

NOTES

Extradition and Asylum: Public International Law

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Introduction

People and crimes frequently cross national boundaries. Someone who has been accused of an offence might go to another country, and a person who is facing persecution may leave their home in order to find safety in another place. International public law addresses both of these situations by means of extradition and asylum.

Extradition is the official procedure through which one state hands over a person to another state in order that they may face a criminal trial or serve a sentence. According to **Oppenheim**, it consists in the delivery by the state in which the person is located of a person alleged to be guilty of a crime to the state asserting jurisdiction.

For example, if a person accused of a serious financial offence in India escapes to the United Kingdom, India can ask for the person to be surrendered under the relevant treaty and law.

Asylum consists of protection extended by a state to someone who fears being persecuted or suffering serious harm in the state from which they have escaped. According to **Oppenheim**, territorial asylum refers to protection given by a state within its own territory.

For example, after leaving Tibet in 1959 the Dalai Lama and a large number of Tibetans obtained refuge in India. This is a well-known instance of territorial asylum, even though the person's legal status still relies on the host state's policy and laws.

The two concepts seem to be opposite since extradition is used in order to bring a suspect to justice, while asylum is concerned with protecting an individual from being returned. Both situations involve a balance between sovereignty, cooperation and human rights.

Asylum

Meaning and importance

Asylum refers to the shelter or protection given by a state to a foreigner who would not be safe in going back to their home country. In legal terms, it does not simply mean physical shelter. It involves protection from being forced to return and, if the claim is allowed, confers a legal status in the country where one is seeking asylum.

Someone might apply for asylum because they are in danger of persecution on grounds of race, religion, nationality, political opinions or membership of a particular social group. **For example**, a journalist who is threatened with imprisonment for criticizing an authoritarian government might apply for asylum in another state.

The right to seek and enjoy asylum is recognised in [Article 14 of the Universal Declaration of Human Rights](#). The main refugee framework is provided by the [1951 Refugee Convention](#) and the [1967 Protocol](#). A refugee is generally someone who has a well-founded fear of persecution and who either cannot or does not seek protection from their own country.

India has not signed the 1951 Convention or the 1967 Protocol and does not have a single refugee law. Refugee issues are managed by means of executive policy, the [Foreigners Act of 1946](#), the [Passport \(Entry into India\) Act of 1920](#), constitutional guarantees and its human-rights commitments. Foreigners are entitled to claim Articles 14 and 21, although voting is restricted to citizens.

Types of asylum

1. Territorial asylum

Territorial asylum is given when a person enters or stays in a state and that state offers them protection, it is the usual type of asylum. The act of granting it is generally an exercise of territorial sovereignty, but human-rights obligations prevent removal if the person is at risk of persecution, torture or death.

2. Diplomatic or extra-territorial asylum

Diplomatic asylum is available in an embassy, consulate, warship or other similar protected places, not in ordinary territory. It is particularly linked with the practices of Latin America and is

not a universal right since it relies on a treaty or on accepted regional practice.

In the case of **Asylum (Colombia v. Peru) (1950)**, the Colombian embassy in Lima granted asylum to *Víctor Raúl Haya de la Torre*, a Peruvian political leader. The International Court of Justice ruled that Colombia could not, on its own and finally, determine that the act in question was political in a manner that was binding on Peru. The Court also concluded that the asylum had been given in breach of the Havana Convention.

The case demonstrates that diplomatic asylum must take into account the conditions set by treaty and respect the rights of the territorial State.

The judgment in the case of **Haya de la Torre (Colombia v. Peru) (1951)** made it clear that Peru was not under an automatic obligation to grant refugees safe passage merely because Colombia had given them asylum. These rulings demonstrate that diplomatic asylum is narrower than territorial asylum and is more dependent on treaty rules.

3. Neutral asylum

Neutral asylum can be granted to soldiers or combatants in the case of an armed conflict. The state which is providing the protection must remain neutral and must not permit its territory to be used as a military base.

Reasons for asylum and non-refoulement

The main reason for applying for asylum is to obtain protection against persecution. It is wrong to send someone back to a country where their life or freedom would be in danger. This is known as **non-refoulement** and is stated in **Article 33 of the Refugee Convention** as well as being supported by human-rights law.

Return must also be prevented in cases where there are strong reasons to believe that the person would be tortured. However, the principle does not cover all cases, those who have committed war crimes or serious non-political crimes may be excluded, but the applications must still be examined fairly.

Indian case law on asylum

In the case of **Hans Muller of Nuremberg v. Superintendent, Presidency Jail (1955)** the Supreme Court acknowledged the State's authority to expel foreigners, but at the same time emphasised that **Article 21** safeguards their life and personal liberty.

In the case of **National Human Rights Commission v. State of Arunachal Pradesh (1996)** the Supreme Court safeguarded Chakma refugees against threats and compulsory removal. It established that Article 21 extends to non-citizens and ordered the State to ensure their protection from violence.

In the case of **Ktaer Abbas Habib Al Qutaifi v. Union of India (1999)** the Gujarat High Court applied the principle of non-refoulement and held that refugees should not be returned to a situation involving persecution, with the exception of cases where national security is at stake.

Diplomatic agents and asylum

Diplomats act on behalf of their country. Although the premises of an embassy are protected by the **Vienna Convention on Diplomatic Relations of 1961**, the embassy does not constitute territory of the sending state. The state which is receiving the embassy usually cannot enter without permission, but it is not possible to obtain a general right of diplomatic asylum by means of an embassy.

The right to safe departure still relies on the consent of the receiving state and on the relevant treaties.

Extradition and Asylum under Public International Law



ASYLUM

A State protects a person who fears persecution or serious harm if returned.

EXTRADITION

One State hands over a person to another State for criminal trial or to serve a sentence.



ASYLUM

- **Territorial asylum:**
Protection inside the State territory.
- **Diplomatic asylum:**
Protection in an embassy, consulate or similar place; not a universal right and depends on treaty or regional practice.
- **Neutral asylum:**
Protection for soldiers or combatants during armed conflict, while the host State remains neutral.



NON-REFOULEMENT

A person should not be returned where there is a real risk of persecution, torture or death. Fair examination is required; serious crimes may be excluded.



INDIA

The Extradition Act, 1962 is the principal law. The Central Government considers the request, and a Magistrate may conduct an inquiry.



IMPORTANT CASES

- **NHRC v. State of Arunachal Pradesh (1996):**
Article 21 protects non-citizens; Chakma refugees had to be protected from violence and forced removal.
- **Rauscher v. United States (1886):**
Recognised the rule of speciality.
- **Soering v. United Kingdom (1989):**
Extradition is unlawful where it creates a real risk of inhuman or degrading treatment.



EXTRADITION: KEY PRINCIPLES

- **Double criminality:**
The act must generally be an offence in both States.
- **Speciality:**
After surrender, the person is generally tried only for the offence for which extradition was granted.
- **Political offence exception:**
Genuine political offences may be refused.
- **Human-rights safeguard:**
Surrender may be refused if there is a real risk of torture, persecution or an unfair trial.

Extradition

Meaning, purpose and examples

Extradition refers to a situation in which a State delivers an individual who is accused or has been convicted to another State which wishes to prosecute them or to carry out a sentence.

For example, if someone is accused of financing terrorism in India and is arrested in France, India could make a request for surrender. France would then look at the treaty, the evidence and the human-rights safeguards before coming to a decision.

Treaties and important extradition principles

Extradition is generally regulated by bilateral treaties, regional conventions, treaties specific to certain crimes, and by domestic law. India has entered into treaties and arrangements with a number of countries and it is the Ministry of External Affairs which deals with the requests.

The main principles are-

1. The act in question must generally constitute a criminal offence in both the state making the request and the state which is being asked to enforce it.
2. The rule of speciality provides that after surrender the person can generally only be tried for the offence for which extradition was obtained. This ensures that the individual is not sent back to be prosecuted for one offence and then faced with charges for earlier offences that are unrelated.
3. The political offence exception allows extradition to be refused in the case of a genuine political offence.
4. The requesting state must furnish the documents and evidence required and may refuse surrender if there is a real risk of torture, persecution or an unfair trial.

In **Rauscher v. United States from 1886** the **rule of speciality** was strongly recognised since a person who had been surrendered could not be tried for an offence other than that for which extradition had been sought.

In **Soering v. United Kingdom 1989** the European Court of Human Rights ruled that extradition could be unlawful if it would subject the person to a real risk of inhuman or degrading treatment. The Court looked at the consequences of the surrender and not simply at the fact that an extradition request had been made.

Extradition under Indian law

The principal law in India is the **Extradition Act of 1962**. It covers fugitive criminals and includes provisions concerning extradition treaties, arrangements, requests, inquiries and surrender. The Central Government looks at the request and a Magistrate may conduct an inquiry before the Government makes a decision on surrender under the Act and the treaty.

Refusal is possible if there is no legal agreement, if the offence is not covered, if double criminality is missing, if the request is political, if the procedure is flawed, or if surrender would breach human-rights protections.

In **Hans Muller** the Supreme Court differentiated extradition from expulsion. Extradition is a cooperative procedure based on law and upon the claim of the requesting state, while expulsion is the power of the territorial state to remove a foreigner in accordance with immigration law.

The case of **Abu Salem** shows how assurances and speciality work. Portugal handed him over since India had given guarantees regarding the offences and the maximum punishment.

Difference between asylum and extradition

 Asylum vs Extradition 		
	Asylum	Extradition
 Main purpose	To protect a person from persecution or serious harm.	To surrender a person for criminal trial or sentence.
 Direction	A person seeks protection from a State.	One State requests another State to surrender a person.
 Legal character	Humanitarian and protective.	Judicial and cooperative.
 Usual beneficiary	Refugee or person fearing persecution.	Accused or convicted fugitive.
 Main limit	Non-refoulement and human rights.	Double criminality, speciality, political offence and fair-trial safeguards.
 Result	Person is allowed to remain or is protected.	Person is transferred to the requesting State.

When the state making the request says there has been a serious crime but the individual claims to be persecuted, the state which is asked to act must look into both the request and the human-rights risk. A criminal designation cannot simply take away refugee status, nor can an asylum claim automatically prevent a real prosecution.

Conclusion

This article very well explains the meaning and principles of Asylum and Extradition. For CLATPG students it is important to remember that asylum is meant to protect people from persecution, whereas extradition promotes accountability by ensuring that fugitives cannot escape justice. The Public International Law aims at achieving a balance between these two objectives.

Hence, Sovereignty and criminal justice must not overlook human dignity and the requirement of fair procedure while balancing international relations.