ASYLUM, EXCLUSION CLAUSE AND EXTRADITION

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The increase in terrorist acts and the capacity of their perpetrators or instigators to hide in countries other than those where they commit their crimes have given rise to numerous requests for extradition. The country where the attacks took place claims them from the country of refuge, so that they can be prosecuted and punished by the judicial authorities, their crimes do not go unpunished and justice is ensured for the victims. The governments in countries of refuge, which are required to extradite the criminals under their international commitments, are now facing the difficult question of a possible protection, based on even more significant rules of international law, which could, in certain cases, prohibit extradition.

Extradition and asylum, an age-old problem that has evolved over time in three stages before the issue of terrorist attacks emerged

1) Extradition and asylum: two contradictory concepts.

In ancient times, and later in the Middle Ages, sacred places, temples or churches were used as asylums. These were inviolable places where criminals and those who fled their country and were sometimes known as supplicants, would find an absolute haven. Even the prince could not contravene the unwritten law that conferred such a status to these places without incurring the wrath of the gods. He could not hand over to a neighbouring country a criminal who was a fugitive from justice of this country.

As it so happens, for a very long time, the most severe penalty, apart from the death penalty, was banishment; the stakes were not the same as they are today: by fleeing his country, a criminal punished himself and the few demands found in history have little to do with criminals under common law and more to do with those who instigated political conspiracies.

2) Asylum must not let the criminal go unpunished anymore.

After the religious wars, the European countries reconciled, the embassies became permanent, people started moving around more freely, and in these circumstances, multiple voices were raised, particularly on legal doctrine, to denounce the impunity offered by asylums that resulted in weakening of the law and prohibited victims from getting justice. It is in line with this view that many friendly countries have started signing extradition treaties from the eighteenth century onwards.

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1 Rep. Fuzier-Herman, section on Extradition, Heading I.
3) A refugee cannot be handed over to those who have persecuted him, even for a sentence for a crime under common law.²

After the two world wars, the growing awareness of the risk of persecuting people led to the signing of the Geneva Convention relating to the status of a refugee. Recognising this status certainly does not protect the refugee or the asylum seeker who has committed a crime from prosecution and international law does not prohibit his extradition under any circumstances provided that the special protection needs of the refugee are taken into account. Moreover, he cannot be forced to return to a place where he risks persecution. This principle is in direct contradiction to the international obligations to be fulfilled by a State after signing a bilateral extradition treaty or, as in the case of France and Belgium, after signing and then ratifying the European Convention on Extradition that, by means of a series of accessions (especially after the wall came down) has extended its scope to a number of States that are geographically located away from us and have legal systems that are not necessarily built on the same foundation as ours.

In this context, the recognition of the enforceability of asylums for requests for extradition has undergone difficulties in becoming established in French case law concerning terrorist acts.

The development of case law has been characterised by uncertainties, especially given that the Geneva Convention did not explicitly mention the prohibition of extradition.

Article 33 of the convention thereby states: “No Contracting State shall expel or return a refugee, in any manner whatsoever, to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

In the decision of the General Assembly of 7 July 1978, Crescent, no. 10079, and then in the decision of the General Assembly of 15 February 1980 Gabor Winter, no. 17224, concerning the people prosecuted by German authorities because of their support to or participation in terrorist movements close to the “Red Army Faction”, the Conseil d’Etat does not resolve the question of enforceability of asylum since, being the authority to which the claim was referred by those concerned, it refuses to recognise them as refugees, before rejecting their request.

² UNHCR Guidance note on extradition and international refugee protection, April 2008.
For its part, the Criminal Division of the Supreme Court, in a decision of 21 September 1984, Garcia Ramirez, no. 84-93943 concerning a Basque militant whose extradition was requested by Spain, found “that in acknowledging that the applicant qualifies for refugee status, Article 33 of the Geneva Convention dated 28 July 1951 only concerns expulsion or removal, administrative procedures that are legally different from extradition.”

It is only by a decision of the General Assembly of 1 April 1988 Bereciartua Echarri No. 85239, by which it revokes a decree authorising the extradition to Spain of a Spanish national of Basque origin who was legally recognised as a refugee, that the Conseil d’État deems that refugee status is an obstacle to the extradition to the country of origin. It is beneficial to note that the decision does not make any reference to Article 33 of the Geneva Convention but to “the general principles of the law that is applicable to refugees”, resulting from the terms of the first Article A 2° of the Convention that defines a refugee.

**Terrorist and political offences**

The legal status of a refugee might have been the result of the political nature of the action taken. Additionally, when the specificity of terrorist offences was not covered by national criminal law and when enforcement against them was based on general incriminations, a basic construction was created by international law, national laws and case law to be able to distinguish terrorist offences from political offences.

In the 1970s, terrorists most often claimed to have a political motive behind their actions of an upheaval in society; however, the prohibition of extradition for political offences was general. It is confirmed in most bilateral agreements and is firmly stated in the European Convention on Extradition dated 13 December 1957 under Article 3 and is also included in national laws concerning extradition: Article 2 of the French law dated 10 March 1927 (codified in Article 696-4 2° of the French Criminal Procedure Code); Article 6 paragraph 2 of the Belgian law dated 1 October 1833 and Article 2a of the Belgian law dated 15 March 1874.

The European Convention on the Suppression of Terrorism of 27 January 1977 provides a list of offences that can never be treated as political: hijacking a plane, an attack on the life of Heads of State or diplomats, hostage situations, usage of bombs, etc. It states that, when submitted a request for extradition of a person who has committed crimes of this nature, the State in question may not refuse this extradition.
This list includes the most commonly used techniques by terrorists during negotiations of the Convention, which are designed to be the first step towards an automatic extradition for terrorists. But States such as France or Belgium which escaped the nihilist terrorism of these years have only accepted it under the condition that they can assess every case for themselves, whether the offence is of a political nature or not, etc.

Nonetheless, case law strongly supports that terrorist offences, given their severity, can in no event claim to have a political motive: Ass of 7 July 1978, Crescent, Ass of 15 February 1980 Gabor Winter, 26 September 1984 Ass of Lujambio Galdeano.

**Terrorist offence and exclusion clause for refugee status**

*Texts*

In order to protect the significant nature of refugee status, the authors of the Geneva Convention wished to explicitly exclude the people who fled their country after committing certain serious crimes in that country from the protection offered by the Convention, even though they would risk persecution if they returned to that country.

Article 1F of the convention thereby provides for the following:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

The texts refer to the provisions of a) the Nuremberg Charter of 1945, the Convention on the Prevention and Punishment of the Crime of Genocide dated 9 December 1948, the Statute of the International Criminal Court dated 17 July 1998, the conventions and resolutions of the United Nations in relation to the fight against terrorism.
Similar exclusion clauses have been added to the EU law: Articles 12 and 17 of Directive 2004/83/EC dated 29 April 2004 with respect to the minimum standards for the conditions that must be fulfilled by the third country nationals or stateless persons to qualify for a refugee status.

Article 17 that concerns subsidiary protection added an additional ground for exclusion in relation to the protection of public order in the receiving State.

Under French law, Article L. 712-1 of the French Code of Entry and Stay of Foreigners and Asylum Law relating to subsidiary protection, taken for the transposition of the directive, includes the same exclusion clauses as stated under Article 17.

Method of reasoning

Policy decision of the CJEU.

The CJEU has set up a framework according to which matters concerning asylum seekers must be considered. These are matters related to the international terrorist movement. In a judgment of the Grand Chamber dated 9 November 2010, Germany w/ B. and D. (C-57/09 and C-101/09), it found that the exclusion of the refugee status of a person who belonged to a terrorist organisation is subject to an individual test of the role played by this person in this organisation and the crimes that were committed: it must be possible to attribute a part of the individual responsibility to him for the crimes that were committed by the organisation.

In France the approach followed is the same.

The National Court for Right of Asylum seeks to specifically identify the personal involvement of the asylum seeker before the exclusion clauses are set against him. For example 21 April 2011, M. R. 10014066 for a seeker who was involved in terrorist activities in Morocco.

The Conseil d’Etat also carries out a careful inspection of the facts attributable to the person concerned and his involvement in the movement. (15 May 1996, R. no. 153491, for a militant from the Islamic Salvation Front in Algeria; 9 November 2005, A. no. 254882 for an officer of the PKK workers party in Kurdistan; 2 December 2015 OFPRA no. 387162 for a participant of the Chechen separatist movement.)
Enforcement in the extradition case: evolution of case law

During the 1980s, ruling on the legality of a decree that grants extradition for a person involved in a terrorist organisation, the Conseil d'Etat is limited to enforcing the exclusion clause in order to dismiss the argument based on the obstacle to extradition that the refugee status would constitute.

For example, for an individual who was involved in the preparation of a terrorist attack: 23 September 1988 J. Z. no. 94788: “...that given the severity of the offences under common law alleged against him in addition to the presumptions concerning him, Mr. J.Z. is not justified in invoking refugee status under the aforementioned convention to support the fact that he should not be extradited.”

This method of reasoning will be changed by a number of decisions of the European Court of Human Rights.

While the Court observes that neither the Convention nor its protocols provide for the right to political asylum (Vilvarajah et al versus the United Kingdom, 30 October 1991), it nevertheless holds that the State that extradites the perpetrator of a crime that will expose someone to ill-treatment prohibited by Article 3 of the ECHR could be deemed liable on the grounds of the Convention (Soering v/ United Kingdom, 7 July 1989).

Referring to the first character of respect for human dignity in the shared values provided for in the Convention, the Court reiterates and firmly holds that there can be no balance between the risk of ill-treatment and the grounds cited for removal (Chahal v / United Kingdom, 15 November 1996).

In line with this case law, Belgium modified its legislation by the law dated 15 May 2007 which introduced a specific paragraph: “Extradition cannot, moreover, be granted if there is a serious risk that the person, if extradited, would be subject to a flagrant denial of justice, cases of torture or inhuman or degrading treatment in the requesting State.”

With respect to the case law, there is already a decision in the case law of the French Conseil d'Etat that was declared an effective plea from the Convention against torture and other cruel, inhuman or degrading treatment which was signed in New York on 10 December 1984: 15 February 1999, C. no. 196667
But after the decisions of the European Court of Human Rights, the plea alleging the violation of Article 3 of the ECHR will be brought up more frequently, especially since the extraditions would be requested by countries further away and whose judicial or prison systems are often criticised. The taking into consideration of risks of personal exposure to inhuman and degrading treatment will modify the litigation process of extradition, and the courts will proceed to an assessment of this risk:

CE (B) 5 April 2011, H no. 212.451; CE (B) 10 October 2013, E no. 225.058: in both these cases the rulings for extradition of a terrorist were revoked because of the risks of violation of the provisions of Article 3 in the requesting State (which was not a member of the Council of Europe).

CE (F) 22 May 2012 R. no. 352952: dismissed.

The assessment of risks is a sensitive issue and the national courts have been counteracted by the ECHR in light of new facts or information, as was the case for a first decision H. in Belgium or French decision R. refer to ECHR 30 May 2013 R. v/ France.

Concluding aspects to be deliberated on

- In international law, the prohibition of torture, inhuman and degrading treatment is absolute, even in the presence of the most heinous acts of terrorism and our countries cannot be ignorant of them, even indirectly.

- Extradition is an act of mutual legal assistance, whose old foundations have been disrupted by terrorism; before extraditing a terrorist, the State must ensure the adequacy of the judicial and prison systems of the requesting State to prosecute the perpetrators of terrorist acts without violating this prohibition. Without this adequacy, regardless of the agreements binding the two States, extradition is not possible.

- To prevent terrorism from enjoying a high level of protection of human rights for prosperity, it is essential that the suppression system of the requested countries allows the prosecution and punishment for offenses related to terrorism even when committed on another country’s soil and without having any link to their interests.

- The obligation of international law will recover its influence again: Aut dedere, aut judicare (extradite or prosecute).