

The asylum and extradition or the criminal pursuit and persecution.

Important concepts that create difficulties in the judicial practice _____

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1. Introduction

In this article I will briefly analyze a very important and actual theme related to reciprocal influences of two similar judicial regimes, such as the *asylum* and the *extradition*, which frequently have problems or difficulties in application in judicial practice. From a more general point of view, difficulties may arise in the English language from a vocabulary point of view, which frequently also generates problems in interpretation. For instance, such may be the case for the terms *prosecution* and *persecution*, which formally are translated respectively as criminal charge and persecution.

I would also like to emphasize on the theoretical and practical importance, domestically and internationally, on matters related to asylum and extradition. The integrating and globalizing processes, the liberalization and the opening of frontiers, the effective war against international criminality, the consolidation of the state of law, the guaranteeing of individual fundamental rights and liberties, the protection of people in necessity from persecution because of race, religion, nationality, membership in a certain social group or because of political convictions, as essential values of the community of nations, are some of the main reasons that encourage the debate for a more effective application of these institutes.

¹ *Ex-President of the High Court of the Republic of Albania. (2013-2019)* (The main part of this article was held by the author on the occasion of an *International Forum*, June 2015. However, the material is adapted to some main developments in this area in the following period. Published revised).

So, as it is understood from the chosen theme, it is very clear that one of the regimes is related essentially to the necessity to avoid impunity, while the other with the important idea of the protection from the danger of persecution. Both these very important principles have deep historical roots from a national and international perspective. Almost all authors that have scientifically analyzed the most crucial matters of the history of the state and of the law agree that the first extradition agreement is of the year 1280 BC, signed in ancient Egypt between the Pharaoh Ramses II of Egypt and Hattušili IIIrd King of the Hittites² On the other hand, the word *asylum* (derived from the Greek word *Asyilia*, which may be translated ‘untouchability’), is encountered for the first time in ancient Greece, referring to persons who because of profession (chiefly merchants and diplomatic representatives), enjoyed immunity in a foreign territory, or were referred to ‘holy’ places where people who looked for accommodation could carry out the *hikitea* rite, which is similar to the modern or contemporary process of the call for asylum.³

It is not surprising that the forehanded meaning of these two institutes has been very different from the meaning they have today.⁴ At that time, the possibility of extradition being refused or that an asylum request would be accepted and vice-versa depended more from the level of diplomatic relations between two states or corresponding sovereigns, than from the genuine and independent judicial evaluation of every specific case.

At times this continues to be true even nowadays, although very rarely and predominantly in regions and states where there are problems with the implementation of the state of law. In these cases, extradition requests and judgments which grant or refuse asylum requests in fact are defined or encouraged more from political assessments than from judicial ones.⁵

² *International Extradition: United States Law and Practice*, M. Cherif Bassiouni, Oxford University Press, 2014, p.5. *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, Geoff Gilbert, Martinus Nijhoff Publishers, 1998, p.17. *Extradition in international law*, Ivan Anthony Shearer, Manchester University Press Oceana Publications [1971]. S. Langdon and Alan H. Gardiner, *The Treaty of Alliance between Hattušili, King of the Hittites, and the Pharaoh Ramses II of Egypt*, *The Journal of Egyptian Archaeology*, 179, (Jul., 1920).

³ *Rethinking Asylum: History, Purpose, and Limits* [Matthew E. Price], Cambridge University Press, 2009, (p.26).

⁴ M. Cherif Bassiouni cited above, in the note 1: (“In fact, from antiquity up to the end of the 18th century, these persons (fugitives) were not in search for common crimes but for political reasons. Common criminals were the least required category of the authors of criminal offences because their harmful action influenced only ordinary people and not the sovereign or the public order.”)

⁵ Brian Gorlick, *Asylum Determination and Evidentiary Uncertainty: Perceptions and Prescriptions*, in International Association of Refugee Law Judges. *The Asylum Process and the Rule of Law*, Manak Publications Pvt Ltd., 2006, p.157: (“Regardless of the opinion that many states have created independent and specialized organs composed of a staff of trained officials well trained to establish the refugee status, in some cases political indicators and policies imposed from the executive power of the government may influence on the decision-making process.” *Arguing about Asylum: The Complexity of Refugee Debates in Europe*, Niklaus Steiner, St Martin’s Press, 1st edition (2000): (‘Asylum policies come as the result of the pulling of the rope (war) between national interests tightening asylum on the one hand and

2. The meaning of the notions: Asylum versus extradition

2.1 Asylum

Before analysing the meaning of persecution, as an essential element of the asylum procedure, let me clarify the difference between territorial asylum and extraterritorial asylum (diplomatic asylum). While the first notion (territorial asylum) is established plainly in international conventions and in domestic legislations of the states, the second notion may be considered mostly as a judgment of emphatic political influence, since the requiring or the granting of the asylum in these cases (diplomatic asylum), as is going to be analysed followingly, is not related to a well and clearly established right through the general principles of the international law.

2.1.1 Territorial asylum

Recently there has been an extraordinary increase of asylum requests. The situation is dramatic especially in some of the most developed countries of Western Europe. Practically this problem is one of the main challenges with which the European Union in particular is confronted. It is sufficient to mention that in the second half of 2013, around 5,9 million people at global level asked protection in or out of the frontiers of their state,⁶ that in 2014, 44 industrialized countries received around 612.700 new asylum applications,⁷ that in 2016, the Federal Republic of Germany accommodated around one million asylum seekers, and so on, while in 2017, on a global spectrum, around 68,5 million persons moved towards western countries who came mostly from zones of conflict in Syria, Afghanistan, Iraq, Myanmar, as well as from some African countries. So, how may asylum be defined then? In the session held in Bath, a city in the United Kingdom some decades earlier, the Institute of International Law (*Institute de Droit International*) tried to define asylum as: “The protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it. (*La protection que l'état accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la rechercher*).”⁸

On the other hand, the well-known Professor Grahl-Madsen considers asylum as: “The right of an individual to stay in the territory of the State that grants asylum, not for a permanent period, but as long as it is necessary. This means that asylum

international norms and morality loosening it on the other'), p. 133.

⁶ UNHCR *Mid-Year Trends 2013*, p. 3.

⁷ UNHCR - *Asylum Levels and Trends in Industrialized Countries*, 2013, p. 5.

⁸ Institut de Droit International, Session de Bath, *L'asile en Droit International Public* (à l'exclusion de l'asile neuter), Rapporteurs MM. Arnold Raestad et Tomaso Perassi, (1950).

may be granted as long as he has the refugee status or as long as he requires the right of residence in a third state.”⁹

Frequently we confuse the meaning of the terms “asylum seeker” and “refugee.” In fact, the difference stands only on different phases of the procedure of the evaluation of individual or collective requests. Technically the refugee is an asylum seeker who is currently granted refugee status, while the asylum seeker is simply a person who has presented an asylum request close to the authorities of a foreign country.¹⁰ From this comes the conclusion that to be an asylum seeker does not mean that you receive automatically the right to obtain asylum. The sentence to grant or to refuse the asylum depends on the host state or on the territorial state, so from the state that has received the request, that is free to consider if a person may be qualified or not as a refugee. However, this decision might not be arbitrary. Normally it might be based on an objective assessment of the concrete refugee, with criteria defined from domestic and international legislation. For this purpose, it is recommended that the last word should be of the court and not of the executive organ, which may have interest to minimize the area of the action of the asylum, intending to hold back other refugees (or illegal immigrants) who require asylum in a certain state.

In fact, the fundamental legal instrument that arranges the international law on refugees is the Geneva Convention relating to the Status of Refugees of 1951 as well as its additional Protocol of 1967.¹¹ The Article 1A of this Convention defines the term “refugee” as a person who: “Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The first element that attracts the attention is the criterion “of the crossing of an international frontier”. This means that the refugee status may be claimed only from persons who seek accommodation in another state, since asylum is an institute that essentially is related to the exercise of the territorial jurisdiction of every sovereign state,¹² which is different from the state from where the seeker comes. Unfortunately, persons that for different reasons (including even those defined from the Article 1 of the Convention of 1951 relating to the Status of Refugees)

⁹ *Atle Grahl-Madsen, Territorial Asylum*, Swedish Institute of International Law, *Almqvist & Wiksell*, Stockholm, 1980, p. 52.

¹⁰ *Niklaus Steiner* cited above, at note 4, p. 133.

¹¹ *Convention relating to the Status of Refugees*, 28 July 1951, *United Nations, Treaty Series*, vol. 189, p. 137. *Protocol relating to the Status of Refugees*, 31 January 1967, *United Nations, Treaty Series*, vol. 606, p. 267.

¹² *Oppenheim, L. (Lassa), International law: A treatise / Vol. 1, Peace*, 2nd edition, *Longmans, Green, and co.*, pp. 391-393.

leave from a region and go to another region of the same state, are excluded from the protection that is granted to the asylum seeker.

This category of people is known by the term “Internally Displaced People.”¹³ Although initially the “Internally Displaced People” was not covered by the competence of the United Nations High Commissioner for Refugees (UNHCR), with the passing of years he was engaged and continued to be engaged even with the assistance of this category of persons, through concrete commitments of humanitarian nature of the United Nations Organization (UNO) for every individual case.¹⁴ So in any case, the application of universal human rights and Fundamental principles of International humanitarian law is intended even for these people, especially when there are domestic armed conflicts. However, it is emphasised that according to the Contemporary International Law and for the intentions of the asylum, these people continue to be under the jurisdiction and the “protection” of their state. The situation is problematic when one of the parties in an armed conflict within the same state, a non-state actor, has or claims to have *effective control*¹⁵ of a certain region of the state in discussion, and self-declares the independence of this territory. Without referring to the foundation of the international recognition of the State, in this case one may discuss the case related to the “responsibility” of people who leave from war zones seeking accommodation in the part controlled from the combatant non-state party. Is it possible to consider these people as Internally Displaced People? The “orthodox” point of view would consider it so and would consider invalid every act declared from the non-state actor, at least up to the completion of combats. Moreover, even if we would accept that a non-state actor principally could be qualified as a State on the basis of international law, yet in this phase, “the just-created state” would not be automatically subject to the Geneva Convention of 1951 or to its Protocol of 1967.

As underlined at the very beginning, the most important aspect in the definition of refugee status is related to “persecution”. Although the Convention does not offer a definition of the term “persecution”, this may be insinuated in general lines by referring to the serious threat of the fundamental human rights and liberties, such as the right of life, the prohibition of torture, the guaranteeing of liberty

¹³ UNHCR—*Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, October 2008, Brookings Institution—University of Bern, p.11.

¹⁴ To the same.

¹⁵ On the notion of the ‘effective control’ in International Law see *International Court of Justice, Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, paragraphs 105-115. *International Court of Justice, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, of 26 February 2007, paragraph 405. *Prosecutor v Dusko Tadic*, The Appeals Chamber, Case No. IT-94-1-A (ICTY 1999). Cassese Antonio, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, *EJIL* Vol. 18 (2007), pp. 649-668.

and security,¹⁶ and so on. According to the definition of the term “refugee” cited above in reference to Article 1A (2) of the Geneva Convention of 1951, a person is qualified to be so only if he/she does not have any chance or any desire to come back to the country of origin, because of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion. On the other hand, the fear of persecution be “well-founded”. It is not enough for that person to have the subjective feeling of being persecuted. There might be a causal relation between the subjective element (respectively *fear*) and the objective element (the criterion of “well-founded”), which may be promoted from concrete elements such as the country of origin, his/her social status in this country, events or developments that have happened to family members, relatives, acquaintances or to his friends, and so on.¹⁷

Furthermore, it is important to underline that the feature or the most important characteristic of the International Law for refugees is *the Principle of Non-refoulement* (known in international theory and practice by the French term of the principle of *non-refoulement*), which word by word means, “Absolute forbiddance of the returning of persons who may be in danger of persecution.” In difference from the right to seek asylum, which is not absolute, the principle of *non-refoulement* is applied despite of the formal recognition or not of the refugee status. It is considered correct that this principle in the course of time has gained the status of international common law.¹⁸ However, it might be underlined that this principle is not applied for people who yet have not touched the frontier, have not touched the territory of the State where they desire to seek accommodation. This was underlined by the Swiss representative in preparatory works (*travaux préparatoires*) of the Convention relating to the Status of Refugees, “The Article 33 cannot be applied to a seeker who has not entered yet in the territory of a country.” The term ‘refoulement’ used in the English text, transmitted exactly this idea.¹⁹ According to Madsen, this point of view was supported completely even from other delegates.²⁰

In fact, it might also be underlined that the Principle of *Non-refoulement* is related essentially to the forbiddance of torture. Almost the same definition as in the Article 33 of the Convention relating to the Status of Refugees may be found

¹⁶ Guy S. Goodwill-Gill, *Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees, United Nations Audiovisual Library of International Law*, (2008), p.3.

¹⁷ *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.1, reedited, Geneva, January 1992, UNHCR 1979, paragraphs 40-43.

¹⁸ Guy S. Goodwill-Gill, *The right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT’L J. REFUGEE L. 443, p. 444 (2011). Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 Articles 2–11*, pp. 13-37, Geneva: Division of International Protection of the United Nations High Commissioner for Refugees, (1997).

¹⁹ To the same, *Commentary of the Article 33*.

²⁰ To the same.

even in the Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

Naturally, even the EU Asylum *acquis* holds similar provisions. Among others, it is mentioned specifically in Article 78²¹ of the Treaty on the Functioning of the European Union (TFEU), as well as some EU Regulations and Directives.²² However, the EU’s serious intention and commitment to have a common policy on asylum might not be understood as a scope of going out of the standards of the United Nations Organization (UNO) Convention relating to the Status of Refugees of 1951. On the contrary, it remains a central point even for the EU asylum regime. The European Court of Justice (ECJ) has stated clearly this attitude through its jurisprudence. So, for example in the case of *Aydin Salahadin Abdulla and Others v Germany* it states among others that: “It is obvious that the Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive to establish who is qualified for the refugee status and the content of this recent one were approved to guide the competent organs of Member States for the application of this Convention on the basis of common concepts and criteria.”²³

In the European Convention on Human Rights (ECHR), there is not any direct reference to the Principle of *Non-refoulement*. However, the European Court of Human Rights (ECtHR) has treated this matter mainly in the context of the application of Article 3 of the ECHR (Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). This court already has a rich and consolidated jurisprudence in this direction, which currently cannot be treated in details. However, among others we may mention the very interesting case of *MSS v. Greece and Belgium*²⁴ of 2011, where the ECtHR had to assess if the asylum seekers, who were asylum seekers, because of non-proper conditions in reception places of asylum seekers as well as in the isolation rooms in Rhodes island, could be subjected to cruel and inhuman treatment if they would go back from Belgium to Greece. In the judgment of the case, the Greek party claimed among

21 The Article 78 (1) anticipates: “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

22 *Dublin II Regulation, Council Regulation (EC) No 343/2003* of 18 February 2003. Council Directive 2005/85/EC of 1 December 2005 on Asylum Procedures. *The Qualification Directive*, etc.

23 CJEU *Joined Cases C-175/08, C-176/08, C-178/08, Aydin Salahadin Abdulla and Others v Germany* [2010] ECR I-01493.

24 *Application N° 30696/09, [GCH]*, of 21 January 2011.

others that according to the Dublin II Regulation, Council Regulation (EC), every Member State of this Union was considered a “safe” country for the intentions of the application of the Principle of *Non-refoulement*. But in spite of this, the ECtHR, based on the claims of seekers as well as on the information received, came to the conclusion that with the transferring of seekers in Greece, Belgium had violated Article 3 of the ECHR, considering the fact that respective Belgium state authorities knew or might have known that seekers there would be subjected to inhuman and degrading treatment. However, within a relatively short time from the declaration of this judgment, Greece took a number of measures to improve the conditions of the asylum seekers in reception centers and in isolation rooms. In a later judgment of the ECtHR, in the case of *Safaii v Austria*²⁵ in 2014, referring to the claims on the conditions of reception and accommodation spaces of the asylum seekers in Greece, it was considered that there is no violation of Article 3 of the ECHR, since the situation has changed significantly compared to the conditions and to the time of the giving of the judgment in *MSS v. Greece and Belgium*.²⁶

In Albania, asylum matters are arranged by law no. 121/2014, *on asylum in the Republic of Albania*, (which replaced law no. 8432, of the date 14.12.1998, *on asylum in the Republic of Albania*, (changed by law no. 10060, of the date 26.01.2009). The law generally follows rules and principles on asylum that are internationally accepted, intending specifically the approximation to the standards of some Directives of the Council and of the European Parliament on this matter. (Directive no.2001/55/EC, Directive no. 2003/9/ EC, Directive no. 2003/86/EC, Directive no. 2005/85/ EC, Directive no. 2011/95/EU, and so on). Naturally the law refers largely to the Geneva Convention of 1951 relating to the Status of Refugees as well as to the cooperation with the UNHCR Office of the United Nations High Commissioner for Refugees. The new law intends to arrange clearly and better the rights and the obligations of asylum seekers, of refugees, of persons in temporary protection, competences and obligations of executive responsible authorities, and so on. Also, it should be pointed out that the authority responsible for the granting, removal and exclusion from the right of asylum, although not expressed explicitly in this law, actually is the Directory of the Asylum and of Nationality, which is part of the Ministry of Home Affairs. The National Commission for the Asylum and Refugees on the other hand might coordinate every assistance offered from national and international donors might supervise the registration of persons who have received temporary protection, as well as might take proper measures for unaccompanied children who require asylum or for other people with specific necessities.

According to Article 40 of the law, the *asylum* seeker to whom the right of application for asylum is rejected is given the right of appeal within 15 days to the National Commission for the Asylum and Refugees, that might take a decision on

²⁵ ECtHR - *Safaii v Austria*, Application N° 44689/09, Judgment of 7 May 2014.

²⁶ To the same, paragraph 51.

this matter within 30 days from the date of the presentation of the request. In the case when the judgment is negative, the *asylum* seeker may file a judicial appeal to the First Instance Administrative Court, afterward to the Administrative Court of Appeal and at the end to the Administrative College of the High Court.

Up to now, a small number of matters related to asylum seekers are filed to the High Court.²⁷ This happens because of relatively low number of asylum seekers in Albania. However, this situation may change in the future. It is expected that in the future the number of asylum seekers will significantly increase. Consequently, if the number of asylum seekers is going to increase, the number of judicial appeals will also increase. This means that we judges should be well prepared to know and to apply best judicial principles and practices, which already are defined quite well from European courts in matters of asylum, as well as the jurisprudence of high and constitutional courts of western democracies.

2.1.2 Diplomatic asylum

Although matters of diplomatic asylum are quite rare compared to territorial asylum, they often attract the main mediatic attention and become a cause for problems and tensions among states. This happens for many reasons.

Firstly, these actions happen mainly in residences of embassies and the asylum process is in itself an exclusion from the normal activity of diplomatic missions. Since the untouchability of embassy residences has always been established quite clearly by international law, the practice of the usage of these spaces as a kind of “protection” from the jurisdiction of the territorial state has always posed the sensitive question of whether this is an abuse of this specific status.

Secondly, these cases usually involve people that have been somewhat known to the general public, who often undertake such an action to avoid the criminal pursuit started in their country of origin, with the claim that accusations are either politically motivated or the crime in itself is of a political nature.

Thirdly, if diplomatic asylum is granted, the seeker normally stands isolated in the embassy, since the authorities of the territorial state do not permit him to have freedom of action. A typical example is the case of Julian Assange, founder of WikiLeaks, to whom political asylum was granted inside the embassy of Ecuador in London, hindering his extradition in Sweden to be confronted with the accusations for sexual abuses.

The widely accepted point of view is that there is no legal right to grant asylum inside diplomatic or consular spaces.²⁸ As is mentioned above, this practice contradicts the normal functioning of these diplomatic missions. This point of view is affirmed

²⁷ High Court, Administrative College, Judgment no. 662, of 17 December 2013.

²⁸ *McNair Arnold, Extradition and Extraterritorial Asylum*, 28 BRIT. Y.B. INT'L L. 172 (1951).

even from the International Court of Justice (ICJ) in the widely known case of “the asylum.”²⁹ The focal issue in this case is the accommodation that the ambassador of Colombia in Lima, Peru, granted to Mr. Víctor Raúl Haya de la Torre, head of the Peruvian Popular Revolutionary Alliance, who was under investigation from the authorities of that country for the encouragement and the leading of a violent rebellion. After granting asylum, Colombia required from the Peruvian authorities the issuing of laissez-passer so that Mr. De la Torre could leave Peru. Competent authorities did not agree to permit him leaving Peru, arguing that he had to be criminally investigated in Peru for the commitment of a criminal offence. In these circumstances, both governments agreed to present the case to the International Court of Justice for the interpretation of the Convention on Asylum (Havana, 1928) as well as of the Convention on Political Asylum (Montevideo, 1933). Initially the Court declared that Colombia had the right to grant temporary asylum for Mr. De la Torre, but later had to consider if the accusations filed in Peru had or not political character. Later on, in relation to the main issue of the case, the Court, among others, underlined that since Peru opposed all the legitimacy of the process of granting asylum, it could not be forced to provide permission to Mr. De la Torre to leave the country. Finally, based on the claims of Peru, the Court declared that in this case, the granting of asylum from Colombia was in opposition with Article 2 of the Convention on Asylum (Havana, 1928), since it missed the element of “urgency” mentioned explicitly in this Convention. More specifically, the International Court of Justice underlined in its judgment that: *“In principle, it could not be imagined that the Convention on Asylum (Havana, 1928) intended to include in the concept of “urgency” the potential danger of the continuous persecution from law-implementing institutions to which every citizen of every state may be exposed. However, as a rule, asylum can not be used to obstruct the functioning of justice. Exclusion from this rule may exist only if “justice” is used as cover for arbitrary actions that undermine the law. This would be the case when the giving of justice would be disrupted by actions clearly motivated from certain political scopes. Asylum protects the person politically accused from every measure of a completely extra legal character that a government may undertake or may claim to undertake against political objectors”*.³⁰

2.2 Extradition

Extradition is defined as the practice that gives a state the opportunity to turn over to another state criminals charged with or convicted of a crime, who escaped and are in the territory of the first state.³¹ In principle, extradition is accomplished

²⁹ *Asylum Case, Colombiav. Peru, Judgment of 20 November 1950, I.C.J. Reports 1950, p.266.*

³⁰ To the same, p. 284.

³¹ *Malcolm N. Shaw - International Law (6th Edition), Cambridge University Press (October 25, 2008), p.689.*

with the implementation of an agreement or a completed treaty between two states, although international cooperation in criminal matters essentially is a matter of will, which means that extradition may also be undertaken without a specific agreement among two states. However, it is emphasized that extradition is predominantly done with the existence of an agreement between the requesting party and the party where the enquired person or persons are located. Although every extradition agreement has its own specifics, usually every agreement of this kind has these elements:

a) *Double criminality*: This is a very aged norm of international criminal law, which is related to the principle of legitimacy and reciprocity. It means that the criminal offence for which extradition is required should be envisaged to be so in both states. Since the duration of the conviction for the commitment of the criminal offence cannot be the same, in principle it is required for it to be defined or for an approximate margin of appreciation to be applied. The kind of conviction should be the same. This is generally implemented in cases of convictions that comprise the deprivation of one's liberty. This is how it is defined in the Article 2 (1) of the European Convention on Extradition.³²

b) *Ne bis in idem principle*: The principle of prohibiting a person's conviction twice for the same criminal fact has strong and consolidated roots both in domestic and international criminal law. There are two situations in relation to the European Convention on Extradition. The first has to do with the requests for extradition in relation to criminal offences for which the judicial organs of the requesting party have already given a final judgment, receiving the *res judicata* status. It is clear that in this case the extradition cannot be done. On the other hand, in cases when the authorities of the requesting party have decided not to start or to interrupt proceedings against the enquired person in relation to the same offence or the same criminal offences, then, depending on the circumstances, a decision *may* be taken either for the refusal of the extradition, or for its authorization.³³

c) *Lapse of time*: Based on Article 10 of the European Convention on Extradition, extradition shall not be granted when the person cannot be prosecuted or convicted, according to the law of either the requesting or the requested party, by reason of lapse of time. This rule has already changed with the coming into force on 1 June 2014 of the Fourth Additional Protocol to the European Convention on Extradition. According to new anticipations in this Protocol, lapse of time will be calculated only according to the legislation of the requesting party and not according to the legislation of the requested Party.

d) *Criminal offences of a political nature*: As briefly mentioned above, the possible refusal of extradition in cases when the enquired person is proceeded or convicted for criminal offences of a political character is practically present almost

³² Council of Europe, Paris, 13 December 1957, ETS No.024.

³³ Council of Europe, Explanatory Report of the European Convention on Extradition, Article 9.

in all respective agreements between states. Almost everywhere it is envisaged that extradition cannot be done if the criminal offence for which the person is enquired has a “political character”. But what is a criminal offence of a political nature? In fact, there is no definition of such a term, since it is not easy for states to agree on the establishment of such a definition. In these circumstances, the more appropriate and pragmatic way to define this term would be the usage of the interesting axiom of Justice Potter Stewart ‘I know it when I see it’³⁴, which means that every specific case needs specific judicial evaluation of specific facts and circumstances. However, it should be underlined that the immunization of “the criminal offence of a political nature” from extradition should be treated carefully from the courts of the receiving state. The main issue in this case should be the humanitarian necessity to protect the person who is criminally in pursuit only because of his political attitudes or ideals of a completely personal character. In theory, the subject of the criminal offence of a political character, in the function of the consideration of the request for extradition, is the person who intends to transmit, develop or achieve peacefully his individual ideas, with a certain objective of political character. An example of this may be the case of Albania in the communist regime, where for almost 50 years, thousands of people along with their family members were convicted and were treated inhumanly, simply because of their desire to establish pluralism, because of the attempts to leave the country for a better life as well as because of the opinions, criticisms, simple evaluations on several deficiencies of daily life (the so-called agitation and propaganda against state authority). However, I want to underline that every specific case should be carefully considered by the court. The refusal of extradition, through a wide interpretation and without a deep investigation of the claims of a political character of the seeker, would create undesired effects and would have harmful effects in practice. It would deteriorate the normal cooperation between states in criminal matters, providing a “warm” shelter, albeit completely undeserved, for criminals who would have the opportunity to avoid the application of the law.

In fact, in judicial doctrine, the criminal offence of a political character may be classified as a ‘clean’ or ‘relative’³⁵ criminal offence.

The first category is easily defined. It refers to the specific figure of the criminal offence for which extradition of the accused person is required. This offence normally is against the state. So for example, if a well-known individual of an opposition party is accused for the commitment of criminal offences such as betrayal or espionage, the relation that exists between the activity where the author is involved and the specific criminal offence for which he is accused may be easily defined.

³⁴ *Jacobellis v. Ohio* 378 U.S. 184, 197 (1964).

³⁵ Helton, Arthur C., *Harmonizing Political asylum and International Extradition: Avoiding Analytical Cacophony*, *Immigration & Nationality Law Rev.* 347, (1988), p.351.

In the second category of political criminal offences of a “relative” nature, according to doctrine, are those offences where “an ordinary crime is so much related to a political act that the figure of the criminal offence takes a political character, becoming an important potential obstacle for the extradition request.”³⁶

Both categories mentioned above are defined in Article 3(1) of the European Convention on Extradition of 1957, which anticipates that: “*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.*”

e) *The danger of violation of fundamental human rights and liberties*: In the cases when there are no criminal offences of a political nature, for the effect of extradition, courts may and should take into consideration other claims of the seeker, such as for example those related to the danger of the violation of the individual fundamental rights and liberties, especially when the standards of Article 3 of the European Convention on Human Rights, as cited above, are involved.

Although these kinds of provisions cannot be considered in details as causes for blocking the procedures of extradition, practically they are the most discussed and the most sensitive matters in national courts. However, it has to be underlined that as a rule, just like in the application of asylum procedures as well as in the evaluation of the application or not of the Principle of *Non-refoulement*, there should be no extradition if there is reliable evidence that suggests that if the enquired person will surrender, he will be subject to torture or inhuman and degrading treatment. In relation to this matter, in the application of Article 3 of the ECHR, the ECtHR has a quite rich and interesting jurisprudence. Among others, one could mention important cases such as *Soering v United Kingdom*,³⁷ *Vilvarajah and Others v The United Kingdom*,³⁸ *Al-Saadoon and Mufdhi v. the United Kingdom*,³⁹ *Garabayev v. Russia*, and so on.⁴⁰

The only case of the ECtHR related to the procedures of extradition that includes Albania is the case of *Rrapo v. Albania*.⁴¹ In this case the seeker was extradited in the United States of America in accordance with the Bilateral Extradition Treaty between the United States of America and the Kingdom of Albania of March 1, 1933. In fact, the ECtHR took an intermediate judgment, by accepting the claim of the seeker not to be extradited until the taking of the final judgment from the High Court on this case. The Albanian authorities did not apply this judgment but made the extradition based on the judgment of the Appeal Court, without waiting

³⁶ To the same, citing *Eain v. Wilkes*, 641 F.2d, n.24, p.523.

³⁷ Application no. 14038/88, Judgment of 07 July 1989.

³⁸ Application no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991.

³⁹ Application no. 61498/08, Judgment of 2 March 2010.

⁴⁰ Application no. 38411/02, Judgment of 7 June 2007.

⁴¹ Application no. 58555/10, Judgment of 25 September 2012.

for the judgment of the Criminal College of the High Court. In the judgment of 25 September 2012, the ECtHR underlined that by making the extradition of Mr. Rrapo, *Albania* had not violated Article 3 of the ECHR, since although in delay, reliable guarantees were taken through diplomatic channels from the government of the United States of America that the applicant would not be subject to the death penalty⁴² and that “in practice there had not been violations on the commitments undertaken from the government of the United States of America on such issues”.⁴³ However, the ECtHR underlined that with regard to the non-application of its intermediate judgment (temporary suspending measure), the Albanian government had violated Article 34 of the ECHR as well as the Article 39 of the Statute.⁴⁴

3. Criminal pursuit and persecution: How to make the difference?

Asylum and extradition are two different judicial institutions quite connected to each-other. Extradition is almost always a judicial process, while asylum normally starts with an administrative process and later on, frequently concludes with a judicial process. This happens especially in cases when the asylum request is refused administratively. On the other hand, asylum has to do mostly with the protection of refugees, so it is mainly oriented towards humanitarian necessities, while extradition intends a more effective fight against criminality and facilitation of international cooperation between states in criminal offences. Both these institutions could certainly function independently from each-other. But it is quite frequent that for a person who seeks asylum, it may be required for him to be extradited to a certain state thereafter. Consequently, in these cases, proper attention should be given to the explanation of the important fact if the criminal pursuit for which extradition is required is related to a common crime, punishable in respective countries, or has to do with a persecution because of race, religion, nationality, membership in a certain social group or because of political convictions, just as is provided in the United Nations Organization (UNO) Convention relating to the Status of Refugees of 1951. Undoubtedly, this is relatively easy in theory, but quite difficult to be applied in practice. There are many cases when common criminals have unjustly gained in another state the right of asylum, just as there are so many other cases when certain persons are extradited, although criminal accusations on their charge have been fake or fabricated mainly for political purposes. Therefore, courts in particular should be more careful in the multidimensional assessment of every individual case. Almost every person who

⁴² To the same, paragraph 71.

⁴³ To the same.

⁴⁴ To the same, paragraph 88.

seeks asylum claims that in a way or another, he has been a victim of persecution in his country of origin. That is the reason why the majority of people accused of common crimes, living in another state, would claim to competent authorities of this state that the accusation on their charge is done because of their political views or because of other circumstances covered by the refugee status, and because of this, if they are extradited to the requested state, they will be subject of torture, inhuman or degrading treatment. Despite such cases of ‘abuse of the law’, executive and judicial organs might take the necessary precautions for a correct evaluation of evidences for every asylum seeker. After all, national authorities have the responsibility to assure that the State that they represent might not extradite or negate the asylum to a person, if there are sufficient evidences to believe that he will be subject to deliberate violations of the rights guaranteed from national and international legislation.

Just as underlined by the International Court of Justice in the case of *asylum*, the criminal pursuit (extradition) might be in principle the rule, while persecution (asylum) might be an exclusion from the rule, functioning in this case as a filter or as a kind of “hindrance” to accomplish the normal cooperation between States on criminal cases. According to the UNHCR handbook and guidelines on procedures and criteria for determining refugee status, ‘A refugee is a victim – or a potential victim – of injustice, not a fugitive from justice.’⁴⁵ Maybe in this case an important explanation should be made: In practice, while it is true that all victims of injustice are considered as persecuted in their native land that requires extradition, the same thing cannot happen in the state where they seek shelter. But on the other hand, the natural question that begs is “how deep may and should the courts of this state investigate, so that to create the conviction that the extradition request’s main intention is persecution or not?” I reiterate that this is not an easy process. It depends completely from the circumstances as well as from the information that may be taken in every individual case. However, it is important to be emphasized that if these facts demonstrate that the extradition request or the arrest warrant of the state of origin is influenced from other external factors such as political opinions, race, religion or the nationality of the accused person, then courts of the requested state should refuse the extradition request.

4. Conclusions

Judicial matters of asylum and extradition are frequently represented as very complicated and at the same time as very difficult ones. Because of their sensibility, even the responsibility of the court is enormous. On one hand is the

⁴⁵ UNHCR handbook, cited above, note 16, paragraph 56.

obligation to fight better and more effectively against criminality in the national and international plan, while on the other hand there is the human protection of people truly in need, connected even with the destiny of their family members or relatives.

Such problems are more serious and more urgent in the conditions of the tendency and of the request for the continuous opening of frontiers, that normally are accompanied with serious measures which intend the preservation and the functioning of the legal state. In these conditions, it is necessary to intensify the cooperation and the dialogue between courts of all levels, in national and international levels. Even judges should be modest and learn not only from our best practices but even from our mistakes. We should work patiently and be transparent. Globalisation has changed many things, including our legal systems, which should no longer be interpreted in a one-dimensional approach. Domestic judges will judge to a large degree cases combined with domestic and international law, while certain institutes of international law such as extradition, asylum and so on, will need specialised knowledge, which frequently lacks in the majority of our courts.

Therefore, I reemphasize on the necessity for the exchange of information among us on the best and most advanced practices. In this direction, the International Association of Judges on Refugee Law, in which I have been part for a long time now, remains a history of success. Its main scope is 'to exchange and to share information on international law and practice for cases related to refugee status'. Through its conferences, seminars and many publications, the Association intends to encourage the dialogue between judges on matters of refugees so that to provide effective protection for them just as is guaranteed from instruments on human rights, such as the Convention relating to the Status of Refugees of 1951, as well as its additional Protocol of 1967.

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