Ensuring Protection and Prosecution of Alleged Torturers: 
Looking for Compatibility of Non-Refoulement Protection and 
Prosecution of International Crimes

ELIZABETH SANTALLA V ARGAS*

Introduction

This contribution seeks to provide an answer to the dilemma caused by the exclusion clause of Article 1F of the 1951 Convention Relating to the Status of Refugees (hereinafter: Refugee Convention). In describing this dilemma, the focus will be on the absolute prohibition of torture and hence, the absolute prohibition of *refoulement* to a country where there is a real risk of torture. These prohibition is laid down in a number of Treaty provisions, like Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: UN Convention against Torture), respectively. It will be assumed that the person is suspected of having committed torture himself. It will further be assumed that he is excluded on the exclusion ground of Article 1F(a) Refugee Convention, torture being seen as either a crime against humanity or a war crime.1 If a person, for whom there is a real risk of torture in his home country, is excluded from protection because of one of the exclusion grounds of Article 1F, two problems may arise: (a) he is not protected against the risk of torture, and (b) he is not prosecuted for his crime. In this essay, a solution is sought in the principle “*aut dedere aut judicare*”. A State excluding a person on the basis of Article 1 F Refugee Convention should be obliged either to prosecute this person or to extradite/surrender the person to a State or to an international criminal tribunal, respectively, which will ensure that the person is prosecuted.

Though it is clear that (a) *non-refoulement* is a basic principle of refugee and human rights law and that (b) criminal prosecution of those accused of committing torture is a fundamental requirement stemming from the prohibition of torture, the relationship between these two cornerstone concepts of international law is not so

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* Institute of Immigration Law, Leiden University, the Netherlands, and Professor of Law at the School of Law, Catholic Bolivian University, Bolivia. The author is starting to write a PhD thesis on the subject dealt with in this article at the Institute of Immigration Law, Leiden University. The author wants to thank the invitation to write at the European Journal of Migration and Law and, in particular, Prof. Pieter Boeles and Mr. Kees Wouters, Institute of Immigration Law, Leiden University, for their valuable and generous contributions to this article.

1 Torture can also be seen as a serious non-political crime in accordance with Article 1F (b) Refugee Convention, or even as an act contrary to the principles and purposes of the United Nations (Article 1F (c) Refugee Convention).