Thus, possible violation of human rights takes precedence over the duty to extradite.⁷⁰³

VI.1.iii. Conflict between Extradition Obligation and Obligation under Customary International Law

With regard to a conflict between an extradition obligation and a human right obligation which has attained the status of customary international law, as a general rule, the latter will prevail.⁷⁰⁴ It is opined that this is particularly the case with regard to *non-refoulement* obligations. Customary international obligation will always prevail over obligations under extradition law.⁷⁰⁵ The importance given to human rights does not depend only depend on specific provisions obligating the same,⁷⁰⁶ but on the primacy of the obligations due their special nature.⁷⁰⁷

VI.2 LEGAL AND ILLEGAL REFUGEES

Wayan Parthiana, argues that the entire conflict can be resolved by making a differentiation between legal and illegal refugees. Legal refugees are those who have been classified as refugees under the 1951 Refugee Convention and the 1967

⁶⁹⁹Art. 55(c), United Nations Charter, 1945, 1 U.N.T.S. XVI. (Hereinafter U.N. Charter); See also, Preamble, Refugee Convention.

⁷⁰⁰ Art. 56, U.N. Charter, *Id.*

⁷⁰¹ Art. 103, U.N. Charter, *Id.*

⁷⁰² Rain Liivoja, "The Scope of the Supremacy Clause of the United Nations Charter", 57 *International and Comparative Law Quarterly* 583 (2008).

⁷⁰³ Kapferer, *supra* note 118.

⁷⁰⁴ Kapferer, *supra* note 118.

⁷⁰⁵ Liivoja, *supra* note 702.

⁷⁰⁶UNHCR Guidance Note on Extradition and International Refugee Protection, <http://www.coe.int/t/dghl/standardsetting/pc-> ; Article 6, Organization of American States (OAS), Inter-American Convention on Extradition, 25 February 1981.

⁷⁰⁷ Malcolm N. Shaw, "International Law", Cambridge University Press, 6th ed., 2010.

Protocol. Illegal refugees are those who have committed crimes in their home state and have fled to escape valid prosecution, these persons fall under the exclusion classes under Art. 1(F) of the Refugee Convention, and can be validly extradited.

All the refugees who stay in a country cannot be classified as legal refugees. In other cases, a person might be classified as a refugee, but would lose his status, after commission of a crime. This is why a differentiation has to be made between legal and illegal refugee.

The UNHCR along with the authorities of the host country in whose territory the refugees are located is involved in the refugee determination process. Other international organizations can also be involved in the process, if considered necessary.⁷⁰⁸ Those who are validly classified as refugees in accordance with the convention are identified as being legal refugees. Legal refugees would enjoy all the rights and obligations endowed on a valid refugee. Individuals who don't qualify are termed as illegal refugees.⁷⁰⁹

Convention Countries and the UNHCR are not bound to provide protection to illegal refugees. The drafting committee was aware that such groups cannot be afforded international protection⁷¹⁰ and Art. 1(F) of 1951 Refugee Convention explicitly provides for the same.

The exclusion clause clearly states that the convention will not apply to an individual who has “committed a crime against peace, war crime, or crime against humanity; or has committed a serious non-political crime; or has been guilty of acts contrary to the principles of the United Nations.”⁷¹¹

⁷⁰⁸ Liivoja, *supra note* 702.

⁷⁰⁹ Ibid.

⁷¹⁰ Shaw, *supra note* 707.

⁷¹¹ Art. 1(F), Refugee Convention, 1951.

VI.2.i. Analysis of the Classification

The exclusion clause has been incorporated along the lines of the International Military Tribunal statute,⁷¹² which provided for three categories of crimes for which individual criminal responsibility can be imposed.⁷¹³ The International Military Tribunal to prosecute Nazi and Japanese officials accused of committing such crimes during World War II. The drafters of the 1951 convention found to provide for the exceptions in the Convention.

Persons who have committed serious non-political crimes in their previous country cannot be enjoined with refugee status as this would allow them to escape from valid prosecution for the crimes committed. The Article also provides for the well accepted political offense exception, which states that a person cannot be extradited if he is wanted for commission of a political offence. A person cannot be held responsible merely for opposing the established government, due to his unique political beliefs. This protects the right of individuals to espouse their views and beliefs.

If an individual has committed acts contrary to the purposes, objectives and principles of the UN, he cannot claim protection under the Refugee Convention.⁷¹⁴ The subject and purpose of the UN are broadly contained in Art. 1 of the United Nations Charter.⁷¹⁵ Whereas, the principles of UN can be found under Art. 2 of the UN Charter.⁷¹⁶ Art. 1 and 2 of the U.N Charter have been recognized as jus cogens principles, and cannot be violated under any circumstances.

Refugees are civilians who have not participated in war crimes, or are trying to escape from valid prosecution or have committed acts contrary to the purpose of the

⁷¹²Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis.

⁷¹³James C Simeon, "The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/or Crimes Against Humanity in Canada", 27(1) Int. J. Refugee Law 75 (2015).

⁷¹⁴ UNHCR Standing Committee, Note on the Exclusion Clauses Note on the Exclusion Clauses, UNHCR, <http://www.unhcr.org/excom/standcom/3ae68cf68/note-exclusion-clauses.html> (last seen on 3 Feb. 2017).

⁷¹⁵ Art. 1, U.N. Charter, *supra* note 699

⁷¹⁶ Art. 2, U.N. Charter, *supra* note 699.

United Nations.⁷¹⁷

However, the UNHCR and the authorities of the host country will often find it difficult to apply the principles and classify a person as a refugee. Practically, the refugee determination process is a difficult one, and merits serious consideration. There the problem often arises as to how to determine whether an individual would fall under Art. 1(F) of the Refugee Convention.

If refugee status is refused to an individual, he must be given clear and cogent reasons for refusal of refugee status. He must also be given an opportunity to appeal against the decision, either through the national authorities or through the mechanism set up by the UNHCR. It can also be taken up at the international level, for example, specifically in case of Europe; individuals can approach the European Court of Human Rights. However, this is based on each region and many parts of the world lack such a mechanism.

The Refugee Convention does not talk about how illegal refugees must be treated.⁷¹⁸ This is because the Refugee Convention only protects those who have been classified as legal refugees, those who are classified as illegal refugees are outside the scope of the convention.⁷¹⁹

The host state will treat such individuals as illegal aliens; the state is entitled to apply its national laws against such persons, and the accepted standard of international laws. The state is however, bound to protect human rights of the individuals.

The host country could conduct a criminal trial to prosecute the individual for illegal entry into the country. Art. 31 of the convention only applies to legal refugees and not illegal refugees, so illegal refugees can be prosecuted for illegal entry and holding

⁷¹⁷U.N. High Commissioner For Refugees, “Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees”, (UNHCR HCR/1p/4/Eng/Rev. 3, 2011).

⁷¹⁸Adrienne Millbank, “The Problem With the 1951 Refugee Convention”, http://www.Aph.Gov.Au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Pubs/Rp/Rp0001/01rp05 (Last Seen on 3 Feb. 2016).

⁷¹⁹U.N. High Commissioner For Refugees, “Report On International Protection, UNHCR <http://www.unhcr.Org/Excom/Excomrep/3ae68c044/Report-International-Protection-Submitted-High-Commissioner.html> (Last Seen On 3 Feb. 2016).

false documents.⁷²⁰ The court can also impose an expulsion order, directing him to leave the country after undergoing the sentence imposed on him. The drawback of such a solution is that cases will take a long time to be decided, as the court must judge the person on daily basis. The individual can be returned to his own country or to any other third country as long as the state accepts him.

Illegal refugees can also be ordered to leave the State and returned to the State where he came from. A state is entitled to take any action against any person in its territory, as long as it does not contravene international law.⁷²¹ Questions can be raised on the legality of such actions, as it could potentially violate Art. 33 of the Refugee Convention. By deporting illegal refugees, States would violate their obligations of *non-refoulement* enshrined in Art. 33 of the Convention.⁷²²

However, Wayan Parthiana argues that the power to deport persons within the territory of the Country is the sovereign power of the country to maintain security and order within the country.⁷²³ He states as illegal refugees are not entitled to protection under the Refugee Convention, they cannot claim protection under the principle of *non-refoulement*.⁷²⁴ Their presence in the host country is illegal and the State is authorized under international law to deport such individuals.

The host country can also prosecute the individuals for the crimes committed by them before entering the State, if it has jurisdiction to prosecute such crimes. In case the host country does not have jurisdiction over the offence, the only option left is to deport the person to the State where crime was committed.

Particularly with respect to individuals who have committed war crimes, genocide, crimes against humanity, the host country can exercise jurisdiction over such offences based on universal principles.⁷²⁵ Such issues can be tried on basis of domestic or international conventions which provide for its punishment. Countries may face

⁷²⁰Goodwin, *supra* note 15.

⁷²¹ Responsibility of States for internationally wrongful acts, A/RES/62/61 (8 Jan. 2008).

⁷²²Jessica, *supra* note 1.

⁷²³ Parthiana, *supra* note 12.

⁷²⁴ Parthiana, *supra* note 12.

⁷²⁵ Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", 30 Mich. J. Int'l L. 927 (2009).

practical problems while conducting trial such as gathering evidence, obtaining testimony of witnesses etc, as the crime has been committed in the territory of different State.

A state can seek mutual assistance, while prosecuting such crimes; however, it is subject to whether the countries are bound by an agreement. Obtaining evidence in the absence of evidence would be a difficult task; however, states may mutually help each other based on good relations.

After the establishment of the International Criminal Court in by the Rome Statute, a perpetrator may be held responsible for commission of such a crime and punished accordingly. For the Court to exercise jurisdiction, host countries must be signatories to the Rome statute and accept the jurisdiction of the International Criminal Court.⁷²⁶

A legal refugee cannot be extradited under international law. The refugee left his home state to escape from persecution on basis of his race, religion, nationality, membership of social group or political opinion, and not to flee from valid prosecution. Secondly, in order to extradite a person, the state must have criminal jurisdiction to prosecute the person for the crimes committed. If the refugee is not associated with the crime, he cannot be extradited.⁷²⁷

If a refugee is found to have committed a crime, after the refugee determination process, the host country must bring the issue to attention of the UNHCR. If the UNHCR is satisfied, it can revoke the refugee status of a person.⁷²⁸ Once this is done, the individual ceases to be a legal refugee, and can be validly extradited to the requesting state.

Illegal refugees who have committed serious non-political crimes, genocide, crimes against humanity and war crimes can be validly extradited. Even in case of commission of other crimes, an illegal refugee can be extradited by the host state, as long as the request has been validly made, as specified in the extradition treaty. An

⁷²⁶ Dapo Akande, "The jurisdiction of the International Criminal Court over Nationals of Non- Parties: Legal Basis and Limits", 1 J Int. Criminal Justice 618 (2003).

⁷²⁷ Geoff Gilbert & Anna Magdalena Rusch, "Jurisdictional Competence Through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?" 12(5) J Int. Criminal Justice 1093 (2014).

⁷²⁸ Kneebone, *supra note* 56.

individual can be extradited in the absence of an extradition treaty, based on good relationship between the two countries.⁷²⁹ The extradition would be based on national legislations, and international law on extradition.

Legal refugees cannot be extradited because their status as a refugee has been determined the UNHCR and the national legal authorities in accordance with the Refugee Convention.

Wayan Parthiana clearly identifies the problem in question, that is whether a refugee can be extradited. This differentiation between legal and illegal refugees is however, preliminary and basic. It does not account for situations where the individual would be subjected to individualized ill-treatment or torture in the requesting state. There are many situations where a person might be an illegal refugee, but his fundamental human rights would be at peril if extradited to the requesting state. The solution does not take into account the various cases which have been discussed in the case analysis. However, an interesting inference can deduced from the analysis, the solution proposed is similar and falls in line with the individualized ill treatment requirement.

VI.3. UNHCR'S VIEW

The UNHCR's guidance note on extradition⁷³⁰ seeks to clarify the principles of *non-refoulement* and extradition, and set out a state's response to such situations.

VI.3.i Extradition request

VI.3.i.a. Request for Extradition from the refugee's country of origin

Under Art. 33 of the Refugee Convention, if the refugee making a request is a national of the requesting State, the State is bound to deny the extradition request. *Non-refoulement* imposes a prohibitory bar on extradition in such cases, unless the

⁷²⁹ M.Cherif Bassiouni, "International Extradition and World Public Order", A.W Sijthoff, 1st ed. 1974.

⁷³⁰ UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

individual comes under the exception of Art. 33(2). However, even in such circumstances, the State is bound to honour its obligations under human right conventions.⁷³¹

In cases where the requesting state has given diplomatic assurances that the individual will not be tortured or persecuted upon return, such undertakings should not be relied upon by the requested state.⁷³² If a person has already been given protection under Art. 33(1), which means that he faces risk of persecution on basis of his race, religion, nationality, membership of social group or political opinion, assurances from the same government which is the agent of persecution cannot be relied upon.⁷³³

VI.3.i.b. Request for Extradition from State other than the State of origin

Indeed, even in situations where the asking for State is not the same as the refugee's State of inception, the State must look into whether non-refoulement and other human rights would be violated upon extradition. The State must ensure that extradition does not expose him to torture or persecution or allow for him to be further extradited to the country of origin, or a third state.⁷³⁴ The State must delve into the situation with regard to the factual circumstances in the country, the diplomatic assurances and a totality of all the relevant circumstances.

An individual may however be refouled back only if there are sufficient political assurances given that removes the risk of serious human right violations.⁷³⁵ It needs to be ensured that the assurances are suitable means to remove the risk of persecution, and the requested state considers it to be reliable.⁷³⁶

⁷³¹UNHCR, Note on Diplomatic Assurances and International Refugee Protection, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164> (last seen on 19 March 2017).

⁷³²UNHCR, Factum of the Intervenor, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada SCC No. 27790” 14(1) Int. J. Refugee Law 141-157 (2002).

⁷³³ *Id.*

⁷³⁴UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

⁷³⁵ UNHCR Guidance Note on Extradition and International Refugee Protection”, *supra* note 706.

⁷³⁶*Id.* UNHCR, Note on Diplomatic Assurances and International Refugee Protection, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164> (last seen on 19 March 2016).

In regard to diplomatic assurances provided in cases of risk of torture, the Special Rapporteur on Torture or other Cruel, Inhuman or Degrading Treatment or Punishment has stated that assurances are sought only from those states where there is a danger to life and torture is rampant. Moreover, diplomatic assurances are not legally binding, and the State cannot be held liable in case of violation.⁷³⁷ If the assurance is violated, the individual cannot claim any legal remedy. Under these circumstances, the requested state cannot rely on diplomatic assurances.⁷³⁸

The UNHCR guidance note suggests that diplomatic assurances given by a country other than refugee's country of origin, the State must again examine the request on grounds of whether there is a risk of persecution, or further transfer to the country of origin

VI.3.ii Asylum seekers

VI.3.ii.a. Request for Extradition from the asylum-seekers country of origin

Under Art. 33(1) of the Refugee Convention, Asylum-seekers are also protected against refoulement, during the pendency of the asylum proceedings.⁷³⁹ The request State cannot extradite an individual to his country of origin during the pendency of his claim for asylum, including the appeal state.⁷⁴⁰ This would apply even in cases where diplomatic assurances have been provided by the requesting state. Diplomatic assurances have to be weighed in light of whether it fully removes the risk of persecution. The country must also take into account factors such as past experiences wherein diplomatic assurances have been adhered to, existence of monitoring mechanisms etc.⁷⁴¹

⁷³⁷Amnesty International, "Dangerous Deals Europe's Reliance on 'Diplomatic Assurances' against torture", available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201101/20110124_705dangerousdeals_en.pdf (last seen on 19 March 2016).

⁷³⁸Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture", available at: <http://www.refworld.org/docid/42c3bd400.html> (last seen on 19 March 2016).

⁷³⁹ William Thomas Worster, "The Evolving Definition of the Refugee in Contemporary International Law", 30 Berkeley J. Int'l Law. 94 (2012).

⁷⁴⁰ UNHCR, Note on Diplomatic Assurances and International Refugee Protection, *supra* note 731; UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, <http://www.refworld.org/docid/45f17a1a4.html> (last seen on 19 March 2016).

⁷⁴¹ *Id.*

VI.3.ii.b. Extradition request from a country other than the asylum seekers country of origin

When an extradition request is made by a country other than the asylum seekers country of origin, the State must analyze the risks which could be faced by the individual on extradition.⁷⁴² The must take into consideration its obligations under refugee law and human right conventions. Diplomatic assurances must be considered in light of the overall situation and whether it would expose the individual to persecution, torture, or other inhuman or degrading treatment.⁷⁴³

If the individual would face the risk of persecution, or further removal to the country of origin, refoulement would be precluded under Art. 33(1) of the Refugee Convention.⁷⁴⁴ The Requested State must also ensure adherence to its human rights treaties and conventions.

The UNHCR guidance note on extradition and non-refoulement explicitly mandates that a state may only surrender the individual to the requesting state if it would not amount to a infringement of its non-refoulement obligation under International Law.⁷⁴⁵ Even if extradited, the State must ensure that the individual has access to a fair and clear asylum procedure.⁷⁴⁶

VI.3.iii. Safeguards to ensure protection of the principle of non-refoulement

VI.3.iii.a Extradition request concerning a refugee recognized by the requested State

When the requested state has recognized an individual as a refugee and an extradition request is made by his country of origin, then in such cases the authorities

⁷⁴² Battjes, *supra* note 321.

⁷⁴³ UNHCR, Note on Diplomatic Assurances and International Refugee Protection, *supra* note 731.

⁷⁴⁴ Jean Allain, "The Jus Cogens Nature of Non-Refoulement", 13 International Journal of Refugee Law 53 (2001).

⁷⁴⁵ UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

⁷⁴⁶ Kapferer, *supra* note 118.

of the requested state have clearly recognized the well-founded fear of persecution fostered by the refugee, and will be binding on all the state organs and institutions dealing with the extradition request.⁷⁴⁷ An individual, thus, would be entitled to the protection offered under Art. 33(1) of the convention, and cannot be refouled.

National legislations of certain countries may sometimes specifically state that the extradition authorities are not bound the decision made by the asylum authorities of the same State. In such circumstances, the requested State is bound to ensure that its action is in consonance with its duties of non-refoulement under the norms of refugee and human rights laws.⁷⁴⁸ The person who has already been determined to be a refugee, the authorities must have due regard to the prohibition on refoulement placed in Art. 33(1) of the Refugee Convention. The extradition authorities must take a holistic view with regard to all the facts and circumstances of the case to determine whether a risk of persecution exists. This would apply even in cases where the country is other than the country of origin.

VI.3.iii.b. Extradition request concerning a refugee recognized by a country other than the requested State

The requested state must look into the treatment which would be meted out the individual in the requesting state, and his status in the country. Once an individual has been given the status of a refugee, after a valid refugee determination process, the decision may not be called into question by other State parties. Once a State party has validly classified a person as a refugee, it must not raise doubt about by another state party, but in special cases, where the person would not have qualified as a refugee, for example, individual made fraudulent claims to be considered as a refugee.

VI.3.iii.c. Extradition request concerning a refugee recognized by UNHCR

When the UNHCR has classified an individual as a refugee, State's must accept this classification. The UNHCR has an international mandate to protect the interests of

⁷⁴⁷ UNHCR Guidance Note on Extradition and International Refugee Protection, *supra* note 706.

⁷⁴⁸ *Id.*

refugees, States must respect and co-operate with the decision of the UNHCR. The UNHCR also has a supervisory responsibility under Art. 35 of the Refugee Convention.⁷⁴⁹

VI.4 PROPORTIONALITY AND THE BALANCING OF INTERESTS IN THE EXTRADITION PROCESS

Extradition and human rights have always been linked together, subsequent to World War II, bilateral treaties have always included a clause excluding extradition if the requesting state fails to give an assurance that death penalty will not be imposed.⁷⁵⁰ Additionally, refoulement is barred when the individual is going to be persecuted on the basis of his race, religion, nationality, membership of social group or political opinion.⁷⁵¹ This clause is based on Art. 33 of the Refugee Convention and has also been incorporated in various other extradition agreements.⁷⁵²

The U.N model Treaty on Extradition⁷⁵³ bars extradition if the person will be prosecuted on basis of race, religion, nationality, ethnic origin, political opinion, sex or status and if the person will not receive the minimum guarantees in criminal proceedings as mentioned in the ICCPR.

Many European States have also express provisions in national legislations which prohibit extradition in case of a real risk of violation of human rights. In 1981, the Swiss legislature adopted a new extradition law which links human rights and extradition law.⁷⁵⁴ Similarly, in Ireland the constitutional safeguards have served as a basis for denial of extradition requests, courts have refused extradition on the ground that there is a real risk of violation of basic human rights as guaranteed by the Irish Constitution.⁷⁵⁵

⁷⁴⁹ Goodwin, *supra note* 15.

⁷⁵⁰ Art. 11, European Convention on Extradition, *supra note* 3.

⁷⁵¹ Art. 3(2), European Convention on Extradition, *supra note* 3.

⁷⁵² U.S.- U.K. Supplementary Extradition Treaty of 1985. The International Convention against the Taking of Hostages of 1979, The Inter-American Convention on Extradition and the Commonwealth Scheme for the Rendition of Fugitive Offenders of 1990 contain similar provisions.

⁷⁵³ Model Treaty on Extradition, A/RES/45/116 (14 Dec. 1990).

⁷⁵⁴ Dugard and Wyngaert, *supra note* 294

⁷⁵⁵ Finucane v. McMahon I.L.R.M 505 (1990).

VI.4.i Basis for Priority of Human Rights over Municipal Law and Extradition Treaties

National and international courts have often given more importance to the possible violation of human right treaties and have accorded it greater importance than extradition treaties. This is primarily because of various human rights conventions forming a part of *jus cogens*, or peremptory norms of international law. Also, human right conventions form a part of *ordre public* of international community⁷⁵⁶ or the rule of law of a particular region and govern the relation between states in that region.

In some instances a domestic court will be required to choose between competing treaty obligations, as in *The Netherlands v. Short*,⁷⁵⁷ and in these cases the interest of the requested state in compliance with its treaty obligations will be the decisive factor.

VI.4.ii. Human rights which obstruct extradition

There are certain human rights, the violation of which would bar refoulement, however, other human rights might not be as pivotal to completely bar extradition. Christine argues that all human rights do not enjoy the same amount of protection with regard to extradition. There is no clear criteria to determine what is a fundamental human right which would prohibit extradition and what is not. Though there are certain general criteria to determine ordinary right and a higher right, there is no uniformity with respect state practice, and a clear hierarchy cannot be drawn up. However, such a classification is useful and would help guide the Courts in coming to a conclusion while dealing with the conflict between extradition and non-refoulement. Rights are classified into three broad categories,

1. Rights which may be restricted for certain purposes such as maintenance of law and order, protection of freedom of others etc.⁷⁵⁸ These rights include freedom of speech, right to privacy etc.

⁷⁵⁶ P. v. Office Federal de la Police ATF 117 Ib 337, 340 (1991).

⁷⁵⁷ *The Netherlands v. Short* 22 NETH. YB. INT'L L. 432 (1991).

⁷⁵⁸ Dugard and Wyngaert, *supra note* 294

2. Absolute rights which cannot be restricted under any circumstances. These rights cannot be violated even in times of war. These rights include prohibition against torture, cruel, inhuman or degrading punishment.⁷⁵⁹
3. Rights which may be restricted only in cases of emergence. These rights include the right to a fair trial etc.⁷⁶⁰

VI.4.ii.a. Rights that may be restricted for certain purposes

These rights may be restricted for specific purposes, such as the suppression of crime etc. When an individual claims a violation of his right, the State will try to balance the conflicting interests, suppression of crime and the possible violation of a person's right to privacy.

In the case of *X v. Bundesamt für Polizeiwesen*,⁷⁶¹ the Swiss Court held that suppression of crime superseded the violation of right to privacy of X. In certain rare cases, this balancing of interest could also weigh in favour of the individual, for eg if it was a small offence. However, such a result rarely occurs.

VI.4.ii.b. Absolute rights

If the individual claims the possible violation of an absolute right, the proportionality test cannot be applied. This follows from the ruling in *Chahal* judgement,⁷⁶² when there is a real risk of violation that a fundamental human right will be violated, extradition must be refused. There cannot be a balancing of interest with respect to suppression of crime and violation of the individual's rights. Prohibition against torture, cruel, inhuman or degrading punishment are absolute rights which cannot be violated. However, there is still no clear consensus among on what would constitute cruel, inhuman or degrading treatment.⁷⁶³ For example, death row phenomenon, certain states interpret the death penalty to constitute cruel, inhuman or degrading

⁷⁵⁹ Dugard and Wyngaert, *supra note 294*

⁷⁶⁰ Dugard and Wyngaert, *supra note 294*

⁷⁶¹ *X v. Bundesamt für Polizeiwesen* ATF 117 lb 210 (1991).

⁷⁶² *Chahal v. United Kingdom*, Eur.Ct. H.R., Application no.22414/93, Report of 27 June 1995

⁷⁶³ Méndez, Juan E., "The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment", available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1849&context=hrbrief> (last seen on 19 March 2017).

punishment, however certain states do not. There is divergence among states as to the interpretation of what constitutes cruel or inhuman punishment. This could lead to situations where an individual could be extradited, though there is denial of an absolute right, because the requested State does not interpret it to be an absolute right.⁷⁶⁴

VI.4.ii.c. Rights that may be restricted only in time of war or other public emergency

These rights can be restricted only in certain circumstances. Various human rights instruments and national legislations provide that these rights can be restricted in specific circumstances, such as times of war or public emergency.⁷⁶⁵ Under normal circumstances extradition requests will be refused, if fair trial is jeopardized, however in times of war, such a requirement may be waived off. However, in such circumstances, the requested state would apply the proportionality test and weigh the seriousness of the offence committed, and the risk of violation of the right. Many domestic Courts have applied such a test to make a determination.

In line with the Soering doctrine, only flagrant violations of other rights can be considered to refuse extradition requests. The burden of proof falls on the individual to prove that there is a real risk of violation of basic human rights.⁷⁶⁶

VI.5 OTHER POSSIBLE SOLUTIONS

VI.5.i. Conditional Extradition

Conditions can be imposed while extraditing an individual. The specialty principle mandates that the individual can be prosecuted only for the offence for which he has

⁷⁶⁴ Dugard and Wyngaert, *supra note* 294

⁷⁶⁵ United Nations. Office of the High Commissioner for Human Rights, "Human Rights In The Administration Of Justice: A Manual On Human Rights For Judges, Presecutors And Lawyers", (United Nations Publication 1st ed. 2003).

⁷⁶⁶ Soering, *supra note* 210.

been extradited.⁷⁶⁷ If the requesting state does not comply with the condition after extradition, it would amount to a breach of treaty.⁷⁶⁸ In case of the death penalty exception, the requested state tries to obtain an assurance that the individual will not be subject to the death penalty.⁷⁶⁹ The requested state can also impose a condition that the individual has to be returned to the country after trial, to serve his sentence.

In cases where the requested state expressly seeks an assurance from the requesting state that the individual will not be subjected to cruel, inhuman or degrading treatment, the requesting state is unlikely to be pleased.⁷⁷⁰ Such acts constitute state practice. In the case of extradition of Zaid Abu Eain to Israel in the year 1982, the U.S. authorities secured an undertaking from the Israeli authorities that he would be tried by a Civil Court and have access to a fair trial.⁷⁷¹

In 1996, Dennis Hurley, a Canadian citizen was extradited by the Canadian government to Mexico, on the condition that his safety must be ensured, and Canadian authorities would be allowed to visit him and communicate with him to ensure his rights are protected.⁷⁷² By this method the requested State can ensure that the assurances provided are being followed.

The Swiss Federal Tribunal in the *Dharmarajah case*,⁷⁷³ allowed for extradition on the condition that death penalty must not be imposed, a new trial must be held instead of the previous one which was held in absentia, and procedural safeguards must be observed. In subsequent decisions the Swiss courts have approved conditional extradition as means of securing the individual's rights.

The requested State, can require the requesting State to provide assurances that the human rights of the individual will be safeguarded. Moreover, even if assurances are

⁷⁶⁷M. Cherif Bassiouni, "International Extradition: United States Law and Practice", (Oxford University Press 6th ed. 2014).

⁷⁶⁸ R v. Parisien, [1988] 1 S.C.R. 950 (Can.), 92 ILR 683, 686.

⁷⁶⁹ Craig R. Roecks, "Extradition, Human Rights and the Death Penalty: When Nations must refuse to extradite a person charged with capital crime", 75 California Western International Law Journal 189 (1994).

⁷⁷⁰ Dugard and Wyngaert, *supra note* 294.

⁷⁷¹ Dugard and Wyngaert, *supra note* 294.

⁷⁷² Dugard and Wyngaert, *supra note* 294.

⁷⁷³ Dharmarajah, ATF 107 Id. 68.

provided, the State may impose a further condition that its authorities may visit the individual in the other state, to ensure that the assurances are being adhered to.⁷⁷⁴ Monitoring can be carried by consular and diplomatic officers of the requested state, who routinely monitor the prosecution of their own nationals which would help bring together a state's incompatible obligations under human rights law and extradition law. It would also be more acceptable to the requesting state, and conditional extradition has been accepted as state practice.

Conditional extradition is not a straight-jacket solution which will work in all situations. The International Association of Penal Law in 1979 refused to accept a proposal to classify conditional extradition as a general practice, to permit restrictions on the use of political offence exception.⁷⁷⁵ It was held that though the system has worked in certain instances, a system cannot be developed to implement a common system among all states. It was primarily depend on the conditions imposed, and more importantly, the successful use of monitoring mechanisms. In many cases the requesting State may decline to take any action after the individual has been extradited, despite of the insistence of the requested State. Wang Jianye was extradited to China for an offence which could be punished by death, on the condition that the death penalty would not be imposed on or sentence to prison for a period more than fifteen years. The individual was executed 1 year after extradition.⁷⁷⁶

VI.5.ii. Aut Dedere aut Judicare

The principle of *Aut dedere aut Judicare*, obligates that States must either extradite or try the individual in their own Courts, various conventions governing terrorism, and other unlawful activities have incorporated this provision. These conventions provide jurisdiction to many States to try the offenders, so the crime may be tried in the jurisdiction of any of the States.⁷⁷⁷

⁷⁷⁴ Dugard and Wyngaert, *supra note* 294

⁷⁷⁵ Christine Van Den Wyngaert, "The Political Offence Exception to Extradition :Defining the Issues and Finding a Feasible Alternative", (Springer 1st ed. 1981).

⁷⁷⁶ Dugard and Wyngaert, *supra note* 294

⁷⁷⁷ Andre de Rocha Ferreira, "The obligation to Extradite or Prosecute", available at: <https://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/The-obligation-to-extradite-or-prosecute-aut-dedere-aut-judicare.pdf> (last seen on 19 March 2016).

However, crimes which are considered to be national crimes cannot be prosecuted in other jurisdictions, especially in case of common law countries where territoriality is the basis for jurisdiction. But the principle can be applied to a limited extent. Civil law countries exercise jurisdiction on basis of both territoriality and jurisdiction, and in recent times, common law countries have begun to exercise jurisdiction to cover offences committed by their nationals.⁷⁷⁸ In cases where the requested State has the jurisdiction to try the individual whose extradition has been sought, and there is a real risk of violation of fundamental human rights. The State may deny refoulement and try the case in its national courts.

There are many drawbacks of this solution. The requested State would not have the necessary evidence, and would be forced to ask the requesting State to provide evidence.⁷⁷⁹ The requesting would not be inclined to co-operate, after being denied the extradition request.⁷⁸⁰ Moreover, the evidence provided will also be suspect, as the requested State has denied the extradition on the grounds that the individual would be subject to persecution, so any evidence provided would also be subject to suspicion. Thus, there are very few cases where the *aut judicare* principle can act as a solution.

VI.5.iii. Other methods to reconcile the conflicting principles

The other relevant principles by which the conflict between the two principles can be resolved, deal with various methods by which the requested state can safeguard its own interest and the interest of the individual. The methods are briefly mentioned hereunder

The rule of specialty mandates that the state cannot prosecute an individual for crimes other than those for which he was extradited, without the permission of the requested State.⁷⁸¹ Even in cases where the individual is to be removed further to the

⁷⁷⁸ Certain common law countries have enacted laws to prosecute their nationals for organizing sex tourism in other countries. Part III A, Australian Crimes Act, 1914.

⁷⁷⁹ Fannie Lafontaine, "Universal Jurisdiction - the Realistic Utopia", 10 (5) J. Int. Criminal Justice 1277 (2012).

⁷⁸⁰ Raphaël van Steenberghe, "The Obligation to Extradite or Prosecute: Clarifying its Nature", 9(5) J. Int. Criminal Justice 1089 (2011).

⁷⁸¹ John J. Barrett III, "The Doctrine of Specialty: A Traditional Approach to the Issue of Standing", 29 Case Western Reserve Journal of International Law 299 (1997).

third country to be tried for offences committed there, extradition law obligates that the State must first seek the permission of the requested State. Extradition law also provides for the requested state to allow for the individual to be extradited and tried in the requesting state, on one of the conditions that the individual will be available to be returned to it to serve his sentence.

Though the aforementioned principles act as safeguards to protect the interests of the individual, they do not *per se* provide complete protection to individual against persecution, torture, or cruel or inhuman punishment. Even in cases where Art. 33(2) applies, safeguards provided under provisions of international human rights law must be followed.

VI.5.iii.a. Political Offence Exception

The political offence exception is well established in international law. It is recognized as a principle under which extradition can be refused by the requested State. The Model Treaty on Extradition provides that an extradition request can be rejected, if the offence is considered to be an offence of political nature in the requested State.⁷⁸²

Bilateral and Multilateral treaties also incorporate the political offence exception. Political offence under these treaties are defined in negative terms, by excluding certain particular offences from the political offence exception, such as murder of head of state or any offence against life.⁷⁸³

The Convention on Organized Crime does not provide for a specific exemption, but still prohibits *refoulement* if there is a real risk that the individual is going to be persecuted on the basis of his race, religion, nationality, membership of social group or political opinion.⁷⁸⁴ This is equivalent to the principle of non-refoulement as contained in Art. 33 of the Refugee Convention. However, this does not encompass the traditional political offence exception, and it is often difficult to prove an

⁷⁸² Art. 3(a), Model Treaty on Extradition, 14 December 1990, U.N. GAOR, A/RES/45/116.

⁷⁸³ Gavan Griffith and Claire Harris, "Recent Developments in the Law of Extradition", 6 Melb. J. Int'l L. 33 (2005).

⁷⁸⁴ Art. 16, Organized Crime Convention.

individualized risk of persecution.

It is often difficult to provide an exhaustive definition for political offence. There is no doubt that it is supposed to include non violent protest against the head of the State. However, apart from this, there is no clarity on what crimes can be covered under this exception. The lack of consensus among States, has led to confusion regarding the definition of political offence.⁷⁸⁵

The definition of political offence is qualified by technical criteria, such as proportionality, that is the offence committed must be in proportion to the political end sought to be achieved . However, such tests have been severely criticized, as they are very subjective and overtly depends on the judge's values on what can be considered permissible political acts.⁷⁸⁶ Unfortunately, National Courts are not equipped to deal with such issues, even when they do, they are inclined to reject the extradition request of the requesting State.⁷⁸⁷

Certain Domestic legislations also define political offence. However, it is often found that the domestic legislations are based on the other criminal laws in the Country, and are idiosyncratic to the State, so a common definition cannot be evolved.

Also, the political offence exception can easily be misused, and can interfere with prosecution of terrorist related offences. It is for these reasons that the political offence exception is losing popularity as a method of reconciliation. There is a shift towards having stronger extradition treaties, with lesser exemptions.⁷⁸⁸

VI.5.iii.b. Principle of Specialty

The rule of specialty, states that an individual who has been extradited can only be tried for the offence he was extradited for. The requesting State is barred from prosecuting him for any other offence. Certain scholars, such as Cherif Bassiouni also

⁷⁸⁵ *Schtraks v Government of Israel* [1964] AC 556, 591

⁷⁸⁶ Geoff Gilbert, "Terrorism and the Political Offence Exemption Reappraised", 34 *International and Comparative Law Quarterly* 695 (1985).

⁷⁸⁷ Steven Lubet, "Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists", 15 *Cornell International Law Journal* 24 (1982)".

⁷⁸⁸ Griffith, *supra note* 783.

argue that the principle of specialty has attained the Status of customary international law.⁷⁸⁹ It has been incorporated in various other international instruments and conventions.

The Model Treaty on Extradition provides that an individual may not be detained, prosecuted, or re-extradited to a third State, except for the offence for which the extradition request was granted, or with the permission of the requested State,⁷⁹⁰ The Rome Statute also enshrines the same principle. A person can only be tried by the Court for the offence for which he has been surrendered, unless the Court requests the State to waive the rights, and the State consents.⁷⁹¹

This is based on the principle of State sovereignty. The traditional view provides that extradition is primarily an issue amongst States, wherein the requested State renounces its sovereign powers over the individual in its territory, and transfers him to the requesting State.⁷⁹²

The principle of specialty also protects the human rights of the individual who is extradited. Particularly, it effectuates compliance with the other guarantees provided by the Requesting State, including political offence exception and double criminality. It prevents the Requesting State from misusing the extradition process, and ensures adherence to the other guarantees built into the extradition process.⁷⁹³

The Model Treaty on Extradition also mandates the prior permission of the Requested State to prosecute the individual for other offences. However, the permission to prosecute can only be provided for those offences mentioned in the extradition treaty, therefore, providing for the other safeguards such as political offence exception and double criminality.

⁷⁸⁹M.Cherif Bassiouni, "International Extradition And World Public Order", (A.W Sijthoff, 1st ed. 1974

⁷⁹⁰ Art. 14, Model Treaty on Extradition, *supra note* 782.

⁷⁹¹ Art. 101, Rome Statute.

⁷⁹²Clive Nicholls, "The Law of Extradition and Mutual Assistance: International Criminal Law, Practice and Procedure", (Cameron May 2nd ed. 2002),

⁷⁹³ Griffith, *supra note* 783.

However, practically, the rule of specialty faces a huge a problem, many States provide for extradition completely disregard the rule, after the individual has been extradited. There is dwindling respect for the rule under international law. For example, several States in the U.S have simply disregarded the rule.

VI.5.iii.c. Model Treaty on Extradition

In order to counter transnational crimes such as terrorism and drug trafficking, extradition has been recognized as an integral tool.⁷⁹⁴ In light of extradition emerging as an important tool, the United Nations General Assembly adopted the *Model Treaty on Extradition*.⁷⁹⁵ It is an effective method of countering new and serious forms of crimes.⁷⁹⁶

Recently, newer multilateral agreements have been adopted, containing model Treaties on Extradition, such as the Organized Crime Convention.⁷⁹⁷ It states that organized crime shall be considered as an extraditable offence, and in the absence of an extradition treaty, the Convention shall be deemed to act as the legal basis for the extradition.⁷⁹⁸

The *Model Treaty on Extradition* contains obligatory grounds for refusing extradition if the extradition request has been made to prosecute the individual on basis of his race, religion, nationality, sex, ethnic group, status or political opinion.⁷⁹⁹ Moreover, it also prohibits refoulement if the individual would be subjected to torture, or cruel inhuman or degrading treatment in the requested State. These provisions incorporate the current legal position on non-refoulement under international law.⁸⁰⁰

Though these provisions are clear, confusions arise when put into practice. It is to be noted the burden of proof is on the individual to prove that there is a real risk of

⁷⁹⁴Standing Committee on Treaties, Parliament of Australia, Report 40: Extradition - A Review of Australia's Law and Policy (2001)

⁷⁹⁵ Model Treaty on Extradition, *supra note* 782.

⁷⁹⁶ Preamble, Model Treaty on Extradition, *supra note* 782.

⁷⁹⁷ United Nations Convention against Transnational Organized Crime, A/RES/55/25 (8 Jan. 2001).

⁷⁹⁸ Griffith, *supra note* 783.

⁷⁹⁹ Art. 3, Model Treaty on Extradition, *supra note* 782.

⁸⁰⁰ Griffith, *supra note* 783.

persecution in the requested State. However, the individual will need to gather substantial amount to resources, in order to do that. It is often the case that refugees lack resources, monetary, or otherwise. It would be difficult for an individual to gather the resources necessary to put up a strong defence. Moreover, it would be difficult for him to gather evidence in the requested State.

Additionally, it would also be problematic to convince the authorities of the requested State about the threat of persecution, when the requested State has close relations with the Requesting State.⁸⁰¹ In the case of *R v. Secretary of State*,⁸⁰² a British national was to be extradited to Hong Kong and tried, as he had accepted bribes. The extradition order was challenged on the ground that the trial will take place after the transfer of power from Hong Kong to the People's Republic of China, and there was a possibility of being subjected to death penalty, because China had death penalty for serious crimes.

Lord Hope, held that though, there was a risk that China would not follow the principle of rule of law, and provides a fair trial, which was based on the previous conduct of the People's Republic of China, optimism of future human rights in Hong Kong is not unreasonable. Past conduct with conduct with China is not the only basis for the future relationship with Hong Kong.⁸⁰³

However, this is not always the case, as has been analyzed in the previous chapter, Courts refused extradition in various cases where a real risk of persecution has been proved.

VI.6 RECONCILIATION OF THE PRINCIPLES

There are a number of ways in which the principle of *non-refoulement* and Extradition Treaties can be reconciled, but pivotal to this understanding is the fact that the principle of *non-refoulement* has achieved the status of customary international law and has also been accepted as a principle of *jus cogens*.

⁸⁰¹ Griffith, *supra note* 783.

⁸⁰² *R v Secretary of State for the Home Department; Ex parte Launder*, 3 All ER 961,967 (1997).

⁸⁰³ *Id.*

Courts must respect that absolute rights cannot be violated, and extradition must be refused in such cases. In case of other rights, Courts must apply the proportionality test and balance the conflicting interests.

The Requested State can also allow for conditional extradition on the individual, on the grounds that the basic human rights of the individual must be respected. However, this can only be in case the Requesting country is other than the country of origin. *Refoulement* back to the country of origin is prohibited. The principle of *aut dedere aut judicare* can also be incorporated. The Requested State can conduct the trial in its own courts; can extradite the individual on the condition that he must be returned to serve his sentence in its territory.

The Model Treaty on Extradition helps reconcile the conflicting principles by providing for an exception to extradition in case of persecution on basis of race, religion, nationality or ethnic origin of the individual. It also provides for the political offence exception, which mandates that an individual cannot be extradited for a political offence. The principle of specialty has also been incorporated into the treaty, so the individual can only be prosecuted for the offence for which he has been extradited.

The Model Treaty on Extradition provides legal basis for the political offence exception and the specialty principle, it codifies both the principles. Additionally, it is legally binding on all the State parties to the Convention. Thus, States can be held legally responsible, in case of breach of their obligation.

One of the most pertinent questions that arise after understanding and analyzing the concepts of extradition and non-refoulement is whether there is any scope of reconciling both the principles in international law to which an answer is sought in this chapter which deals with the possibilities of reconciling both the concepts.

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. 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. 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 specialty. 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.