CHAPTER III

GENERAL PRINCIPLES OF EXTRADITION

Introduction

In International Law, the rules regarding extradition are not well established mainly because extradition is a topic which does not came exclusively under the domain of International Law. Law of extradition is a dual law. It has operation national as well international operation. Extradition or non-extradition is determined by the municipal Courts of a State, but at the same time it also a part of International Law because it governs the relation between two States over the question whether or not a given person should be handed over by one State to another State. This question is decided by the national Courts but on the basis of international commitments as well as the rules of International Law relating to the subjects.[1]

As has been discussed in the previous chapter that in the absence of any multilateral treaty or Convention, extradition is done by States on the basis of bilateral treaties where in provisions are made in accordance with the municipal laws by which they have agreed between themselves to surrender the accused to the requesting State in case such person comes under the purview of a given treaty. Bilateral treaties are supplemented by national laws or legislation at municipal level. Thus many States have national legislations. They have made rules regarding extradition of fugitive criminals. For example, in India, the rules regarding extradition have been made in the Extradition Act of 1962 and the Extradition (Amendment) Act, 1993. Similarly, other States also have their own extradition laws.

One way or the other, bilateral treaties, national laws of several States and the judicial decisions of municipal Courts led to develop certain principles regarding

[1] H.O. Aggarwal, *International Law and Human Rights*256 (Central Law Publication, Allahabad, 13th edn., 2006).

extradition which are deemed as general rules of International Law. Though there are numerous provisions which deal with extradition, each case has to be considered individually and according to the applicable provisions. However, these general rules are common to most extradition laws.

It is quite evident that the traditional International Law gives each State liberty to exercise absolute and exclusive administrative and jurisdictional power irrespective of the will of other State or States. This legal postulate is deeply rooted in one of the oldest conceptions of Law of Nations, namely the concept of sovereignty which vests in a State, in the absence of any other supervising authority with complete independence of action in its internal as well as external activities.[2] It is internal independence that empowers a State to exercise absolute and supreme authority over all persons and things found within its frontiers. Similarly, external independence gives a State absolute liberty of action outside its borders to manage its international affairs according to its own discretion.[3]

However, this independence does not give unlimited liberty of action to a State to do what it likes without any restriction whatsoever. The mere fact that a State is a member of international community limits its liberty of action with regard to other States. Thus sovereignty is a territorial concept and has no application outside its territory.[4] Moreover a sovereign State, is fully entitled to put any limitation or restriction on its sovereignty by entering into an international agreement or treaty with another sovereign State or States or with some organisation enjoying international personality or by usages generally accepted as expressing Principles of Law to regulate relations between these co-existing independent communities. Thus, the sources of the right to demand the extradition of fugitive offenders from justice of foreign States are not only contingent or conventional stipulation, but based

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[2] H.W. Briggs, *The Law of Nations* 414 (Stevens and Sons, London, 2nd edn., 1953).
[3] Satyadev Bedi, *Extradition in International Law and Practice* 35 (Discovery Publishing House, New Delhi,1999).
[4] *Id at* 36.

on wider and broader principles of morality, solidarity and convenience. All these principles stand for the conservation of law and order, the observation of justice and the repression of crimes through the prosecution and punishment of guilty persons.

Thus the most modern extradition treaties seek to balance the rights of the individuals with the need to ensure extradition process that operates effectively and are based on principles that are now regarded as established international norms, which are designed not only to protect the integrity of that process itself, but also to guarantee the fugitive offender a degree of procedural fairness[5]. In practice, therefore, the return of criminals is secured by means of extradition agreements between States[6]. Although International Law does not require such treaties to follow a particular form, certain general principles of extradition law have emerged from the practice of States, which are commonly incorporated into extradition agreements. In 1990 the General Assembly of the United Nations approved a Model Treaty on Extradition containing many of these principles, which aims to provide 'a useful frame work' for States in the negotiation and revision of bilateral agreements[7] and Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, 2004. Exactly no amendment has been made to the Model Treaty on Extradition, December 14, 1990. In the Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters, 2004, the text remains the same. The revision has been made to provide detailed explanation to the provisions of the treaty. The purpose of this revision has been made clear in the introductory notes of Revised Manuals, E/CN.15/2004/CRP.11(1.1772). It states as follows:

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5 Ilias Bantekas and Susan Nash, *International Criminal Law* 181(Routledge-Cavendish London, 2edn., 2003).

6 Dugard John, *International Law : A South African Perspective* 210 (Juta & Co.,Cape Town1994).

7 *Model Treaty on Extradition*,1990,*United Nations General Assembly Resolution* 45/116 as adopted on December 14, 1990, *available at*:www.un.org/documents/ga/res/45/a45r116.htm and www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf (visited on October 19 ,2011).

- The Model Treaty on Extradition is an important tool in international cooperation in criminal matters, because of both its contents and structure. Its provisions are the result of a careful assessment of the needs and difficulties of countries in extradition procedures. It imposes clear and concise obligations, and contains acceptable safeguards for the requesting State (to whom extradition cannot be arbitrarily refused), the requested State (which maintains sovereignty and rights to protect persons wanted and nationals from unacceptable detention or treatment) and the person wanted (who has ample opportunity to have his or her particular circumstances examined).
- The revised Model Treaty is an important tool that should be carefully reviewed by States as part of their examination of their extradition relationships, to ensure that such relationships are up to date. Within the domestic legal framework, the revised Model Treaty should also be consulted by States implementing their extradition obligations under article 16 of the United Nations Convention against Transnational Organized Crime (2000) ("the Palermo Convention") and article 44 of the United Nations Convention against Corruption (2003) ("the Merida Convention"), as well as, inter alia, to implement UNSCR 1373 (2001) and its requirements of denying safe haven to those who finance, plan, support or commit terrorist acts, and ensuring that such persons are brought to justice.
- It should be noted that this Manual is designed primarily to assist States with the negotiation and implementation of extradition treaties. However, it can also be a useful tool for the development of extradition legislation that allows for extradition without treaty as it provides information on principles and practice that may be very relevant to the drafting of extradition legislation generally.

On the similar lines Model Law on Extradition has been framed by United Nations Office of Drugs and Crime in October, 2004. The law has been made keeping in mind the promotion of international cooperation in criminal matters, including extradition, so that through the elaboration of relevant model instruments as a substantial component of technical assistance to Member States, as to enable them make their legal framework and mechanisms in this field more efficient and effective.

The general principles are being discussed here taking into consideration the practice of the States.

Extradition Treaties or Arrangements

The first and the foremost general principle of extradition is the Extradition Treaties. The consensus in International Law is that a State does not have any obligation to surrender an alleged criminal to a foreign State on account of principle of sovereignty that every State has legal authority over the people within its borders. Such absence of international obligation and the desire of the right to demand such criminals of other countries have caused a web of extradition treaties or agreements to evolve. Most countries in the world have signed bilateral extradition treaties with most other countries. No country in the world has extradition treaty with all other countries[8]. Extradition treaties and legislation not only supply the broad principles and rules of extradition but also dictate the very existence of the obligation to surrender fugitive criminals. It is clear that States do not extradite criminals in the absence of a treaty or a municipal law which empowers them to do so. The existence of commitment to the requesting State is an express condition precedent to extradition in the United States, Great Britain, and the countries of the Commonwealth whose extradition laws are modeled to those of Great Britain.[9]

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[8] Extradition from Wikipedia, the free encyclopedia, *available at* : http://en.wikipedia.org/wike/extradition (visited on October19, 2011).

[9] I.A Shearer, *Extradition in International Law* 22(Oceana Publications, UK,1971).

The majority of international extradition agreements are bilateral treaties. During the nineteenth and early twentieth centuries, the extradition law as it is known today was developing and spreading from Europe to the rest of the world. Many States concluded bilateral treaties specific to the demands of those particular relations. Bilateral treaties make for a piecemeal approach to extradition practice, given that some differences will arise during each set of negotiations, but the agreement will be that best suited to the two Parties in particular situation[10]. Undoubtedly though, bilateral treaties will continue to be the most numerous form of extradition arrangements, yet the different approaches by States to international treaties in domestic law also affects extradition laws. In England and Australia, for instance, the treaty on its own cannot empower a court to grant surrender, domestic legislation has to be passed to implement the treaties. The Statutes permit extradition and the treaty can only be used to fill any gaps or to improve the rights of the fugitive. In France and Switzerland extradition treaties are self-executing and provide the law for the extradition hearing with the domestic legislation filling the gaps and being a substitute mechanism when no treaty exists. In practice there is a little difference in two approaches[11].

In the case of *United States v. Rausher*[12], the Supreme Court of the United States stated the American view on extradition in these terms:

"It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives for justice, to the states where the crimes were committed, for trial and punishment. This has been done generally by treaties……. Prior to these treaties and apart from them there was no well-defined obligation on one country to deliver …….. it was upon the principle of comity …….. and it

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[10] Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanism*32-33(Martinus Nijhoff Publisher , The Netherlands,1998).

[11] *Id* at 36.

[12] (1866)119US407.

has never been recognized as among those obligations of one Government towards another which rest upon established principles of International Law".

National legislations and judicial decisions of the various States confirm the principle that a demand for extradition need not be granted unless it is in conformity with the formalities and conditions incorporated in the treaties. A classical statement of this doctrine was clearly expressed by the Supreme Court of the United States when it observed:

"The principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled, and it has been said that it is under a moral duty to do so …… the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exists only when created by treaty."[13]

Since 1815, the British Courts have constantly maintained a similar attitude as that of the United States. Prior to that date the view was held by the Law officers of the Crown that the Royal Prerogative extended to the power of surrendering aliens to foreign States and that there existed judicial authority to the same effect.[14]

The statement of Lord Russell in 1862 made the position more clear than ever, when he said:

"England, France and the United States have constantly, either by diplomatic acts or by decisions of their tribunals, expressed the opinion that, upon principles of International Law, irrespective of treaty, the surrender of a foreign criminal who has taken refuge within their territory cannot be demanded".

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[13] *Factor v. Lanbenheimer*, 290 US 276, 287.

[14] William Blackstone, *Commentaries on the Laws of England* 355 (Oceana Publications, New York, 1966).

The same principle has found expression in the judicial practice of those countries which form part of the British Commonwealth. Therefore an Indian Court[15] declined to deliver up one Tarasov to Russia, because there was no treaty on extradition between the Soviet Union and India. Basically, on the same plea Ghana, Maldives and Pakistan refused to surrender the alleged criminals found within their territories to the demanding states viz. Federal Republic of Germany, Ghana and India in the absence of any treaty on extradition between the asylum and the requesting States.[16]

In contrast to this view the courts of Latin American States as well as of the European continent have demonstrated a greater willingness to grant extradition in the absence of a treaty arrangement. However, when there is a treaty arrangement between two or more States, a demand for extradition would only be granted in the cases and in conformity with the conditions formally prescribed in the treaties.[17]

While bilateral treaties were the first method to be used to conclude extradition relations, States have also developed alternative forms of arrangements. For instance, now a day's multilateral treaties and regional Conventions have proved popular as already discussed in detail in previous chapter. However, being brief here, such treaties and Conventions include Arab League Extradition Agreement, Benelux Extradition Convention, Commonwealth Scheme, European Convention, Inter-American Convention, Nordic States Scheme, Organisation Communale Africaine at Malgache Convention.[18]

Thus, the Extradition treaties may be deemed declarative of an existing reciprocal relationship or creative of the substantial basis of the very process. As has been stated by Whiteman:

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15 *In re v. S. Tarasov* (1963) 57 *AJIL* 855 (1963).
16 *Supra* note 3 at 43.
17 *Id.*
18 For Details see Chapter II of the present study at 57-61.

"Extradition treaties do not, of course, make crimes. They merely provide a means whereby a State may obtain the return to it for trial or punishment of persons charged with or convicted of having committed acts which are crimes at the time of their commission and who fled beyond the jurisdiction of the State whose law it is charged, have been violated"[19].

Kinds of Extradition Treaties

There are mainly two types of extradition treaties

1. List Treaty: The most common and traditional is the list treaty, which contains a list of crimes for which a suspect will be extradited.
2. Dual Criminality Treaty: This type of treaty has been recognized since 1980. It generally allows for the extradition of the criminal suspect if the punishment is more than one year imprisonment in both the countries.

Under both types of treaties, if the conduct is not a crime in both countries then it will not be an extraditable offence.[20]

Thus it can be concluded that the purpose of Extradition treaty is that

a) No criminal should go unpunished.

b) Country does not have extra-territorial jurisdiction except in some serious offence.

c) It works as warning for the criminals.

d) To eliminate the crime from the society.

Effect of War on Extradition Treaties

There have been two different opinions on the question of extinction of treaties as a result of the outbreak of war, ranging from total abrogation of the treaty to the continued enforcement of the treaty. The doctrine sometimes, asserted, especially by earlier writers,

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[19] White man , Digest 753-754,Vol. 6 (1968) as cited by M.Cherif Bassiouni, *International Extradition and World Public Order*29 (A.W Sijthoff, Chicago, 1974).

[20] Rohit Kumar, "Extradition Treaty", *available at* : http://jurisonline.in/2008/09/extradition-treaty/ (visited on October 27, 2012).

that war *ipsofacto*, abrogates the treaties of every kind between warring Parties. The contemporary view is that whether the stipulations of a treaty are cancelled by the war depends upon their extrinsic character. It is obvious that war must extinguish certain treaties, such as those of friendship and alliance, because of their very nature, whereas treaties contemplating a permanent arrangement of rights are not to be abrogated by the occurrence of war, but merely suspended during the conflict.[21]

Thus in *Karnath v. United States,*[22] the Court observed that:

"There seems to be a fairly common agreement that at least the following treaty obligation remain in force; stipulations in respect of what shall be done in a state of war; treaties of cessation, boundary and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and generally provisions which represent complete Acts. On the other hand, treaties of amity, of alliance, and the like having political character, the object of which is to promote relations of harmony between nation and nation, are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war".

Several tests have been suggested in order to access the effect of war on treaties. Whether a treaty should be regarded as having abrogated altogether or as being merely in suspense during the period of hostilities, or as continuing in force during hostilities, has been said to depend on the objective compatibility of the treaty with a belligerent situation. Alternatively (or conjointly), the subjective intentions of the Parties or their political conduct with regard to the treaty may be considered.[23] On any test, a treaty of perpetual friendship and alliance, for example, would fall to the ground on the outbreak of hostilities,

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[21] Moore, Digest 799 (1906) as cited by *Supra* note 19 at 39.
[22] 279 US 231 (1929).
[23] *Clark v. Allen*, 331 U.S. 503 (1947).

whereas the Geneva Convention on the Treatment of Prisoners of War[24]would by virtue of its very object apply during hostilities. Extradition treaties die at neither of these two extremes.[25]

The effect of war on extradition treaty was at issue in *Agrento v.Horn*[26] where the fugitive argued that, despite the purported 'revival' by the United States of the extradition treaty with Italy pursuant to Article 44, of the Peace Treaty of 1947, the treaty has been abrogated by the outbreak of war and could be replaced only by an altogether new treaty. The court avoided the theoretical question by basing its decision on a consideration of the 'background of the actual conduct of the two nations involved acting through the political branches of their governments.' In the light of the provisions of the Peace Treaty which invited notification by the state department of the revival of the treaty in question, and the subsequent conduct of the Parties evidencing an understanding that the treaty was in force, the court was moved to the conclusion that the treaty had been merely suspended, and had not been abrogated, during the war.

Similar problem had further been discussed in *Gallina v. Fraser case*[27] where it was contended that decision in the *Agrento v. Horn* was based solely on the ground that the Political Department determines …….whether or not a treaty survives a war and was therefore erroneous. The court relied on *Charlton v. Kelly*[28] in acknowledging the pre-eminent role of political departments in interpreting treaty obligations. It however, stressed, that it was not relying "solely" on the views of the political departments. It further admitted that while some treaties must necessarily be considered as extinguished by a state of war

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[24] *Geneva Convention-III Relative to the Treatment of Prisoners of War* of August 12, 1949. Prisoners of War have a protected status under International Humanitarian Law(IHL). For details, see Dr. Sukhdarshan Singh Khehra and Dr.(Mrs.) Harpal Kaur Khehra , "Protected Status under International Humanitarian Law: Conceptual Analysis of Prisoners of War", *II Punjabi University Law Journal (Pbi.UL.J)* 25-39(2008).

[25] *Supra* note 9 at 44.

[26] 355 US 818 (1957).

[27] 278 F.3d 77 (2nd Cir. 1960).

[28] 229 US 477(1913).

between the Parties and that extradition during the war is out of question, it followed *Argento case* in holding that the extradition treaty between the United States and Italy was merely inoperative during the period of hostilities.

Thus it can be concluded that during the war certain class of treaties definitely extinguish between the belligerent States for e.g. those of amity, alliance and having political party until they are revived by express or implied renewal on the return of peace. However all the jurist agree on the point that a treaty stipulating for permanent rights as general agreement and professing to aim at perpetuity do not cease on the occurrence of war.

State Succession and Extradition Treaties

A State generally goes constitutional changes in three forms;

i) Change of Parties or ministers

ii) A change in the constitutional character of a government, in other words, when a State changes its constitutional framework so fundamentally as to suggest that new entity has been created.

iii) When a State changes its status for e.g. gaining independence or cease to be an international person through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation.[29]

So far as the first change is concerned no question of International Law arises. It is an established fact that all the treaties that have been concluded between sovereign States are not personal but national and thus like other national rights and obligations are inseparable as has been rightly said by Sir James Marriot;[30]

"The sovereign contracts, not for himself as a private person (for that idea would be injurious to sovereignty) but as a public one. In other words, he binds himself, his

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[29] *Supra* note 3 at 50.

[30] Lord McNair, *The Law of Treaties* 669(Oxford Claredon Press, UK, 1961).

successors and his people, as great representatives of a whole kingdom, who neither dies nor changes in his national capacity."

Therefore changes in governments do not affect the States international engagement because governments come and go, but the State remains as international person.

In the second form of change when a State changes its constitutional framework emerging from a monarchy into a republic or vice versa or from democratic into a totalitarian State, there seems to be a common agreement among jurists and publicists that the changes in the constitutional frame work of a State have no influence on its international rights and obligations arising from treaties concluded by the former regime. On this point Wheaton has very clearly observed;

"They (real treaties) continue to bind the State, whatever intervening changes may take place in its internal constitution, or in the persons of its rulers. The State continues the same, notwithstanding the change and consequently the treaty relating to national objects remains in force so long as the nation exists as an independent State".[31]

Thus, it is clear that generally, the question of State succession arises whenever there is a change in the country's status rather than government. This question arose recurrently whenever former colonies of a given State become independent or when a State ceases to be an independent international person through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation. Ordinarily States on attainment of independence, assume the treaty obligations applicable to their respective territories which were formerly binding on the parent State.[32]

In *Terlinden v. Anes*[33] it was contended by the fugitive that the creation of the German Empire in 1871, had terminated the Extradition Treaty between the United States

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[31] Krystyna Marek , *Identity and Continuity of States in Public International Law* 569(Librairie Droz, France,1968).

[32] M.Cherif Bassiouni, *International Extradition and World Public Order*35 (A.W Sijthoff, Chicago, 1974).

[33] 184 US 270(1902).

and the Kingdom of Prussia. The Supreme Court, however, held that intervention by the Court on the theory that the treaty has been abrogated by the formation of the German Empire was improper in the light of the contrary judgment of both governments. The Court further stated that; "The decision of the Execute Department in matter of extradition with in its own sphere, and in accordance with the constitution, are not open to judicial review."

The same view was upheld in *Thirad v. Ferrandina*[34] by the Southern District Court of New York declaring that the Extradition Treaty of December 22, 1931 between the United States and Great Britain is currently valid and is continuing in force between United States and India. Rejecting the contentions of the accused that the treaty on which extradition was grounded, did not survive after the creation of the Republic of India in 1950. The Court further observed that;

"whether an extradition treaty exists is an issue with major foreign policy implications and one which does not easily fall within the sphere of the judicial branch of government."

Another viewpoint is that the States are free not to assume treaty obligations of the parent State on the attainment of independence, if they think so, a new State has been said to begin its life with 'a clean slate' so far as the treaties of its predecessor are concerned. Similarly an annexation and absorption automatically destroys all the previous treaties concluded by the extinct State. This view was endorsed by German Supreme Court when it declared;

"The extradition treaties concluded between France and the German States are extinguished in consequence of the Law of January 30, 1934, regulating the reorganisation of German Empire by virtue of which Germany has become a Unitarian state while the German States have ceased to exist in their capacity as subjects of International Law.[35]

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[34] 536F.2d478n.9(2nd Cir. 1976).

[35] *Extradition (Jurisdiction case)* 8 A.D. 348 ; (1935-37) Ann. Dig.348 (Germany, Supreme Criminal Court, 1936).

Similar approach was taken by the Supreme Court of India in *Babu Ram Saksena v. The State* [36]. Facts of this case are given below. In 1869 the British Government and the State of Tonk entered into a treaty which provided for the extradition of offenders in respect of certain offences specified therein called "heinous offences," which did not include the offences of cheating and extortion. In 1903 the Indian Extradition Act was passed which provided for extradition in respect of cheating and extortion also, but Section 18 of the Act provided that nothing contained in the Act "shall derogate from the provisions of any treaty for the extradition of offenders." Under the Independence of India Act, 1947, the suzerainty of His Majesty over the Indian States lapsed and with it all treaties and agreements in force; but under a "standstill agreement," between the Indian Dominion and the States (including Tonk) all agreements between His Majesty and the States were continued, including agreements in respect of extradition. Tonk acceded to the Dominion of India in 1947 and became a member State of the United State of Rajasthan.

The appellant was a member of the Uttar Pradesh Civil Service and his services were lent to the State of Tonk in 1948. After he had reverted to the Uttar Pradesh he was charged with the offences of cheating and extortion alleged to have been committed while he was in Tonk and was arrested through an extradition warrant issued under Section 7 of the Extradition Act, 1903. He applied under Section 491 and 561-A of the Code of Criminal Procedure, 1898 for his release, contending that in view of the provisions of Section 18 of the Extradition Act and the Extradition Treaty of 1869, and his arrest was illegal.

But the Supreme Court observed that;

‘‘The question now is how far was the Extradition Treaty between the Tonk State and the British Government affected by reason of the merger of the State into the United State of

[36] AIR1950 SC155.

Rajasthan. When a State relinquishes its life as such through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation, the general opinion of International Jurists is that the treaties of the former are automatically terminated. The result is said to be produced by reason of complete loss of personality consequent on extinction of State life. The cases discussed in this connection are generally cases where independent States have ceased to be such through constrained or voluntary absorption by another with attendant extinction of the formers treaties with other States.
Thus the forcible incorporation of Hanover into the Prussian Kingdom destroyed the previous treaties of Hanover. The admission of Texas into the United States of America by joint resolution extinguished the Treaties of the Independent Republic of Texas. The position is the same when Korea merged into Japan. According to Oppenheim, whose opinion has been relied upon, by Sir Alladi, no succession of rights and duties ordinarily takes place in such cases, and as political and personal treaties presuppose the existence of a contracting State, they are altogether extinguished. It is a debatable point whether succession take place in cases of treaties relating to commerce or extradition, but here again the majority of writers are of opinion that does not survive merger or annexation" and the appeal was set aside.

Thus taking into account the different views with regard to succession of treaties and conventions it can be concluded that when a new State comes into existence which formerly formed the part of an older State, its acceptance or rejection of treaty obligations of the extinct (former) State is a matter for the new State to determine by an express declaration or by conduct in the case of each individual treaty as the considerations of the policy require.[37]

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[37] *Supra* note 3 at 57.

Extradition and Political Offence

Another accepted Principle in International Law is that the political offences may not give rise to extradition. Under existing extradition treaties, as well as in most-systems of municipal laws, extradition shall not be granted if the offence for which extradition requested is regarded by the requested State as a political offence or an, offence connected with political offence. The United Nations Model Treaty on Extradition, 1990, arranges it as a mandatory ground for refusal by the requested State as compared with the optional ground for refusal.[38] Article 3(a) of the Model Treaty states as under:

"Extradition shall not be granted if the offence for which extradition is requested is regarded by the requested State as an offence of a political nature". Again under Model Law on Extradition 2004 under Chapter 2, Section 4 deals with offences of political nature. It States:

"Extradition (shall not be granted) (may be refused), if the offence for which it is requested is an offence of a political nature".

Similarly Article 3(1) of the European Convention, 1957 also provides:

"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."

Article 4(4) of the Inter American Convention, 1981 stipulates similar provisions.

The Indian Extradition Act, 1962 also makes the law for such exclusion. Section 31 (1) of the Act lays down that a fugitive criminal shall not be surrendered or returned to a foreign State if the offence in respect of which his surrender is sought is of a political character.

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[38] Lt. Zhenhua, "New Dimensions of Extradition Regime in the fight against Terrorism", 42 *Indian Journal of International Law* (*IJIL)* 164(2002).

Historical Development

The principle of non-extradition of political offenders crystallized in the nineteenth century, a period of international convulsions, when tolerant liberal States such as Holland, Switzerland and Great Britain insisted on their right to shelter political refugees.[39] It appears that until the beginning of 19th century the extradition of those accused of political offence was a generally accepted practice.

In fact, early treaties on the subject were designed to make possible the surrender of political offenders.[40] Grotius and Hobbes considered political offences as graver than ordinary crimes and thus requiring a severer penalty. The attitudes of Grotius and Hobbes are a logical and inevitable consequences of their fundamental theory according to which the subjects of a sovereign have no right to rebel against authority.[41]

During the nineteenth century, however, emerging States began to recognize the right of people to rebel against oppressive governments. These States began the practice of granting asylum[42] to those, whose coup attempts failed. Thus, burgeoning Western European democracies opted not to surrender the fate of political revolutionaries to the monarchial ancient regimes.

The Belgian Government first formulated the political offence exception in terms of non-extradition in Belgium's Extradition Law of 1833. The same year, Russia, Prussia and Austria ratified treaties not to extradite political offenders.[43]The practice of refusing to extradite (often involving the grant of asylum) person convicted of political offence is

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[39] I.A Shearer (ed.), *Starke's International Law* 320(Butterworth, London, 1994).

[40] Manucl R Garcia-Mora , *International Law and Asylum as a Human Right* 73(Public Affairs Press Washington D.C., 1956).

[41] *Id.*

[42] The term "asylum" means (1) the protection (2) offered by a State (3) on its territory or elsewhere to (4) an individual who came to seek it. Definition adopted by the Institute of International Law at its Bath Conference in 1950.For more details on Asylum and Extradition ,See Chapter IV of the present Thesis at 167-253.

[43] Abihshek Anand, "Extradition of Criminals and Doctrine of Political Offence Exception: Need of Fresh Outlook" 4 ,*available at:* hptt/www.manupatra.co.in (visited on February 12,2011)

essentially derived from principle of humanitarianism.[44]

The *'raison d' etre* (reason) of the exemption can be found in the well founded apprehension that to surrender unsuccessful rebels to the demanding State would surely amount to delivering them to their summary execution or in any event, to the risk of being tried and punished by a justice colored by political passion. Thus to surrender political rebels has been looked upon with a singularly marked antipathy and the granting of asylum to such refugees has generally come to be regarded as a moral duty.[45]

Nature of Political Offences

The question of what is political crime and who is political criminal is very often raised in media. This question is also central in the topical international debate on the contemporary phenomena of terrorism. The definition of political crime has been concern of legal theory and jurisprudence since the introduction of the term in the legal texts at the beginning of the nineteenth century.[46]

Despite its universality, no statute or treaty has attempted to positively define the term "Political Offence" and offence of political character. In the absence of internally accepted definition, the Courts and legal writers tend to categorize the political offence into:

1. Pure Political Offences
2. Relative Political Offences[47]

1. Pure Political Offence

A Pure Political Offence is one that is exclusively aimed at the State or against political interest, without injuring private person's property or interest and not

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44 E. Martin Gold, "Non Extradition for Political Offence, The Communist Perspective", 11 *Harvard International Law Journal (HARV. INT'L LJ.)* 191(1970).

45 *Supra* note 40 at 76.

46 Nikos Passas, "Political Crime and Political Order: Theory and Practice", 6 *Liverpool Law Review* 23(1986).

47 Aftab Alam,"Extradition and Human Rights", 48 *Indian Journal of International Law* (*IJIL)* 90 (2008).

accompanied by the commission of common crime. Such offences are directly aimed at the government and have none of the elements of ordinary crimes. They include treason, sedition, and espionage.[48]

Treason, sedition and espionage are offences directed against State itself and are therefore, by definition, a threat to existence, welfare and security of that entity, and as such, they are purely political offences.[49]

2. Relative Political Offence

The Relative Political Offence can be an extension of the purely political offence, when in conjunction with the latter, a common crime is also committed or when without committing a purely political offence, the offender commits a common crime prompted by ideological motives.[50]

Each circumstance has to be judged in case of such crimes to see, whether the nexus between the crime and the political act is sufficiently close, the political exception clause in the treaty can be legitimately invoked.[51]The relative political crimes, frequently being violent and including common criminal conduct, create problems when their perpetrator argue for absolution on the grounds of their political motives.[52]

Whether or not a relative offence has political consequences will often depend on the proximity of the offence to the political objective sought. There is no fixed rule as to what degree of proximity is required.

"If the accused robbed a bank to obtain funds to support a political party, the object would…….clearly be too remote to constitute a political offense. But if the accused

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48 Shantonu Sen,"The American Law on Extradition", *CBI Bulletin* 3(February, 1989).
49 *Supra* note 32 at 383.
50 *Id.*
51 *Supra* note 48.
52 *Supra* note 43.

has killed a dictator in hope of changing the government of the country, his object would sufficiently immediate to justify the epithet 'Political'.[53]

The problem of defining a political crime is well summarized by Oppenheim when he states "where as many writers consider a crime, Political, if committed from a political motive other call 'Political' any crime committed for a political purpose; again others recognize such a crime only as political as was committed both from a political motive and at the same time for political purpose; and thirdly some writers confine the term 'Political Crime' to certain offences against state only such as high treason etc. Up to present day all attempts to formulate a satisfactory conception of the term have failed." So today, International Law leaves to the States to decide according to their own municipal laws and practice whether, an offence to which extradition has to be requested is Political Crime or not.[54]

Judicial Tests

The Courts in Britain have tried to lay down the tests in *Re Castioni* Case, 1891.[55] The applicant Castioni was in proceedings for *habeas corpus*, he was a Swiss Citizen of Canton of Ticino, large number of citizens of his Canton had for some time been dissatisfied with its government and feeling finally erupted into a large scale armed attack on a government building. Castioni was one of the leaders of the uprising who, after breaking into the building with the others shot a member of the government who was standing inside. There was no evidence of private grudge between Castioni and the deceased; in fact, the evidence suggested that they had never met before. A more obvious case of a political offence could hardly be imagined. At all event the case has been regarded by later courts as connecting the concept of political offence with overt acts in the

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[53] Steven M Hyjek "Political Offences in the Law of Extradition", *available at:* www.refugee.org.nz (Visited on February 12, 2012).

[54] Kalinga Kumar Panda, *A Text Book of International Law* 188 (Anmol Publications, Delhi,1998).

[55] (1891) 1QB149.

course of some kind of political disturbance or conflict between different parties contending for powering a State.[56]

In another case i.e. *Re-Menuier*[57], Meunier was an anarchist who escaped to England from France, where he had perpetrated two bomb outrages one in a crowded café and another at army barracks. A divisional court on habeas corpus rejected the submission that the facts disclosed an offence of a political nature. Cave J. stated:

"It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the state, each seeking to impose the government of their own choice on the other, and that, if the offence is committed by one side or on the other in pursuance of that object, it is a Political Offence, otherwise not".

In one respect this dictum served to narrow the concept further by introducing the qualification that there should be some kind of organized party contending for power with the established government.[58]

But in *Rex v. Kolozynski* case[59], 1955, the British court did not follow the restrictive definitions given in these two judgments, but extended the definition of Political Offences by saying. "The words, offence of political characters' must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1890 when *Castioni's* case was decided." This judgment has been favorably accepted by many scholars and accordingly, now; not only offences committed to over throw a government, but also attempt to suppress or prosecute persons holding different political opinion, is considered as Political offence.[60]

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56 *Supra* note 9 at 110.
57 (1894) 2QB 415.
58 *Supra* note 9 at 320.
59 (1955)1QB540.
60 *Supra* note 54 at 188.

Limitations on Political Offences

Terrorism

Such limitations revolve around international terrorism, anarchistic offences, war crimes and international crimes. These form the subject matter of discussion in the ensuing pages. Over the years the romantic image of the political descendants fighting for democracy has been tarnished by the political terrorists fanatically determined to overthrow the regime of another State by all means, including hostage taking, hijacking and more recently bombings. As a result the political offence exception, has become highly controversial and courts have sought to define the political offence in such a way that it excludes the political terrorist but does not abandon the protection of a genuine political descendent. International terrorism presents a particular problem for extradition as most transnational acts of terror are politically motivated and fall within the tests traditionally laid down for political offender.[61] Extradition treaties play a particularly important role in the cooperative efforts to combat terrorism. Yet their effectiveness has been hampered by the fact that the political exception contained in all extradition treaties, protects from extradition of political offenders of all types, non-violent, violent alike, including terrorist.[62]

Modern treaties, multilateral and bilateral, tend to expressly provide that the acts of international terrorism shall not be treated as political offence, for the purpose of extradition. The 1985 Supplementary Treaty between United States and United Kingdom narrowed the political offence exception in the 1972 Extradition Treaty excluding violent crimes from the definition of political offences.

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[61] A Katz, "Terrorism and its effect on Refugees and Extradition Law", published in Monograph, No. 74, July 2002, p.6 *available at:*www.iss.co.za (visited on March 13,2011).

[62] Peterson C Antje, "Extradition and Political Offense Exception in the Suppression of Terrorism", 67 *Indian Law Journal (ILJ)* 1(1992).

Various International Conventions on the Suppression of International Terrorism which include International Convention for the Suppression of Terrorist Bombing, 1997; International Convention for the Suppression of Financing of Terrorism, 1999; International Convention for the Suppression of Acts of Nuclear Terrorism , 2005 etc. have moved a step further toward the removal of political exception to extradition in respect of terrorism hence facilitating the effective functioning of the extradition regime in the fight against terrorism.[63]

Although it is accepted that there is no universal definition of terrorism, but stated that the manifest evil of terrorism including the random and auditory taking lives needed to be balanced against the fundamental values to a democratic society. The challenge for States is to provide safe haven to genuine refugees without allowing their territories to be abused by terrorists to avoid justice. The international and continental legal regimes relating to refugee issues must be considered and adapted where it is necessary to give effect to these principles in light of increased transitional activity.[64]

Anarchistic Offences

The second limitation deals with the anarchistic offences. It was only during the latter half of 19th century, there was prompt rise of anarchism. In this connection it is today a generally accepted doctrine that anarchistic offences do not fall within the category of political offences and therefore can give rise to extradition.[65]

This matter has been clearly expressed under Article 3(2) of the Treaty between Brazil and Bolivia of February 25, 1938 according to which: "Criminal Acts which constitute an open manifestation of anarchy or are designed to over throw the bases of all social organisations shall not be considered as Political offense."

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[63] Alison E. Lardo, "The 2003 Extradition Treaty between the United States and United Kingdom: Towards a Solution to Transnational White Collar Crimes Prosecution", 20 (2)*Emory International Law Review (EILR)* 875(2006).

[64] *Supra* note 61 at 6.

[65] *Supra* note 40 at 87.

Political offenders are not opposed to all government processes, but only to a particular government which they regard as so lacking in constitutionalism and democracy that the danger of being prosecuted, should their movement fail, is worth the risk.

Subversives, on the other hand, aim, not at over throwing one particular government but all governments. Thus it makes clear that it would be precarious and dangerous to classify anarchists in the category of political offenders.[66]

War Crimes

Extradition of war criminals is inextricably bound up with the problems of definition and jurisdiction in respect of war crimes and the general question of the status of an individual in International Law. The Rome Statute of International Criminal Court, 1998 under Article 8 gives an exhaustive detail of war crimes. For the purpose of the Statute war crimes means, the acts against the persons or property such as willful killing, torture or inhuman treatment including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, willfully depriving a prisoner of war the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement, taking of hostages, etc. It also includes other serious violations of the laws and customs applicable in international armed conflict.

The French Extradition Law of 1927 provided that the acts committed in the course of a civil war would not be protected as political offences if they are acts of odious barbarism, vandalism, prohibited by the laws of war.[67]

After Second World War special efforts were made to track down the major war criminals, By a resolution of the United Nations unanimously adopted on 13 February 1946, all States were urged to arrest war criminals and to 'cause them to be sent back' to the countries in which the abominable deeds were done, in order that they may be judged

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66 *Id at* 88.
67 *Supra* note 39 at 186.

and punished according to the laws of those countries.[68] The only international instrument regarding war crimes which imposed any particular obligation on the Parties with respect to extradition was Genocide Convention, 1948, which prohibited the Parties there to, from qualifying genocide and related crimes and political offences for the purpose of extradition, urging States to grant extradition, in accordance with laws and treaties in force.

Now, most of the major war criminals have been brought to trial by way of arrest in *locus delicti*, rendition under peace treaties, extradition under normal or Adhoc extradition agreements or by informal methods. The problem of war crimes in extradition is a matter of decreasing moment.[69]

International Crimes

Offences against the laws of nations or *Delicti Jus Gentium* by their very nature affect the world community as a whole. As such they cannot fall within the political offence exception because even though they may be politically connected they are in derogation to the "laws of mankind" in general and international criminal law in particular.

The following is offered as a catalog of recognized international crimes, which should, therefore, constitute an exclusion from political offence exception.

1. Aggression, as defined by United Nations Charter.
2. Crimes against Humanity as defined in formulation of the Nuremberg Principles by the United Nations General Assembly and the Genocide Convention, 1948.
3. War crimes as defined by the 1912 Hague Convention and 1949 Geneva Convention, and other rules of conduct in war and restriction in war fare.
4. Piracy
5. Hijacking

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[68] *United Nations Year Book* 66 (1946-47) as cited by *id.*
[69] *Id.*

6. Slavery and other forms of traffic in women and children.

7. Counterfeiting

8. Kidnapping of internationally protected persons.

9. International traffic in Narcotics.

10. Racial discrimination.[70]

Under Indian Extradition Law, 1962 also there is a list of offences which have been excluded from the category of political offences such as murder or other willful crime against Head of the State or Head of the government or a member of their family, Aircraft Hijacking offences, Aviation sabotage, Crimes against internationally protected persons including diplomats, Hostage taking, offences related to illegal drugs etc.[71]

There is still difficultly, however, in determining what constitutes international offence, their elements, and the factual establishment of their occurrence. There are however, some international agreements on the notice that such offences constitute

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[70] *Supra* note 32 at 420-421.

[71] Under Section 31 (2) under *the Extradition Act*, 1962 of India lists the offences, which are not to be regarded as offences of a political character. The Section states as under: The following list of offences is to be construed according to the law in force in India on the date of the alleged offence. Wherever the names of the relevant Acts are not given, the Sections referred to are the Sections of the *Indian Penal Code* (45of 1860):-

1. Offences under the *Anti-Hijacking Act*, 1982 (65 of 1982).
2. Offences under the *Suppression of Unlawful Acts against Safety of Civil Aviation Act*, 1982 (66 of 1982).
3. An offence within the scope of the *Convention on the Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents*, opened for signature at New York on 14th December 1973.
4. An offence within the scope of the *International Convention Against the Taking of Hostages* opened for signature New York on 18th December, 1979.
5. Culpable homicide, murder Sections 299 to 304).
6. Voluntarily causing hurt or grievous hurt by a dangerous weapon or means (Sections 321 to 333).
7. Offences under the Explosive Substances Act, 1908 (6 of 1908).
8. Possession of a fire-arm or ammunition with intention to endanger life[(Section 27 of *The Arms Act*, 1959 (54 of 1959)].
9. The use of a fire-arm with intention to resist or prevent the arrest or detention [Section 28 of *The Arms Act*, 1959 (54 of 1959)].
10. Causing of loss or damage to property used for public utilities or otherwise with intention to endanger life (Sec.425 read with section 440).

"exceptions to exception", even though there is still no codification of international Criminal Law.[72]

Thus this analysis exhibits the nature of political offences as an exception on the consideration of humanity. However the extradition of political offenders has always remained controversial because of the difficulty in defining a political offence. Thus in the absence of universal definition of political offence two categories of political offences have been recognized i.e. pure political offences and relative political offences. There is no difficulty in the matter of purely political offences; problem arises in the matter of relative political offences. Court considering extradition throughout the world has experienced great difficulty in deciding when an offence is one of political character. Problems however arise in the case of ordinary crimes such as murder, robbery, when they are politically motivated. International Terrorism presents a particular problem for extradition, as most transnational acts of terror are politically motivated and fall with in the tests traditionally laid down for political offender. Modern treaties, multilateral treaties and bilateral treaties, tend to expressly provide that acts of International Terrorism shall not be treated as Political offence for the purpose of extradition, e.g. SAARC Convention (Suppression of Terrorism) Act, 1993, Article 1 specially provides the terrorist acts will not be regarded as a Political Offence.

There is still little conclusive agreement as to what constitutes a political offence in the law of extradition. However it may be asserted that the following elements, to varying degrees are considered relevant in identifying political offences:

1. The offender is motivated by a desire to challenge or oppose the State in some manner, while motive alone will rarely be sufficient, absence of a genuine motive may be fatal.

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[72] Johanson, "The Draft Code of Offences against Peace and Security of Mankind", 4 *International and Comparative Law Quarterly* (*IL&Com. LQ)* 446(1955).

2. The actions of the offender target State rather than private interests.
3. The offence occurs in the context of a political disturbance.
4. The actions of the offender are proximate to the objectives.
5. The action of the offender is proportionate to the purpose, in particular it has some degree of effectiveness and harm private interests as little as possible.
6. The offence does not fall within one of the exceptions related to international crimes (terrorism).
7. The offence attracts disproportionately severe punishment.
8. Last but not the least the offender will receive an unfair trial or discriminatory punishment.[73]

Extradition and Human Rights Implication

Transnational crime has become a global problem. Countries all over the world are concerned about the increase in the level and sophistication of transnational crimes to facilitate international concerted efforts to combat this problem, mutual legal assistance and extradition procedures are emphasized. The international community has responded by creating new institutions and expanding the network of bilateral and multilaterals treaties designed to out-law transnational crimes, promote extradition and authorize mutual assistance.[74]

These treaties create a legal relationship between the two States which can be characterized as a particular type of qualified sovereignty. Bilateral extradition treaties are not characterized by the creation of an automatic process of transfer of the individual or individuals between the States. Rather, they are marked by the establishment of a weak legal relationship in which the State's request is considered by other State, on the basis of

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[73] *Supra* note 53.

[74] Otis H. Stephens, Jr. John M .Sceb, et. al., (eds.), "Extradition, International", *Encyclopedia of American Civil Rights and Liberties, available at*: http://www.mathieudeflem.net/ (visited on December 12, 2011).

formal procedure that entails a degree of scrutiny of this request. The existence of this formal procedure provides the State with autonomy that may result in an initial refusal to extradite accompanied by a request for further information, or the refusal to extradite. This in turn, means that the requesting State does not have the right to extradition, but makes a request, in response to which other State merely enacts a formal procedure through which a free decision to extradite is made.[75] The extradition treaties typically spell out the conditions under which extradition can take place. An extradition treaty will provide that the crime involved is serious, and that there exists sufficient evidence for the prosecution against the wanted individual or that the person to be extradited has been convicted under conditions of due process of law.[76] There are other general principles upon which extradition treaties rely i.e. double criminality offence, reciprocity etc. Although law and practice does not recognize a general exception to extradition where the human rights of the fugitive are threatened in the requesting State, objection to extradition based on human rights grounds have become commonplace in extradition proceedings.[77] The human rights movement which has had such a powerful impact on International Law and relations in the post-World War II period, has in recent years turned its attention to extradition treaties, executive acts and judicial decisions on extradition have all been affected.[78]

The linkages between extradition law and human rights have to be made to examine the applicability of human rights norms in the extradition proceedings and difficulties involved there in, the emphasis should be upon the need for drawing a balanced approach in dealing with extradition cases.

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[75] Peter Langford, "Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights"13:14 *International Journal of Human Rights (IJHR)* 512(2009), *available at:* http://pdfserve.informaworld.com (visited on December11, 2011).

[76] *Supra* note 74.

[77] John Dugard and Christine Van Den Wyngaert, "Reconciling Extradition with Human Rights", 92 *American Journal of International Law (AJIL)* I87 (1999).

[78] *Id.*

International human rights law does not establish right not to be extradited. On the contrary, it is an instrument which enables States to obtain custody of, and prosecute, the alleged perpetrators of human rights violations. Extradition can make a significant contribution to the fight against impunity for such crimes. Human rights law does, however, impose certain restrictions and conditions on the freedom of States to extradite, by prohibiting the surrender of the wanted person to a risk of serious human rights violations. In some circumstances, this means an absolute bar to extradite, while in others – in particular, cases involving death penalty – it has long been established practice to grant extradition only if the requesting State gives assurance concerning the treatment of the wanted person upon return.[79]

Mutual relationship between human rights and extradition are often characterized as a "tension" between protective and cooperative functions of this form of international legal assistance.[80] Therefore, there is presently a sharper need in extradition cases to find a proper balance between the recognition of State's claim to sovereignty on the one hand and respect for individuals civil and human rights, on the other.

Human Rights Safeguards under Extradition Law

Extradition treaties, bilateral or multilateral, provide fugitive offenders with several human rights safeguards. These safeguards are varied and arose out of the different reasons and satisfy different purposes and concerns.[81]

The existing system of extradition already incorporates the safeguards for individual rights, such as the political offence exception, the rule of double criminality, and

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[79] UN High Commissioner for Refugees , *The Interface between Extradition and Asylum*, viii, a Research Paper commissioned by the Protection Policy and Legal Advice Section of Department of International Protection in *Legal Protection Series, PPLA/2003/05*, November 2003,Switzerland, ,*available at:* http://www.unhcr.org/refworld/pdfid/3fe846da4.pd (visited on March 13, 2013).

[80] Michael Plachta, "Contemporary Problem of Extradition: Human Rights, Grounds for Refusal and the Principle Aut Dedere Aut Judicare", Report on *114th International Training Course visiting papers 64*, *available at :* http://www.unafei.er.jp (visited on December 12, 2010).

[81] M.Cherif Bassiouni, "Law and Practice of United States" as quoted by Aftam Alam "Extradition and Human Rights" 48 *1J1L* 287 (2008).

the principle of speciality which specifies that the extradited individual will only stand trial for offence specified in the extradition. But not all civil and human right concerns are as easily dealt with in extradition, conflicts in specific cases have revolved around use of the death penalty, torture in criminal proceedings, harsh interrogation methods, questionable trial and incarceration, conditions and cruel, inhuman or degrading treatment and punishment.[82]

One of the biggest hurdles in extraditing a person is the standard of the justice in the demanding State. For e.g., in the case of an Indian who is alleged to have picked pockets in Saudi Arabia and escapes to India, would it be proper for India to surrender him to Saudi Arabia, the punishment for the offence is the amputation of the offender's hand. Moreover the law of the evidence for that country does not meet International Standards and the judiciary is not independent. Unless a country meets the requirement of International standards of Justice, it would be dangerous to individual's liberty to surrender an alleged criminal to that State.[83]

The *Soering v.United Kingdom*[84] is a Landmark case that illustrates the problems of human rights involved in extradition.

In this case Soering, a West German national, murdered the girlfriend's parents in Virginia and fled to U.K., from where his extradition was requested by the US. After the UK ordered his extradition, he petitioned the European Commission of Human Rights, which referred the case to the European Court of Human Rights. The Court held that the UK, was required by Article 3 of the European Convention on Human Rights, 1953 which prohibits torture and inhuman or degrading treatment or punishment not to extradite Soering to the

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82 *Supra* note 74.

83 M. Basheer Hussain, "India: Keeping to the Rule of Law, Certain Aspects of Extradition Treaties", available *at: http*://www.hrsolidarity.net/mainfile.phd/ (visited on December 12, 2010).

84 11 ECHR (ser. A) (1989).

US where there was a real risk that he would be subjected to inhuman or degrading treatment by being kept on death row for a prolonged period in Virginia.

Another important case on the similar line is "*Path way students case*"[85] where two suspected terrorists were saved from deportation by UK to Pakistan as they were thought to be at risk of torture or death upon their return.

Similarly *Garg Mc Kinnon's*[86] battle against extradition has been rumbled on since 2002, Mc Kinnon was indicted by a US Court in November 2002 for hacking into 97 computers in the US Defence Department and National Aeronautics Space Administration. He fled away to UK and is fighting a legal battle, arguing that he should not be extradited on the grounds of his mental condition and he also invoked Article 3 of the European Convention on Human Rights, 1953.

Finally it is probable that he may be saved from extradition to US on computer hacking charges by the government because of the government's plan to "review the operation of the Extradition Act and the US/UK extradition treaty to make sure, that it is even handed".[87]

New Trends in Extradition Law

Thus it is clear from above discussed cases that though in the present system of multiple bilateral extradition treaties, there is no overarching International Law or treaty guiding their application, yet human rights have begun to be recognized across nations, there has been a relative loss in nation's sovereignty and a streamlining of extradition provisions.[88] The adoption of the United Nations Model Treaty on Extradition, 1990,[89] is the most significant development from the point of view of incorporating human rights

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[85] Adam Wagner, "The Increasing Role of Human Right Law in Extradition and Deportation case," *UK Human Rights blog, available at :* http://ukhumanrightsblog.com (visited on December 14, 2010).

[86] *Id.*

[87] *Id.*

[88] Supra note 74.

[89] *United Nations General Assembly Resolution*, 45/116, December 14, 1990 and amended under *United Nations General Assembly Resolution* 52/88, December 12, 1997.

safeguards with in extradition laws. The Model Treaty provides for several exceptions to the extradition obligation: seven, of which are mandatory[90] while eight are optional[91]. Similar provisions have been stipulated under Model Law on Extradition, 2004, under Chapter 2, Sections 5 and 6. It particularly provides for refusal of extradition if there are "grounds to believe that the request has been made to prosecute or punish a person on account of person's race, religion, nationality, ethnic origin, political opinion, sex or status, or if person would be subjected to torture or cruel, inhumane or degrading punishment", or if the person "has not received or would not receive the minimum guarantees in criminal proceedings as contained in Article 14 of the International Covenant on Civil and Political Rights,1966".

In recent years, there has been growing support, from the Courts and academia, for the notion that human rights should be taken into account in extradition processes[92]. Recent cases of the European Court of Human Rights are evolving in the same direction and applying the European Convention on Human Rights to extradition as discussed earlier.

Moreover the treaty based framework of extradition is transformed once a State becomes a contracting Party to the European Convention of Human Rights. For a State as a contracting Party, is now subject to the demands of European Convention of Human Rights, as a Human Right treaty.[93]

This development coincided with the tendency toward strengthening the position of individuals through the recognition of their personality in International law, albeit in a very

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90 *UN Model Treaty on Extradition*, Article 3 (a) -(g).
91 *UN Model Treaty on Extradition*, Article 4 (a)- (h).
92 Chistine Van Denwyngaert, "Applying the European Convention on Human Rights to Extradition:Opening Pandora's Box ?" 39 *International Comparative and Law Quarterly* (*IL&Com. LQ)* 757 (1990).
93 *Supra* note 75.

limited scope yet still contested by some authorities and acknowledgment that they should have their say in international matters involving their interests.[94]

Human Rights as an Absolute Bar to Extradition

It is now been a generally established practice that some human rights are being recognized as an absolute bar to extradition. These human include: right to life, fair trial, protection against torture or degrading treatment and discrimination. Hereinafter follows a discussion of such rights which put a bar on extradition.

A. Death Penalty

Many States refuse extradition where the offender would be subjected to death penalty and make extradition conditional upon an assurance that the death penalty, if imposed will be commuted to a sentence of imprisonment. There is no general rule of International law prohibiting death penalty[95]. However everyone has a right to life, liberty and security of person under Article 3 of Universal Declaration of Human Rights. It needs to be recalled that the Universal Declaration was adopted by the *General Assembly Resolution*, 217 A (III) on December 10, 1948 by a vote of 48 in favor, zero against, with eight abstentions: the Soviet Union, Ukrainian SSR, Byelorussian SSR, People's Federal Republic of Yugoslavia, People's Republic of Poland, Union of South Africa, Czechoslovakia and the Kingdom of Saudi Arabia. Honduras and Yemen, both members of UN at the time, failed to appear for vote. The names of the countries that voted in favour of this Declaration are shown in Table III.1

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[94] *Supra* note 80.

[95] *Supra* note 47 at 87.

TABLE-III.1

List of Countries that Voted in favour of Universal Declaration of Human Rights, December 10, 1948

1.	Afghanistan	13.	Cuba	25.	India	37.	Panama
2.	Argentina	14.	Denmark	26.	Iran	38.	Paraguay
3.	Australia	15.	Dominican Republic	27.	Iraq	39.	Peru
4.	Belgium	16.	Ecuador	28.	Lebanon	40.	Philippines
5.	Bolivia	17.	Egypt	29.	Liberia	41.	Siam
6.	Brazil	18.	El Salvador	30.	Luxembourg	42.	Sweden
7.	Burma	19.	Ethiopia	31.	Mexico	43.	Syria
8.	Canada	20.	France	32.	Netherlands	44.	Turkey
9.	Chile	21.	Greece	33.	New Zealand	45.	United Kingdom
10.	Republic of China	22.	Guatemala	34.	Nicaragua	46.	United States
11.	Colombia	23.	Haiti	35.	Norway	47.	Uruguay
12.	Costa Rica	24.	Iceland	36.	Pakistan	48.	Venezuela

Source: en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights (Visited on July 13, 2013)

Moreover as per Article 6(1) of the International Covenant on Civil and Political Rights this right shall be protected by law and no one shall be arbitrarily deprived of his life. The list of States Parties to International Covenant on Civil and Political Rights having signed, ratified/acceded becomes apparent from Table III.2. The present States Parties are 167 in number.

TABLE –III.2

List of States Parties to International Covenant on Civil and Political Rights 16 December,1966

S.No.	Country	Signature	Ratification/Accession
1.	Afghanistan	-	24 January, 1983
2.	Albania	-	4 October, 1991
3.	Algeria	10 December, 1968	12 September, 1989
4.	Andorra	5 August, 2002	22 September, ,2006
5.	Angola	-	10 January, 1992
6.	Argentina	19 February, 1968	8 August, 1986
7.	Armenia	-	23 June, 1993
8.	Australia	18 December, 1972	13 August, 1980
9.	Austria	10 December, 1973	10 September, 1978
10.	Azerbaijan		13 August, 1992
11.	Bahamas	4 December, 2008	23 December, 2008
12.	Bahrain	-	20 September, 2006
13.	Bangladesh	-	6 September, 2000
14.	Barbados	-	5 January, 1973
15.	Belarus	19 March, 1968	12 November, 1973
16.	Belgium	10 December, 1968	21 April, ,1983
17.	Belize	-	10 June, ,1996
18.	Benin	-	12 March, ,1992
19.	Bolivia	-	12 August, 1982
20.	Bosnia and Herzegovina	-	1 September, 1993
21.	Botswana	8 September, 2000	8 September, 2000
22.	Brazil	-	24 January, 1992
23.	Bulgaria	8 October, 1968	21 September, 1970
24.	Burkina Faso	-	4 January, 1999
25.	Burundi	-	9 May, 1990
26.	Cambodia	17 October, 1980	26 May, 1992
27.	Cameroon	-	27 June, ,1984
28.	Canada	-	19 May, ,1976
29.	Cape Verde	-	6 August, ,1993
30.	Central African Republic	-	8 May, 1981
31.	Chad	-	9 June, 1995
32.	Chile	16 September, 1969	10 February, 1972
33.	Colombia	21 December, 1966	29 October, 1969
34.	Congo	-	5 October, 1983
35.	Costa Rica	19 December, 1966	29 November, 1968
36.	Côte d'Ivoire	-	26 March, 1992
37.	Croatia	-	12 October, 1992
38.	Cyprus	19 December, 1966	2 April,1969
39.	Czech Republic	-	22 February, 1993
40.	Democratic People's Republic of Korea	-	14 September, 1981

41.	Democratic Republic of the Congo	-	1 November, 1976
42.	Denmark	20 March, 1968	6 January, 1972
43.	Djibouti	-	5 November, 2002
44.	Dominica	-	17 June, ,1993
45.	Dominican Republic	-	4 January, 1978
46.	Ecuador	4 April, 1968	6 March, 1969
47.	Egypt	4 August, 1967	14 January, 1982
48.	El Salvador	21 September, 1967	30 November, 1979
49.	Equatorial Guinea	-	25 September, 1987
50.	Eritrea	-	22 January, ,2002
51.	Estonia	-	21 October, 1991
52.	Ethiopia	-	11 June, ,1993
53.	Finland	11 October, 1967	19 August, 1975
54.	France	-	4 November, 1980
55.	Gabon	-	21 January, 1983
56.	Gambia	-	22 March, 1979
57.	Georgia	-	3 May, 1994
58.	Germany	9 October, 1968	17 December, 1973
59.	Ghana	7 September, 2000	7 September, 2000
60.	Greece	-	5 May, 1997
61.	Grenada	-	6 September, 1991
62.	Guatemala	-	5 May, 1992
63.	Guinea	28 February, 1967	24 January, 1978
64.	Guinea-Bissau	12 September, 2000	1 November, 2010
65.	Guyana	22 August, 1968	15 February, 1977
66.	Haiti	-	6 February, 1991
67.	Honduras	19 December, 1966	25 August, 1997
68.	Hungary	25 March, 1969	17 January, 1974
69.	Iceland	30 December, 1968	22 August, 1979
70.	India	-	10 April, 1979
71.	Indonesia	-	23 February, 2006
72.	Iran	4 April, 1968	24 June, 1975
73.	Iraq	18 February, 1969	25 January, 1971
74.	Ireland	1 October, 1973	8 December, 1989
75.	Israel	19 December, 1966	3 October, 1991
76.	Italy	18 January, ,1967	15 September, 1978
77.	Jamaica	19 December, 1966	3 October, 1975
78.	Japan	30 May, 1978	21 June, 1979
79.	Jordan	30 June, ,1972	28 May, 1975
80.	Kazakhstan	2 December, ,2003	24 January, 2006
81.	Kenya	-	1 May, 1972
82.	Kuwait	-	21 May, 1996
83.	Kyrgyzstan	-	7 October, 1994
84.	Lao People's Democratic Republic	7 December, 2000	25 September, 2009
85.	Latvia	-	14 April, 1992
86.	Lebanon	-	3 November, 1972
87.	Lesotho	-	9 September, 1992

88.	Liberia	18 April, 1967	22 September, 2004
89.	Libya	-	15 May, 1970
90.	Liechtenstein	-	10 December, 1998
91.	Lithuania	-	20 November, 1991
92.	Luxembourg	26 November, 1974	18 August, 1983
93.	Madagascar	17 September, 1969	21 June, 1971
94.	Malawi	-	22 December, 1993
95.	Maldives	-	19 September, 2006
96.	Mali	-	16 July, 1974
97.	Malta	-	13 September, 1990
98.	Mauritania	-	17 November, 2004
99.	Mauritius	-	12 December, 1973
100.	Mexico	-	23 March, 1981
101.	Monaco	26 June, 1997	28 August, 1997
102.	Mongolia	5 June, 1968	18 November, 1974
103.	Montenegro	-	23 October, 2006
104.	Morocco	19 January, 1977	3 May, 1979
105.	Mozambique	-	21 July, 1993
106.	Namibia	-	28 November, 1994
107.	Nepal	-	14 May, 1991
108.	Netherlands	25 June, 1969	11 December, 1978
109.	New Zealand	12 November, 1968	28 December, 1978
110.	Nicaragua	-	12 March, 1980
111.	Niger	-	7 March, 1986
112.	Nigeria	-	29 July, 1993
113.	Norway	20 March, 1968	13 September, 1972
114.	Pakistan	17 April, 2008	23 June, 2010
115.	Panama	27 July, 1976	8 March, 1977
116.	Papua New Guinea	-	21 July, ,2008
117.	Paraguay	-	10 June, 1992
118.	Peru	11 August, 1977	28 April, 1978
119.	Philippines	19 December, 1966	23 October, 1986
120.	Poland	2 March, 1967	18 March, 1977
121.	Portugal	7 October, 1976	15 June, 1978
122.	Republic of Korea	-	10 April, 1990
123.	Republic of Moldova	-	26 January, 1993
124.	Romania	27 June, 1968	9 December, 1974
125.	Russian Federation	18 March, 1968	16 October, 1973
126.	Rwanda	-	16 April, 1975
127.	Samoa	-	15 February, 2008
128.	San Marino	-	18 October, 1985
129.	Senegal	6 July, 1970	13 February, 1978
130.	Serbia	-	12 March, 2001
131.	Seychelles	-	5 May, 1992
132.	Sierra Leone	-	23 August,1996
133.	Slovakia	-	28 May, 1993
134.	Slovenia	-	6 July, 1992
135.	Somalia	-	24 January, 1990

136.	South Africa	3 October, 1994	10 December, 1998
137.	Spain	28 September, 1976	27 April, ,1977
138.	Sri Lanka	-	11 June, 1980
139.	St. Vincent and the Grenadines	-	9 November, 1981
140.	Sudan	-	18 March, 1986
141.	Suriname	-	28 December, 1976
142.	Swaziland	-	26 March, ,2004
143.	Sweden	29 September, 1967	6 December, 1971
144.	Switzerland	-	18 June, 1992
145.	Syrian Arab Republic	-	21 April, 1969
146.	Tajikistan	-	4 January, 1999
147.	Thailand	-	29 October,1996
148.	The former Yugoslav Republic of Macedonia	-	18 January, 1994
149.	Timor-Leste	-	18 September, 2003
150.	Togo	-	24 May, 1984
151.	Trinidad and Tobago	-	21 December, 1978
152.	Tunisia	30 April, 1968	18 March, 1969
153.	Turkey	15 August, 2000	23 September, 2003
154.	Turkmenistan	-	1 May, ,1997
155.	Uganda	-	21 June, 1995
156.	Ukraine	20 March, 1968	12 November, 1973
157.	United Kingdom of Great Britain and Northern Ireland	16 September, 1968	20 May, 1976
158.	United Republic of Tanzania	-	11 June, 1976
159.	United States of America	5 October, 1977	8 June, 1992
160.	Uruguay	21 February, 1967	1 April, 1970
161.	Uzbekistan	-	28 September, 1995
162.	Vanuatu	29 November, 2007	21 November, 2008
163.	Venezuela	24 June, 1969	10 May, 1978
164.	Viet Nam	-	24 September, 1982
165.	Yemen	-	9 February, 1987
166.	Zambia	-	10 April, 1984
167.	Zimbabwe	-	13 May, 1991

Source: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en(visited on 15 July ,2013)

It is further provided in the same Covenant through Article 6(2) that in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime. This penalty can be carried out pursuant to the final judgment rendered by a competent Court. The Covenant of Civil and Political Rights also lays down in Article 6(5) that the sentence of death shall not be imposed for crimes committed by persons below the 18 years of age and shall not be carried out on pregnant women. However, nothing can be invoked to delay or prevent the abolition of capital punishment by any State Party to this Covenant[96]. Thus as initially adopted human right Convention outlaws the death penalty, although Protocols to the International Covenant on Civil and Political Rights, 1989[97]; the European Convention of Human Rights, 1983 and 2002[98] and American Convention of Human Rights, 1990[99] do so. At present there are 77 Members to the Second Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty, as shown in Table.III.3

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96 *International Covenant on Civil and Political Rights*, 1966, Article6 (5).

97 *Second Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty*, December 15, 1989.

98 *Protocol No.6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty*, April 28,1983;*Protocol No.13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty in all Circumstances*, May 3, 2002.

99 *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, adopted June 8, 1990.

TABLE- III.3

List of States Parties to Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 15 December 1989

S.No.	Country	Signature	Ratification/Accession and Succession
1.	Albania	-	17 October, 2007
2.	Andorra	5 August, 2002	22 September, 2006
3.	Argentina	20 December, 2006	2 September, 2008
4.	Australia	-	2 October, 1990
5.	Austria	8 April, 1991	2 March, 1993
6.	Azerbaijan	-	22 January, 1999
7.	Belgium	12 July, 1990	8 December, 1998
8.	Benin	-	5 July, 2012
9.	Bolivia	-	12 July, 2013
10.	Bosnia and Herzegovina	7 September, 2000	16 March, 2001
11.	Brazil	-	25 September, 2009
12.	Bulgaria	11 March, 1999	10 August, 1999
13.	Canada	-	25 November, 2005
14.	Cape Verde	-	19 May, 2000
15.	Chile	15 November, 2001	26 September, 2008
16.	Colombia	-	5 August, 1997
17.	Costa Rica	14 February, 1990	5 June, 1998
18.	Croatia	-	12 October, 1995
19.	Cyprus	-	10 September, 1999
20.	Czech Republic	-	15 June, 2004
21.	Denmark	13 February, 1990	24 February, 1994
22.	Djibouti	-	5 November, 2002
23.	Ecuador	-	23 February, 1993
24.	Estonia	-	30 January, 2004
25.	Finland	13 February, 1990	4 April, 1991
26.	France	-	2 October, 2007
27.	Georgia	-	22 March, 1999
28.	Germany	13 February, 1990	18 August, 1992
29.	Greece	-	5 May, 1997
30.	Honduras	10 May, 1990	1 April, 2008
31.	Hungary	-	24 February, 1994
32.	Iceland	30 January, 1991	2 April, 1991
33.	Ireland	-	18 June, 1993
34.	Italy	13 February, 1990	14 February, 1995
35.	Kyrgyzstan	-	6 December, 2010
36.	Latvia	-	19 April, 2013
37.	Liberia	-	16 September, 2005
38.	Liechtenstein	-	10 December, 1998
39.	Lithuania	8 September, 2000	27 March, 2002
40.	Luxembourg	13 February, 1990	12 February, 1992

41.	Malta	-	29 December, 1994
42.	Mexico	-	26 September, 2007
43.	Monaco	-	28 March, 2000
44.	Mongolia	-	13 March, 2012
45.	Montenegro	-	23 October, 2006 d
46.	Mozambique	-	21 July, 1993
47.	Namibia	-	28 November, 1994
48.	Nepal	-	4 March, 1998
49.	Netherlands	9 August, 1990	26 March, 1991
50.	New Zealand	22 February, 1990	22 February, 1990
51.	Nicaragua	21 February, 1990	25 February, 2009
52.	Norway	13 February, 1990	5 September, 1991
53.	Panama	-	21 January, 1993
54.	Paraguay	-	18 August, 2003
55.	Philippines	20 September, 2006	20 November, 2007
56.	Portugal	13 February, 1990	17 October, 1990
57.	Republic of Moldova	-	20 September, 2006
58.	Romania	15 March, 1990	27 February, 1991
59.	Rwanda	-	15 December, 2008
60.	San Marino	26 September, 2003	17 August, 2004
61.	Serbia	-	6 September, 2001
62.	Seychelles	-	15 December, 1994
63.	Slovakia	22 September, 1998	22 June, 1999
64.	Slovenia	14 September, 1993	10 March, 1994
65.	South Africa	-	28 August, 2002
66.	Spain	23 February, 1990	11 April, 1991
67.	Sweden	13 February, 1990	11 May, 1990
68.	Switzerland	-	16 June, 1994
69.	The former Yugoslav Republic of Macedonia	-	26 January, 1995
70.	Timor-Leste	-	18 September, 2003
71.	Turkey	6 April, 2004	2 March, 2006
72.	Turkmenistan	-	11 January, 2000
73.	Ukraine	-	25 July, 2007
74.	United Kingdom of Great Britain and Northern Ireland	31 March, 1999	10 December, 1999
75.	Uruguay	13 February, 1990	21 January, 1993
76.	Uzbekistan	-	23 December, 2008
77.	Venezuela	7 June, 1990	22 February, 1993

Source: treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg...*(*visited on July 24,2013).

Article 11 of the European Convention on Extradition, 1957 provides that if the offence for which extradition is requested is punishable by death under the Law of requesting party and if in respect of such offence the death penalty is not provided for by laws of the requested State or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out. Many bilateral treaties have adopted provisions similar to Article 11, for example treaty between United States and Mexico, 1978; treaty between India and Portugal, 2007.

The latest example in this case is the extradition of Abu Salem, where the Portuguese Government agreed to extradite Abu Salem to India only when Government of India assured that the death penalty would not be imposed on him.[100]

B. Fair Trial

The obligation to safeguard the wanted person's right to a fair trial under international[101] and regional human rights instruments[102] requires the requested State to access the quality of the criminal proceedings which would await him or her if surrendered.[103] It is among the most important civil and political rights. It holds a prominent place in a democratic society.

Strong evidence for the importance of the right to fair trial in the extradition context can be adduced from the UN Model Treaty on Extradition, 1990. Article 3 which lists the mandatory grounds for refusal of Extradition, clearly specifies that Extradition shall not be granted, "if the person……. would not receive the minimum guarantees in criminal proceedings as contained in the ICCPR(International Covenant on Civil and Political

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[100] Puneet Vyas, "Laws Governing Extradition : A Special Reference to Abu Salem's Extradition", *available at* :http://www.legalserviceindia.com(visited on December 20,2011) .

[101] *Universal Declaration of Human Rights*, 1948, Article 10-14; *International Covenants on Civil and Political Rights*, 1966, Article 14.

[102] *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, Article 6; and *the American Convention on Human Rights*, 1969, Article 8.

[103] *Supra* note 79 at ix.

Rights, 1966)Article 14".[104] Section 7(1) of Chapter 2 of Model Law on Extradition, 2004 deals with fair trial standards. It states:

"Extradition may be refused, if, in the view of the (competent authority of country adopting the law), the person sought (has not received or) would not receive the minimum fair trial guarantees in criminal proceedings in the requesting State".

In practice also many States have subjected the extradition to express condition that extraditee would be accorded a fair trial. For example, when the US extradited Ziad Abu Eain to Israel in 1982, a Palestinian wanted by Israel in connection with a terrorist bombing, the executive secured an undertaking from Israel that he would be tried by a Civil Court, not a Military Court and that he would be accorded all the fair trial rights required by Human Rights Convention.[105]

Similar provision has also been incorporated in Article 6 of the European Convention on Human Rights. In *Dudko v. The Government of the Russian Federation*[106], Russia had requested the extradition of Mr. Dudko on charge of illegal dealings involving his furniture business to UK.

Lord Justice Thomas was presented with an argument that the judicial system in Russia was too corrupt, and would not guarantee the claimant a fair trial if he were to be extradited. The Judge decided the case on a separate technical point, but had sympathy with corruption argument. He stated that 'In the light of my conclusion the appellant be discharged because the offence was not properly specified, it would not be desirable to express a view on whether on facts of this case, the Russian system violates Article 6 or does so in such a way as to amount to a flagrant denial of Justice'.[107]

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104 *United Nations General Assembly Resolution*, 45/116, December 14 , 1990, Art- 3 (f).
105 *Supra* note 47.
106 (2010)EWCH 1125(Admin).
107 *Id.*

C. Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The right to protection against torture, cruel, inhuman or degrading punishment belongs to the category of absolute rights. As a peremptory norm of International Law (*Jus Cogens*), the prohibition of torture is binding on all States. It applies in all circumstances, including during armed conflict and in times of national emergency.[108]

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 requires that Member States would not expel, return or extradite person to States if there are substantial grounds for believing that they would be at a risk of being subjected to torture.[109] The States Parties to this Convention are 153 as given in Table-III.4

TABLE-III.4

List of States Parties to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984

S.No.	Country	Signature	Ratification/Accession and Succession
1.	Afghanistan	4 February, 1985	1April, 1987
2.	Albania	-	11 May, 1994
3.	Algeria	26 November, 1985	12 September, 1989
4.	Andorra	5 August, 2002	22 September, 2006
5.	Antigua and Barbuda	-	19 July, 1993
6.	Argentina	4 February, 1985	24 September, 1986
7.	Armenia	-	13 September, 1993
8.	Australia	10 December,1985	8 August, 1989
9.	Austria	14 March, 1985	29 July, 1987
10.	Azerbaijan	-	16 August, 1996
11.	Bahrain	-	6 March, 1998
12.	Bangladesh	-	5 October, 1998
13.	Belarus	19 December, 1985	13 March, 1987
14.	Belgium	4 February, 1985	25 June, 1999
15.	Belize	-	17 March, 1986
16.	Benin	-	12 March, 1992
17.	Bolivia (Plurinational State of)	4 February, 1985	12April, 1999
18.	Bosnia and Herzegovina	-	1 September, 1993 d

[108] *Supra* note 79 at viii
[109] Article-3.

19.	Botswana	8 September, 2000	8 September, 2000
20.	Brazil	23 September, 1985	28 September, 1989
21.	Bulgaria	10 June, 1986	16 December, 1986
22.	Burkina Faso	-	4 January, 1999
23.	Burundi	-	18 February, 1993
24.	Cambodia	-	15 October, 1992
25.	Cameroon	-	19 December, 1986
26.	Canada	23 August, 1985	24 June, 1987
27.	Cape Verde	-	4 June, 1992
28.	Chad	-	9 June, 1995
29.	Chile	23 September, 1987	30 September, 1988
30.	China	12 December, 1986	4 October, 1988
31.	Colombia	10 April, 1985	8 December, 1987
32.	Congo	-	30 July, 2003
33.	Costa Rica	4 February, 1985	11 November, 1993
34.	Côte d'Ivoire	-	18 December, 1995
35.	Croatia	-	12 October, 1992
36.	Cuba	27 January, 1986	17 May, 1995
37.	Cyprus	9 October, 1985	18 July, 1991
38.	Czech Republic	-	22 February, 1993
39.	Democratic Republic of the Congo	-	18 March, 1996
40.	Denmark	4 February, 1985	27 May, 1987
41.	Djibouti	-	5 November, 2002
42.	Dominican Republic	4 February, 1985	24 January, 2012
43.	Ecuador	4 February, 1985	30 March, 1988
44.	Egypt	-	25 June, 1986
45.	El Salvador	-	17 June, 1996
46.	Equatorial Guinea	-	8 October, 2002
47.	Estonia	-	21 October, 1991
48.	Ethiopia	-	14 March, 1994
49.	Finland	4 February, 1985	30 August, 1989
50.	France	4 February, 1985	18 February, 1986
51.	Gabon	21 January, 1986	8 September, 2000
52.	Georgia		26 October, 1994
53.	Germany	13 October, 1986	1 October, 1990
54.	Ghana	7 September, 2000	7 September, 2000
55.	Greece	4 February, 1985	6 October, 1988
56.	Guatemala		5 January, 1990
57.	Guinea	30 May, 1986	10 October, 1989
58.	Guyana	25 January, 1988	19 May, 1988
59.	Holy See	-	26 June, 2002
60.	Honduras	-	5 December, 1996
61.	Hungary	28 November, 1986	15April, 1987
62.	Iceland	4 February, 1985	23 October, 1996
63.	Indonesia	23 October, 1985	28 October, 1998
64.	Iraq	-	7 July, 2011
65.	Ireland	28 September, 1992	11April, 2002

66.	Israel	22 October, 1986	3 October, 1991
67.	Italy	4 February, 1985	12 January, 1989
68.	Japan	-	29 June, 1999
69.	Jordan	-	13 November, 1991
70.	Kazakhstan	-	26 August, 1998
71.	Kenya	-	21 February, 1997
72.	Kuwait	-	8 March, 1996
73.	Kyrgyzstan	-	5 September, 1997
74.	Lao People's Democratic Republic	21 September, 2010	26 September, 2012
75.	Latvia	-	14April, 1992
76.	Lebanon	-	5 October, 2000
77.	Lesotho	-	12 November, 2001
78.	Liberia	-	22 September, 2004
79.	Libya	-	16 May, 1989
80.	Liechtenstein	27 June, 1985	2 November, 1990
81.	Lithuania	-	1 February, 1996
82.	Luxembourg	22 February, 1985	29 September, 1987
83.	Madagascar	1 October, 2001	13 December, 2005
84.	Malawi	-	11 June, 1996
85.	Maldives	-	20April, 2004
86.	Mali	-	26 February, 1999
87.	Malta	-	13 September, 1990
88.	Mauritania	-	17 November, 2004
89.	Mauritius	-	9 December, 1992
90.	Mexico	18 March, 1985	23 January, 1986
91.	Monaco	-	6 December, 1991
92.	Mongolia	-	24 January, 2002
93.	Montenegro	-	23 October, 2006
94.	Morocco	8 January, 1986	21 June, 1993
95.	Mozambique	-	14 September, 1999
96.	Namibia	-	28 November, 1994
97.	Nauru	12 November, 2001	26 September, 2012
98.	Nepal	-	14 May, 1991
99.	Netherlands	4 February, 1985	21 December, 1988
100.	New Zealand	14 January, 1986	10 December, 1989
101.	Nicaragua	15 April, 1985	5 July, 2005
102.	Niger	-	5 October, 1998
103.	Nigeria	28 July, 1988	28 June, 2001
104.	Norway	4 February, 1985	9 July, 1986
105.	Pakistan	17 April, 2008	23 June, 2010
106.	Panama	22 February, 1985	24 August, 1987
107.	Paraguay	23 October, 1989	12 March, 1990
108.	Peru	29 May, 1985	7 July, 1988
109.	Philippines	-	18 June, 1986
110.	Poland	13 January, 1986	26 July, 1989
111.	Portugal	4 February, 1985	9 February, 1989
112.	Qatar	-	11 January, 2000

113.	Republic of Korea	-	9 January, 1995
114.	Republic of Moldova	-	28 November, 1995
115.	Romania	-	18 December, 1990
116.	Russian Federation	10 December, 1985	3 March, 1987
117.	Rwanda	-	15 December, 2008
118.	San Marino	18 September, 2002	27 November, 2006
119.	Saudi Arabia	-	23 September, 1997
120.	Senegal	4 February, 1985	21 August, 1986
121.	Serbia	-	12 March, 2001
122.	Seychelles	-	5 May, 1992
123.	Sierra Leone	18 March, 1985	25April, 2001
124.	Slovakia	-	28 May, 1993
125.	Slovenia	-	16 July, 1993
126.	Somalia	-	24 January, 1990
127.	South Africa	29 January, 1993	10 December, 1998
128.	Spain	4 February, 1985	21 October, 1987
129.	Sri Lanka	-	3 January, 1994
130.	St. Vincent and the Grenadines	-	1 August, 2001
131.	Swaziland	-	26 March, 2004
132.	Sweden	4 February, 1985	8 January, 1986
133.	Switzerland	4 February, 1985	2 December, 1986
134.	Syrian Arab Republic	-	19 August, 2004
135.	Tajikistan	-	11 January, 1995
136.	Thailand	-	2 October, 2007
137.	Macedonia	-	12 December, 1994
138.	Timor-Leste	-	16April, 2003
139.	Togo	25 March, 1987	18 November, 1987
140.	Tunisia	26 August, 1987	23 September, 1988
141.	Turkey	25 January, 1988	2 August, 1988
142.	Turkmenistan	-	25 June, 1999
143.	Uganda	-	3 November, 1986
144.	Ukraine	27 February, 1986	24 February, 1987
145.	United Arab Emirates	-	19 July, 2012
146.	United Kingdom of Great Britain and Northern Ireland	15 March, 1985	8 December, 1988
147.	United States of America	18 April, 1988	21 October, 1994
148.	Uruguay	4 February, 1985	24 October, 1986
149.	Uzbekistan	-	28 September, 1995
150.	Vanuatu	-	12 July, 2011
151.	Venezuela (Bolivarian Republic of)	15 February, 1985	29 July, 1991
152.	Yemen	-	5 November, 1991
153.	Zambia	-	7 October, 1998

Source: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en (visited on July 24, 2013)

The UN Model Treaty on Extradition, 1990 also provides mandatory exception to extradition "If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment[110]. Section 6 of Chapter 2, Model Law on Extradition 2004 deals with torture, cruel, inhuman or degrading treatment or punishment. It states:

"Extradition shall not be granted, if, in the view of the (competent authority of country adopting the law), the person sought (has been or) would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment.

The Council of Europe has also emphasized that Member States should under no circumstances extradite person who is at the risk of being subjected to ill treatment in violation of Article 3 of the European Convention on Human Rights or being subjected to a trial which does not respect the fundamental principles of fair trial, or in a period of conflict, to standards which fall below those enshrined in the Geneva Convention.[111] Consequently, no requested State should have difficulty in justifying a refusal to extradite a person to a State in which he is likely to be subjected to torture and cruel, inhuman or degrading treatment or punishment.

D. Discrimination

The European Convention on Extradition of 1957 states that a person shall not be extradited if the requested State has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or

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[110] Article -3(f).

[111] The Right to Fair Trial is provided for in all four *Geneva Conventions* and in *Additional Protocols I and II*. *First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1864, Article 49; *Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1906, Article 50; *Third Geneva Convention Relative to the Treatment of Prisoners of War*, 1929, Article 102-108; *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1949, Article 5 and 66-75; and *Protocol I (1977) Relating to the Protection of Victims of International Armed Conflicts*, Article 75(4); *Protocol II (1977) relating to the Protection of Victims of Non- International Armed Conflicts*, Article 6(2).

that person's position may be prejudiced for any of these reasons.[112] The UN Model Treaty on Extradition, 1990 also contains a similar provision which adds ethnic origin, sex and status to the list of prohibited categories of discrimination.[113] The Model Law on Extradition, 2004 deals under Section 5 deals with the discrimination clause. It states:

"Extradition shall not be granted, if, in the view of the competent authority of country adopting the law, there are substantial grounds to believe that the request for extradition has been made for the purpose of prosecuting or punishing the person sought on account of his

Option 1: race, religion, nationality, ethnic origin, political opinions, sex (gender) or status

Option 2: race, religion, nationality, membership of a particular social group or political opinion , or his position may be prejudiced for any of those reasons".

Thus, States may refuse extradition where there is likelihood of open discrimination against extraditee on the above stated grounds.

Thus from above analysis it may be concluded that all human rights violations does not qualify as potential obstacles to extradition. There is no certainty about the content and scope of the rights that are most likely to block extradition. There are some human rights violations that may be absolute obstacles to extradition (such as torture), or that may in appropriate circumstances thwart extradition (such as denial of Fair trial). However an inevitable conclusion that can be drawn from extradition practice is that, despite the link between human right and extradition, no general human rights exception exists.[114] The reliance on Human Rights Convention is due to ever increasing restrictions on the Political offence exception especially after the US efforts to wage war against Terrorism. Other traditional safeguards are also being interpreted narrowly by States. Thus, in this situation

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112 Article -3(2).
113 Article -3 (a)-(g).
114 *Supra* note 77.

Soering and other cases have proved that it may be more beneficial for fugitive to rely on Human Rights provision than on traditional defense and exceptions arising from the treaty contracts or the domestic law of the requested State. In the cases where there is a conflict between obligation of the State to extradite and obligation to protect fundamental human rights, generally the preference is given to the latter. The judicial systems of various countries have given importance to human rights over extradition treaties. But if we deeply analyze the facts then it may be concluded that it is not requested State's obligation to respect human rights which prove a hindrance for effective cooperation in criminal matter rather it is the requesting States failure to protect human rights is the stumbling block in the international cooperation. The protection of human rights should not be seen as an impediment in the way of international cooperation but rather as an essential requirement to an effective international strategy to deal with fugitives.

Principle of Double Criminality

The principle of double criminality is traditionally bound with institutions of international criminal law. Double criminality is a requirement not only with extradition but also with the transfer of criminal proceedings and with execution of foreign sentences. International criminal law employs a range of "double conditions", the common denominator of which is the requirement that two legal systems share a certain set of values or legal prescriptions. In addition to double criminality, International Law uses such terms as "double punishability", the "double possibility of criminal proceedings" and the "double possibility of the execution of penal judgment". Among these concepts, double criminality is most important and universal condition applied in the basic institutions of international criminal law. For the purpose of extradition, the principle of double criminality means that an extraditable offence must be an offence that is punishable under the laws of both the requesting and the requested State by depravation of liberty or under

detention order for a maximum period of at least one year or by some severe penalty. No person shall be extradited unless this condition is satisfied.[115] It is well recognized that the right of an individual to his personal liberty, in so far as he does not transgress substantive law of the realm or infringe the legal right of others, is incontrovertible and the person so deprived of his liberty has access to the courts to protect him from any violation of that right[116]. Thus, a State cannot detain or apprehend the person who is being sought for extradition unless the evidence submitted by the requesting State justifies *prima facie* judicial proceedings and the execution of foreign penal judgment.[117]

Meaning of Double Criminality

Double criminality is a crime punished in both the countries. That is a country where a suspect is being held and a country asking for the suspect to be handed over or transferred, to stand trial. It is also known as dual criminality.[118]

For the purpose of extradition, the principle of double criminality means that an extraditable offence must be an offence that is punishable under the laws of both the requesting and the requested against the accused. Moreover, decisions pronounced by the foreign courts have no binding force on the national courts of the country to which the requisition is made. Hence, criminality of the act or acts charged must be proved or determined in accordance with the national laws of the place where the fugitive or the person so charged is apprehended or detained.[119] The reason being that the executive has no prerogative to deprive an individual of his liberty indiscriminately in the absence of a positive law without due process of law. Obviously, therefore no State is under legal

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115 Lt Zhenhua, "New Dimension of Extradition Regime in the Fight Against Terrorism", 42 *IJIL*166 (2002).

116 Leslie Wolf Phillips (ed.), *Constitutions of Modern States*184 (Pall Mall Press, London, 1968).

117 Lech Gardocki, "Double Criminality in Extradition Law" 27 *Israel Law Review* (*Isr. L Rev.)* 288 (1993).

118 *Available at*: http://definitions.uslegal.com/d/double-criminality/ (visited on October 26, 2011).

119 For instance, *Extradition Laws of Argentina*,1885 (Article-2); *Australia Extradition (Foreign States)Act*,1966(Article -14); *Canada Extradition Act*,1952 (Article -10); *Finland Extradition Law*, 1932 (Article – 3); *France Extradition Law*,1927(Article -4); *German Extradition Law*, 1929(Article-2); *Indian Extradition Act*, 1962(Article - 7).

obligation to deliver up a fugitive offender to foreign State on its demand if the person so demanded is charged with an offence which is a crime under the law of the demanding State only but not punishable under legal system of the State of refuge.

Approaches to Determine Double Criminality

Before the early twentieth century, the number of extraditable offences was not as many as it is now. Therefore, in order to ensure that an offence is recognized by both the Parties, the traditional method is that, a list of extraditable offences is provided by a clause in the extradition treaty or attached to such treaty. The same is done in the municipal laws of extradition in some States. Suppose that an offence is not included in treaty list, the extradition request shall most probably be turned down. With the increase in the number of extraditable offences, the enumerative method proves to be inconvenient and inadequate in the handling of the matter. Therefore modern treaties on extradition have begun to adopt the eliminative method, which just defines extraditable offences by reference to the maximum and minimum penalty as a criterion which may be imposed by both Parties, without laying down the specific offences. Thus any offence which satisfies this condition shall be regarded as extraditable.[120]

Bassouni has categorized extraditable offences in two categories:-

1) As requiring the offence charged to be identical to an offence in the treaty list or
2) The offence charged is not identical to the treaty listed offence, but the acts performed which support that charge could sustain a charge under the laws of the requested State which charge corresponds to the treaty listed offence.

The second one of these interpretative approaches focuses on the question of whether the acts performed in the requesting State and constituting an offence under its laws could also constitute on offence under the laws of the requested State and made

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[120] *Supra* note 115.

extraditable under the treaty regardless of the actual offence charged by the requesting State. In effect, this approach produces the same result reached whenever the subjective interpretation of the requirement of double criminality is applied. Under this approach for interpreting the extraditable offences the requested State examines the category and the type of offence charged to determine its counterpart under its own laws[121]. Generally the common crimes variety are likely to constitute an offence in all legal systems, thus if the identical charge is not crime in both the requesting and requested State, there is a great likelihood that same category or type of offence exists in the requested State. Thus, this type of wide interpretation of extraditable offences corresponds to a subjective interpretation of double criminality.

As extradition is primarily considered as an instrument of inter State co-operation for the elimination or suppression of crimes. Therefore States applying the principle of double criminality do not interpret it very narrowly. On the other hand, they surrender the fugitive criminals even if the offence charged is not called by the same name or designation or carry the same penalty under their own laws. This liberal and unrestricted interpretation of the principle of double criminality is restored to establish extraditability of a crime. It demonstrates the desire of the States for an adjustment between the classical legal conceptions on one hand and the circumstances and environments of a specific case on the other, to give effect to the intentions of the Parties. Because the main object of the concept of extradition is to bring the alleged offenders to trial in order to answer the allegations preferred against them and to punish violators of the law in order to promote administration of justice.[122]

Thus on analyzing it may be concluded that there are two methods of interpreting the requirement of double criminality, namely*: inconcreto* (Objective) and *inabstracto*

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[121] *Supra* note 32 at 327.
[122] *Supra* note 3 at 133.

(Subjective). The first approach relies on the label of the offence and a strict interpretation of its legal elements. The second approach relies on the criminality of the activity regardless of its specific label and full concordance of its elements in the respective laws of the two States.[123]Relying on the first principle there is a famous old *Blackmer v. United States case.*[124] The French Court refused extradition of Blackmer in 1928 to the United States on the ground that the offence with which he was charged did not constitute a prosecutable offence *inconcreto* under French Law. The French Court found that the statute of limitation for similar offences lapsed under French Law, extinguished the prosecutability of the offender, and, therefore, the act charged could not constitute an offence under French Law. Again *In re Plevani case*[125] of the Court of Cassation in France rejected the request of Italy for the surrender of one Plevani, a convict who was sentenced in 1946 for two terms of imprisonment in Italy but escaped from prison while serving sentence and took up residence in France. The refusal was on the basis of Article 5 of the Extradition Law, 1927, which categorically prohibits the extradition of person whose sentence had become time barred under French Law. Again in 1959 when Spain demanded the surrender on one Rull Fernandes, a Spanish national on the charge of fraudulent bankruptcy and absconding with assets from the government of Venezuela, it was contented that extradition should be denied since the offences charged were not known to Venezuela Law, and therefore the extradition request violated the principle of double criminality. The Federal Court of Venezuela held that the extradition of the accused must be denied. It further observed that even in the absence of an extradition treaty, States strictly adhere to the rule that extradition should only be granted for such acts which are designed as crimes by the laws of both countries.[126]

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123 *Supra* note 32 at 322.
124 284 US 421(1928).
125 (1955) 22 ILR 514.
126 *Re Rull* (1959) 30 ILR 385.

This rule of " double criminality", although seems to be simple to express, many a times gives rise to difficult problems, first because of variations in law and institutions in the two countries, and second, because the act charged does not amount to corresponding crime. The point is by no means an academic one even in these days of growing uniformity of standards; in Western Europe alone sharp variation are found among the criminal laws relating to such matters as abortions, adultery, euthanasia, homosexual behavior and suicide.[127] The difficulty exists not because of variation in the laws and institutions generally, but mostly because the same act does not necessarily carry same judicial name or amount of culpability, if any, in two different States. For example in an old case *Ex parte Windsor*[128] an English Court discharged the prisoner who was wanted for committing forgery by the United States because the acts alleged by the requesting State did not constitute the crime of forgery under English Law. Therefore, from the above stated instance it could be adduced that *inconcreto* i.e. objective interpretation of the requirement of double criminality in asylum State can decline the surrender of a fugitive offender if he is charged with an act or omission which does not constitute a crime under its own law.

Now a days, there is an increasing trend to adopt the *inabstracto* i.e subjective, interpretation. In practice, three tests for correspondence between the requesting and requested State could be applied: correspondence of names, correspondence of the elements of the offence and less strictly a corresponding criminalization of fugitive's acts or omissions. No State requires that the names of the offence in both States be identical. The traditional test is whether the elements of the offence charged on the warrant correspond to an offence contrary to the criminal laws of the requested State, although the test may be applied with differing degrees of strictness[129].

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127 *Supra* note 9 at 138.
128 (1865) 6B &S 522, 122 E.R. 1288.
129 *Supra* note 10 at 106.

In the British case of Re *Arton*[130] where France had asked the Government of England to extradite Emile Arton on the allegations that the accused had committed in France a number of crimes including faux (falsification of accounts and using falsified accounts) against the law of and in the territory of France which were extradition crimes under the terms of the treaty as well. It was argued on behalf of the accused that while forgery (faux) is a crime under Article 147 of Code Penal, falsification of accounts is neither a crime with in that Article nor within the 18th head of Article 3 of the Extradition Treaty. However rejecting the application for *habeas corpus* Lord Russel of Kellowen said that:

"The English and French texts of treaty are not translation of one another. They are different versions, but versions, which on the whole, are in substantial agreement. We are here dealing with a crime alleged to have been committed against the law of France; and if we find, as hold that we do, that such a crime is a crime against the law of both countries and is, in substance, to be found in each version of the treaty, although under different heads, we are bound to give effect to the claims of extradition."

Thus by applying the liberal interpretation of crimes, a person can be extradited, if his conduct is criminal in the jurisprudence of both States even though they may not be defined identically.

Confronting with similar difficulties, the United States of America has also accepted the liberal interpretation of double criminality requirement, the Judicial precedent for this opinion could be found first in *Kelly Griffin case*[131] as early as in 1916, then in *Collins v. Loised*[132] in 1922 and the same principle was reaffirmed in a Landmark judgment in *Factor v. Laubenheimer* in 1933.[133]

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130 (1896) 1QB509.
131 241 US6.
132 259 US 309.
133 290 US276.

The proceedings were taken by the British authorities for the extradition of Jacob Factor on a charge of receiving in London, money which he knew to have been fraudulently obtained. At the time extradition was applied for, Factor was residing in the State of Illinois, by the laws of which the offence charged was not an offence in Illinois.

It was held by the Supreme Court that this did not prevent extradition if, according to the criminal law generally for the United States, the offence was punishable; otherwise extradition might fail merely because the fugitive offender would succeed in finding in the country of refuge, some province in which the offence charged was not punishable. Substantial similarity of alleged extradition crime to the crime punishable according to the legal systems of the State of refuge is sufficient to bring into effect the double criminality rule so as to justify the grant of extradition.

Latest Trend

Thus to solve the problems that arise because of the differences in Legal systems and interpretations of dual criminality, the United Nations Model Treaty on Extradition in Article 2 Paragraph 2 proposes States to look at totality of the conduct and to decide whether any combination of those acts and / or omissions would constitute an offence in force in the requested State[134]. The same provision has been upheld under Section 3 of Model Law on Extradition,2004. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States. Nevertheless, when it comes to mutual legal assistance, the trend and practice of many States is to relax this requirement. Some States are rendering mutual legal assistance even without the requirement of dual criminality[135]. The Draft United Nations Convention against

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[134] *Resource Material Series* No. 57, 114th International Training Course Reports of Seminar,Topic 1, "Specific Problems and Solutions that Arise in Cases Involving International Mutual Legal Assistance or Extradition", *available at* : http:/unafei.org.jp/enuh/pdf/pdf_rms/(visited on December 4, 2011).

[135] Group 2. Mutual Assistance in Criminal Matters, Annual Report for 1996 and Resource Material Series No. 51, 599 (1997) as quoted in *Resource Material Series* No. 57, 114th International Training Course Reports of Seminar, *available at* : http:/unafei.org.jp/enuh/pdf/pdf_rms/(visited on December 4, 2011).

Transnational Organized Crime indicates that the delegations proposed that the dual criminality requirement be abolished for mutual legal assistance except for the application of coercive measures.[136] Thus because of the difficulties in the interpretation of dual criminality clause and the disparity in the views certain recommendations have been given during the 114th International Training Course Reports of Seminar[137].

1. In order to enhance International co-operation, in case of extradition, it is recommended to interpret the principle of dual criminality in a flexible manner. In other words, the relevant authority in the requested State should be required to look at the totality of the conduct, focusing on criminality of the conduct whatever its label. The requirement should be satisfied even if the offence is categorized differently in the two States or if some components of the conduct forming the extradition offence or mutual legal assistance are not entirely same.
2. Countries should consider granting legal assistance without requiring that the alleged conduct constitute an offence in the requested country, unless the assistance requested involves the application of coercive measures, for instance search and seizure.
3. To solve practical problems created by the dual criminality requirement the harmonization of domestic law is recommended. This could be achieved through elaborating and ratifying an international instrument. An example can be found in the Draft United Nations Convention against Transnational Organized Crime whose Article 4 criminalizes Laundering offences. By

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136 *Revised Draft United Nations Convention against Transnational Organized Crime* ,1999 *United Nations General Assembly Resolution* A/AC.254/18 , Vienna, October 4-15, 1999, Article 14.

137 *Resource Material Series* No. 57, 114th International Training Course Reports of Seminar,Topic 1, "Specific Problems and Solutions that Arise in Cases Involving International Mutual Legal Assistance or Extradition", *available at* : http:/unafei.org.jp/enuh/pdf/pdf_rms/(visited on December 4, 2011).

ratifying this Convention, State parties will adopt an identical definition of this offence and its constituent elements.

Thus it is clear that the principle of double (or dual) criminality is a deeply ingrained principle of extradition law. The principle requires that an alleged crime for which extradition is sought be punishable in both the requested and requesting States. A traditional method of giving effect to the principle has been the adoption in extradition treaties of lists of extraditable offences, such as murder, theft, etc. This approach, which emphasized terminology, is susceptible to a rigid and technical formality, and presented obvious difficulties for emerging categories of more complex crime. The modern approach is a general requirement that the conduct in question be punishable under the laws of both States Parties and the problem is by and large solved by the United Nations Model Treaty on Extradition, 1990 and Model Law,2004 by proposing the States to look at totality of the conduct and to decide whether any combination of those acts and / or omissions would constitute an offence in force in the requested State. The above discussion also clearly indicate that the meaning of extraditable offences is that which is listed or designated in the treaty, subject to different applications , and in the absence of a treaty , those offences which will be the basis of reciprocal recognition. All the above discussed cases also indicate that the requirement of double criminality applies whether by treaty or not and is subject to one of the two methods of interpretation described earlier, i.e., *in concerto* or *in abstracto*. The weight of authority, however, reveals that subjective method, i*n absracto* , prevails.

Doctrine of Speciality

According to this principle of speciality, the person whose extradition has been requested may only be prosecuted, tried or detained for those offences which provided grounds for extradition or those committed subsequent to extradition. If an individual has been extradited in application of a judgment, only the penalty imposed by the decision for which extradition was granted may be enforced. Thus, the principle of speciality means that an individual may only be tried for the offences cited in the extradition request, on the basis of the definition of the offences applicable at that time. If the requesting State discovers, subsequent to extradition, that offences had been committed prior to that date and which should give rise to prosecution, it may ask the requested State for authorization to prosecute the extradited person for the new offences (this constitutes a request for extension of extradition)[138].

Rationale behind the Rule of Speciality

According to Bassiouni[139] the rationale for the doctrine rests on the following factors:

1. The requested State could have refused extradition, if it knew that the relator would be prosecuted or punished for an offence other than the one for which it granted extradition.
2. The requesting State did not have *in personam* jurisdiction over the relator, if not for the requested State's surrender of that person.
3. The requesting State could not have prosecuted the offender, other than *in absentia*, nor could it punish him or her without securing that person's surrender from the requested State.

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138 N.P. Rajeevakshan, "Extradition – Principles and Procedures", 7 *CBI Bulletin* 38 (1999).
139 *Supra* note 32 at 353.

4. The requesting State would be abusing a formal process to secure the surrender of the person it seeks by the relying on the requested State who will use its processes to effectuate the surrender.

5. The requested State would be using its processes in reliance upon the representations made by the requesting State.

Therefore, by the reasons of these factors as stated above by M.Chief Bassiouni[140], the requesting State is bound either to prosecute or punish (or both) the surrendered person in accordance with the reasons for which the processes of the requested State were set in motion. Otherwise, the requested State's processes could have been set in motion under false pretenses.

Another reason that can be adduced here for the rule of speciality is that in consequence of its internal independence and territorial supremacy a State is fully entitled to place certain conditions on the requesting State, before it determines to comply with the request to surrender a fugitive found within its territory. It can ask the requesting State not to prosecute or punish such person for any act committed prior to his surrender other than that which motivated his extradition.[141] Many national statutes make provisions for the extradition of person claimed subject to a guarantee or pledge by way of treaty or municipal law that the person surrendered will neither be prosecuted nor punished for any act or offence other than those which formed the basis for his surrender.

The doctrine is, therefore, a concomitant of a requested State's right to determine the extraditability of the person sought for the offence specified. Implicitly, it protects the relator from unexpected prosecution, even though it is principally advanced as a means of

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140 *Supra* note 32 at 353-354.
141 *Supra* note 3 at 271.

protecting the requesting State from abuse of its processes.[142] Thus, the rule of speciality is an established principle of International Law relating to extradition.

Legal Provisions on Speciality Principles

The rule is incorporated generally in the extradition law of a State and in the extradition treaties. It was invoked as early as 1870 in Section 19 of the British Extradition Act with the aim of preventing a person from being tried in the United Kingdom after his surrender for a crime other than for which he was extradited. Identical provisions have been included in Section 18 and 19 of the present Extradition Act of 1989. Indian Extradition Act, 1962 incorporated this principle under Section 21. Article 14 of the Extradition Treaty between India and the U.K., 1993 and Article 17 of the Extradition Treaty between India and the USA,1999 and Article 17 of Extradition Treaty of India and the U.A.E. of 1999 provides for the rule of speciality .

The rule has also been incorporated in various international instruments.

The Model Treaty on Extradition, 1990, states the rule of speciality in Article 14(1):

A person extradited under the present treaty shall not be proceeded against, sentenced, detained, re extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than:

a) An offence for which extradition was granted;

b) Any other offence in respect of which the requested State consents. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present treaty.

The Model Law on Extradition, 2004 includes this principle in Section 34 of

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[142] *Kuhn v. Staatsanwalt schaft des Katons*, Switzerland Federal Tribunal, 34 ILR 132 (1961).

Part 3, the Section states that:

1. A person who has been extradited from a foreign State to (country adopting the law) shall not be proceeded against, sentenced, detained, subjected to any other restriction of personal liberty in the territory of (country adopting the law]or re-extradited to a third State for any offence committed prior to his surrender other than for which he was extradited unless:

a) the (competent authority of the foreign State)has expressly given its consent; or

b) the extradited person, having had an opportunity to voluntarily leave the territory of (country adopting the law), has not done so within (30/45) days of his final discharge in respect of the offence for which he was extradited or if he has voluntarily returned to that territory after leaving it; or

c) extradition was accomplished in accordance with section 27[143] of the present law and the extradited person has expressly renounced his entitlement to the rule of speciality.

Article 101 of the Rome Statute of the International Criminal Court adopted in 1998 states the principle in similar terms:

1. A person surrendered to the Court under the Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with Article 91 (relating

[143] Section 27 deals with Simplified Extradition Procedure.

to contents of request for arrest and surrender). State Parties shall have the authority to provide a waiver to the Court and should endeavor to do so.

Article 14 (1) of the European Convention on Extradition 1957 also make similar provisions:

"A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom."

Judicial Approach

Basically relying on the principle of identity of extradition and prosecution, majority of court decisions accept the principle of speciality and even some of them regard it as universally recognized principle of International Law. Few cases are being discussed here where the courts have accepted it as a general principle of extradition.

An important case on this rule is that of *United States v. Rausher*[144], wherein the accused was extradited on the charge of murder, but he was tried and convicted in the U.S.A., on a minor charge of causing cruel and unusual punishment on a member of crew. He made appeal before Supreme Court of the United States which quashed the conviction and ordered the release of prisoner on the ground that unless otherwise provided for by a treaty, the prisoner could only be charged with the offence for which he was extradited unless he was given a reasonable time to return to the country which surrendered him.

The principle has also been invoked in *Tarasov's case*[145] wherein a Russian Sailor was involved, while the Russian requisition was made to try him for the alleged theft committed on the high seas, the communication from the investigator, Prosecuting Magistracy Odessa, charged the accused with four offences, including "plunder" of State

[144] (1886) 119 US 407.
[145] In *re V.S. Tarasov* (1963), 57 *AJIL*855 (1963).

money, desertion of a Soviet-ship and escaping trial. An application was moved on behalf of the accused that the Soviet Union be asked about the subsisting laws in that country for the purpose of showing that the accused would not be tried for any act other than that for which his extradition was granted. The Soviet Embassy did not produced any law and the Delhi Court refused the extradition for non-fulfillment of this condition even though *prima facie* case against the fugitive was established.

The case of *Daya Singh Lahoria v. Union of India*[146] is similar to that of *Rauscher's case* wherein the petitioner Daya Singh who was extradited from the United States in a writ petition stated before the Supreme Court of India that the criminal courts in the country have no jurisdiction to try in respect of offences which do not form a part of the extradition judgment by which he has been brought in this country and he can be tried only for the offences mentioned in the extradition decree. It was the contention of the petitioner that he cannot be tried for the offences other than those mentioned in the extradition order as that would be a contravention of Section 21 of the Extradition Act, 1962, as well as the contravention of the provisions of International Law. Justice Pattanaik held that fugitive brought in this country under an extradition decree can be tried only for the offences mentioned in the extradition decree and for no other offences and the criminal court in this country will have no jurisdiction to try such fugitive for any other offences.

Waiver of the Rule

Alternative provision is also inserted in certain treaties which authorizes the requesting State to prosecute and punish the person surrendered for an offence other than that for which he was extradited, if he gives his free and voluntary consent there to or he himself states that he is willing to stand trial for such other offence[147]. A few treaties do not make the consent of the surrendering State necessary when the person involved agrees to

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146 (2001) 4 SCC 516.

147 Satyadev Bedi, *Extradition : A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries* 204 (William S. Hein and Company; Inc. Buffalo, New York, 2002).

be tried for an offence other than that for which he was extradited[148], although, in some cases, a notice containing the statement of the extradited person is required to be transmitted to the surrendering State.[149]

Thus the principle does not have an absolute operation as exemplified by the speciality provisions in the 1990 Model Treaty on Extradition, Model Law on Extradition, 2004 and the Rome Statute as discussed earlier. The prosecution or punishment of the crime other than those for which extradition was granted is enabled if the requested State gives its consent. It, however, limits that obligation of consent to offences which are subject to extradition under the treaty, thus effectively imparting some requirements and safeguards on extradition (including double criminality, the political offence exception, the discrimination exception and double jeopardy).[150]

All treaties do not contain an appropriate limitation of the circumstances in which consent can be granted. The Australia – Mexico Extradition Treaty 1991, which includes the rules of speciality, contains an exception where consent can be granted by the requested State's Attorney General.[151]

No doubt such requirements are important factors which a decision maker charged with a request for waiver of speciality must take into account to safeguard the interests of the extradited person, but without such express limitations there is real possibility for abuse of power. Thus the absence of clear guidelines on the making of requests for waiver of speciality gives considerable scope for circumvention of various safeguards on extradition.

While there are no express treaty provisions which require that the rule of speciality should not be waived where the requesting State knew the basis of the relevant

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148 For instance, Belgium – Mexico ,1938, Article 9; Columbia – Nicaragua,1929, Article 11;Columbia – Panama ,1927, Article 9 .

149 Examples include: Iraq- Turkey ,1946, Article 13(3); Poland – Germany, 2003, Article 76; Poland – Hungary, 1959 Article 78 (2).

150 Griffith, Gavan; Harris, Claire, "Recent Developments in the Law of Extradition", 6(1)*Melbourne Journal of International Law* 37(2005) *available at* : http://www.austii.edu.au/au/journals/MelbJIl/2005/2.html (visited on December7, 2011)

151 Article 15, 18.

offences at the time of the initial extradition request, there is a good basis for the view that such a limitation must be implicit to avoid the circumvention of the extradition requirements. The suggestion that the requesting State's knowledge of the particulars at the time of the initial request may prove a bar should be supported.[152]

Apart from the dilution to the rule of speciality through the consent provisions in bilateral and multilateral Conventions, there are examples where there is an apparent disregard of the rule in practice. The U K commentators have observed that the speciality rule has been breached on several occasions by certain States of the U.S, by simply trying the extradited offenders for offences outside the scope of the extradition request[153].

On the other hand, there are various bipartite treaties, national statutes and certain draft – Conventions For example Australia – Austria Article 10; Australia – Sweden Article 12; India – Nepal Article 8; Israel – Canada Article -17; Kuwait- Saudi Arabia Article 7; Mexico – Panama Article 6; Spain- Italy Article 31 etc[154] which expressly exclude the consent of the surrendered person as an exception to the rule of speciality because when a person being detained by State with view to his extradition, as discussed earlier its very difficult to be sure whether he had really acted freely and voluntarily in consenting to be tried for a different crime from that, for which his extradition has been requested.

Thus if the courts of the requesting States even at a provincial level, do not comply with the requirements of speciality in confining the offenders prosecuted on return, foreign States should decline to cooperate on extradition matters with that State in future.

Extension of the Doctrine: Limitations on Re- Extradition and Death Penalty

One extension of the doctrine applies to re-extradition to a third State. In this case whenever the State which originally sought the surrender of the individual after securing

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[152] Geoff Gilbert, *Aspect of Extradition Law* 106 (M.Nijhoff Publisher, The Netherlands, 1991).
[153] Linda Woolley, "Extradition**:** Abuse by US Authorities" 145 *Solicitor's Journal (UK)* 140 (2001).
[154] *Supra* note 3 at 329.

that person, then considers extraditing him or her to a third State which asked that State for same person. In this case the re-extraditing State must first secure the consent of the original surrendering State before granting the second extradition request to the third State.[155]

This extension of doctrine manifests the continued interest of the original surrendering State in the compliance with the purposes and grounds for which its process had been set in motion and for which it granted extradition[156]. Article 15 of the European Convention on Extradition 1957 also makes the similar provision, which reads:

"Except as provided for in Article 14, the requesting Party shall not, without the consent of the requested Party, surrender to another Party or to a third State a person surrendered to the requesting Party and sought by the said other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in Article 12".

The other extension of the doctrine applies in the case of death penalty. Because of the abolition of the death penalty by many States, the provisions are commonly found in the treaty arrangements of these States that if the offence for which the surrender of a fugitive is deemed carries a death penalty under the laws of the requesting States , and such punishment is not provided for under the legal system of the State of refuge or normally is not carried out , then the requested State can make the surrender of the alleged offender subject to the undertaking by the requesting State that, in case of conviction , death penalty will not be inflicted upon the person extradited or it will be commuted to a prison sentence or fine or both.[157]

There are various statutes which provide that if the penalty prescribed by the law of the requesting State to which accused is liable is death or corporal punishment, extradition

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155 *Supra* note 32 at 359.
156 *United States ex rel. Donnelly v. Mulligan,* 74 F.2d 220 (C.A.2, 1934).
157 *Supra* note 147 at 205.

shall be granted only on condition that penalty will be commuted to a prison sentence. The surrendering State who wishes to impose such a condition must explicitly indicate it when granting the request of the requesting State[158]. If it fails to do so, the requesting State may consider it a mere recommendation for leniency. It is not yet well established if such a condition is binding on the requesting State as it may be considered an infringement of its sovereignty .However, if the agent or the requesting State accepts the condition it would become part of the doctrine of speciality. Similarly, if a State receives a person on the basis of its request, it cannot re-extradite that person to a third State that could impose upon the relator the death penalty without either securing the first requested State's permission or in the event that first requested State would impose a condition of non-applicability of a death penalty to make its re-extradition conditioned upon non-applicability of that penalty.[159]

Thus in the end it can be concluded that the State which is surrendering the fugitive, by applying the Doctrine of speciality extends its Long - arm residual jurisdiction over the offender who has been subject to its exclusive jurisdiction which it has exercised for a special purpose and is definitely entitled to see that it is not abused or misused.

Nationality and Extradition

Right to Nationality

The right to nationality has traditionally underscored the realisation of many other rights in the International Law, as generally a person relies on their State of nationality to acknowledge and uphold their rights vis-à-vis other States in any dispute[160]. The fundamental importance of the right to nationality has been described by Supreme Court of United States in *Perez v. Brownell*[161], Chief Justice Warren states;

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158 In *re Cortes*, Argentina, Supreme Court, 1933 (1933-1934) AD356(No.152).

159 *Supra* note 32 at 360.

160 Natalie Klein and Lise Barry, "A Human Rights Perspective on Diplomatic Protection: David Hicks and his Dual Nationality"13(1*) Australian Journal of Human Rights* 4 *available at*: http://www.austlii.org/au/journals/AJHR/2007/1.pdf (visited on December 20, 2011).

161 366 US 44(1958).

"Citizenship is man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a Stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation and no nation may assert right on his behalf. His very existence is at sufferance of the state within whose borders it happens to be."

The right of nationality is enshrined in Article 15 of the Universal Declaration on Human Rights, 1948 which states that:

"No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

Subsequent Human Rights Conventions, such as the International Convention on Elimination of All Forms of Racial Discrimination (1965) and the International Covenant on Civil and Political Rights (1966), confirmed the importance of the right to nationality. Similar provisions are found in regional human rights instruments, such as Article 20 of the American Convention on Human Rights (1969) which provides:

"Every person has the right to a nationality. Every person has a right to the nationality of the State in whose territory he was born if he does not have a right to any other nationality. No one shall be arbitrarily deprived of his nationality or of the right to change it".

Nationality was defined by the International American Court of Human Rights in *Castillo Petruzzi v. Peru*[162] as 'the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that State'.

The Nationality plays a very important role in extradition proceedings. The controversy over the surrender of national is a question of immense significance here.

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[162] (1999) IACHR 6.

Extradition of own Nationals

In many cases a person after committing a crime in a foreign country flees back to his own country. Whether a State would extradite such person i.e. its own nationals, to a State where crime has been committed is a controversial point and practice of States, considerably differs on it. The controversy over the surrender of a national is as old as the notion of extradition itself and thus it is a question of immense significance. There is little exaggeration in asserting that the problems surrounding the non-extradition of nationals are as old as extradition itself. Its origin can be traced back to ancient times. Whether consistently or not, the practice of refusing the surrender of one's nationals has been maintained by many countries for centuries. Notwithstanding all of the convincing arguments against it, as well as the proposals to modify State policies with respect to this form of international co-operation in criminal matters, there is nothing to indicate that it will soon be abandoned. Most States seem to be unmoved by the compelling arguments proposed by International Criminal Law scholars in favour of relaxing the strict prohibition of the extradition of nationality by either allowing a "conditional surrender" or even a total departure from practice.[163]

Unlike political offence exception or exclusion of military and fiscal offences, the exemption of nationals has to do with the person rather than with the offence.[164] One of the most common Articles of international extradition treaties is that which relieves a State from a duty to extradite a criminal who is one of its nationals. The provision takes two forms. In one it is provided that nationals of the requested Party may not be surrendered. In other it is provided that the Contracting Parties 'shall be under no obligation to surrender their nationals'. The former (which is more common) thus presents an absolute bar to the extradition of a State's own nationals, while the latter is usually regarded as allowing

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[163] Michael Plachta "(Non) Extradition of Nationals : A Never ending story?" *13 Emory International Law Review* (*EILR*) 77 (1999).

[164] *Supra* note 32 at 435.

discretion to the requested State to grant or refuse a request for the extradition of one of its own nationals. [165]Thus the exemption of nationals takes two forms: absolute and qualified and it is found in the constitution of a given country, in extradition treaties, or in its municipal laws. Viewed in this light States can easily be divided in two groups: those States which exempt their nationals from extradition relying on *Greco-Roman* heritage which has become an integral part of their law and States which apply the Common Law System and accept the principle of the surrender of all persons including their own nationals except where otherwise provided for in their own national laws or treaty provisions.[166]

Absolute Exemption of Nationals

Many States are traditionally strongly opposed to extraditing their own nationals. This attitude and practice are commonly based on or confirmed in national legislation (often of a constitutional rank) granting nationals the right to remain in the territory of the State not to be extradited or expelled.[167]

The history of the practice of non-extradition of nationals can be traced back to the ancient times. The studies revealed that Greek City States did not use to surrender their own citizen and the same practice was observed by the Italian cities. Similarly Roman Citizens were not normally surrendered to foreign States. In those times extradition was more a matter of grace than of an obligation and was only exceptionally formalized in a treaty. Moreover, conditions in the ancient world were such that to remove a subject from

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165 *Supra* note 9 at 94.

166 *Supra* note 147 at 173.

167 Zsuzsanna Deen Racsmany and Judge Rob Blekxtoon "The Decline of the Nationality Exception in European Extradition? The impact of the Regulation (Non) Surrender of Nationality Dual Criminality under the European Arrest warrant", 13 *European Journal of* Crime, *Criminal Law and Criminal Justice* (*EJCCL & CJ)*317-363(2005).

his own State for punishment in another was tantamount to abandoning him to an unpleasant and probably permanent exile if not death.[168]

As a result of these circumstances it was natural for the national States not to surrender their national to foreign jurisdiction when there was doubt about the person's chances of being judged properly and impartially in the Court of another State. Nussabum asserts that the religious rivalries between Roman Catholics and Protestants in Europe, at that time were mainly responsible for the denial of extradition of nationals because it was felt that Catholics would never receive fair treatment at the hand of Protestant courts and vice-versa.[169] The first treaty in which an express exemption of nationals appeared was the treaty of 1834 between France and Belgium. French treaty practice after 1844 uniformly excluded the extradition of the requested States own nationals. France in real sense led the world in the matter of extradition and its practice with regard to was widely emulated. Of the total of 163 extradition treaties printed in the League of Nations Treaty Series and first 550 volumes of the United Nations Treaty Series, 98 except the nationals of the requested State absolutely, 57 give to the requested State a discretionary right to refuse to surrender its nationals, while only eight provide for extradition regardless of nationality of fugitive.[170]

Thus, it can be concluded here that the nationality as an exception to extradition has its origin in the sovereign authority of the ruler to control his subjects and the lack of trust in other legal systems. The traditionally voiced reasons in support of this exception are following:

1. The fugitive ought not to be withdrawn from his judges.
2. The State owes its subjects the protection of its laws.

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168 *Supra* note 9 at 95.
169 Arthur Nussbaum, *A Concise History of the Law of Nations* 208(Macmillan, New York, 1947).
170 *Supra* note 9 at 96.

3. It is impossible to have complete confidence in the justice meted out by a foreign State, especially with regard to a foreigner.
4. It is disadvantageous to be tried in a foreign language separated from friends, resource and character witness.[171]

Under existing international practice a State is assumed to have practically unlimited legal control over its nationals. Thus, nationality is the legal basis for the exemption of citizens from extradition because allegiance and protection go together and if the States demand obedience from their subjects it is natural for the nationals to expect from their government's protection not to be delivered up to the foreign State.[172]

Admittedly, an examination of the legislations adopted in various countries reveals that practically all States exercise penal jurisdiction on the principle of nationality. However, States which derive their jurisdiction from civil law assert a competence which is substantially more comprehensive than that exercised by States adopting Common Law System. Naturally, therefore, national codes, laws and rules of the various countries categorically prohibit the extradition of nationals. For example Argentina Extradition Law of 1885, Article 13; Finland, Extradition Law, 1970, Article-2; France Extradition Law 1927, Article-15; Netherlands, Extradition Law of 1875 as amended in 1967, Article-4.[173]This principle has been expressly incorporated in the constitution of certain States. For example Constitution of Afghanistan Article 27; Brazil, Article 150(19); Cyprus, Article 14; German Democratic Republic, Article 10;Federal Republic of Germany, Article 16(2); Greece Article 8; and Luxemburg Article, 13.[174]The same objective is achieved by other States by defining extradition as "the surrender of aliens." These States do not speak of

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171 Sharon A Williams, "Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition', 62 *International Review of Penal Law* 259 (1991)
172 *Supra* note 3 at 176.
173 *Supra* note 3 at 204.
174 *Supra* note 3 at 205.

nationals but only deal with aliens.[175] The statute of certain States oppose extradition of nationals as a national policy but the contrary may expressly be provided for in an international treaty or convention.

There are various Multilateral Conventions, Codes and Projects which contain provisions prohibiting the extradition of nationals of the signatory Parties and make it obligatory for them to take action against them for crimes with which they are charged and thus bind the State, not to allow the nationality of the accused in any way to impede punishment. Few treaties among them require a mention i.e. The Draft Extradition Convention approved by the International Law Commission, 1928; Second International Law Penal Treaty signed at Montevideo, 1940; Inter American Draft Convention, 1973 make the similar provisions that "The nationality of the person sought may not be invoked as a ground for denying extradition except when the law of the requested state establishes the contrary".[176]

Thus here it may be concluded that the absolute prohibition of nationals, from extradition proceedings by the municipal laws of these States, does not confer immunity upon the fugitive offenders who after committing the crime in foreign land or jurisdiction take refuge in their homelands. The principle of *"aut dedre aut judicare*" (extradite or prosecute) should be implemented to bring fugitive offenders to justice.[177] The factor behind the implementation of the principle is that the rule of personal jurisdiction allows an offender to be prosecuted in his home State for crimes committed abroad provided these crimes are cognizable and punishable by the law of the *locus delicti* and law of the home country. A prosecution be instituted at the instance of the prosecuting authorities of the

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175 *Belgium Extradition Law* of 1874, Article 1; *Nether land Extradition Law* of 1875 as amended in 1967, *Poland Extradition Law* of 1875 Article 4.

176 Article- 8.

177 *Resource Material Series* No. 57, 114th International Training Course Reports of Seminar, Topic 2, "Refusal of Mutual Legal Assistance or Extradition" 191, *available at* : http:/unafei.org.jp/enuh/pdf/pdf_rms/(visited on December 14, 2011).

fugitives own State acting on material supplied by foreign authorities. The laws of various countries provide for the exercise of such jurisdiction.[178]

Practice followed by Common Law Countries

On the other hand there are other States, which adopt a different approach towards the criminal jurisdiction based upon the Principle of Territorial Jurisdiction that the States being sovereign are competent to prosecute and punish for the crimes committed within their territories. This territorial principle finds expression in all the modern codes.

The practice of excluding the extradition of one's own nationals has never been favored officially by Great Britain; its first treaty was with United States in 1794 which applied to all persons irrespective of their nationality. So also did the next two treaties with the United States (1842) and with France (1843).[179]The territoriality of a crime is the founding stone in the penal jurisprudence of British Commonwealth countries, which vests in each State exclusive jurisdiction with respect to any crime committed within its territorial limits irrespective of the nationality of the alleged offender or accused involved.[180] Thus the countries which adhere to this rule primarily are the countries of the British Commonwealth Nations or the States which have either continued in force the imperial Extradition Act, 1870 or have substantially re-enacted it as these States have broadly speaking accepted their succession to British treaties.[181]These States include Australia, Bangladesh, Burma, Canada, Ghana, India, Jamaica, Kenya, Malawi, Malaysia, New Zealand, Tanzania, Nigeria, Pakistan, South Africa, Trinidad, Tobago, Uganda,

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178 *Supra* note 3 at 179-180.

179 Ivan A Shearer, "Non- Extradition of Nationals: A Review and a Proposal " 2(3)*Adelaide Law Review* 277(1966), *available at* : http:/digital library.adelaide.edu.au/dspace/bitstream/2440/14932/1/alr_V2n3_1966_SheNo (visited on December 8, 2011).

180 *Supra* note 147 at 122.

181 *Supra* note 9 at 96.

Zambia and others which do not reject in principle the extradition of their citizens to foreign countries. The same is true with America and Israel.[182]

The policy is fully reflected in the national statutes of such States. They do not make any distinction between national and foreign malefactors. The provisions of these statutes refer to fugitive criminal and not aliens alone. For example, Australia, Extradition Act, 1966, Article 16; Canada Extradition Act, 1972, Article 10; Great Britain Extradition Act, 1870, Article 10; Indian Extradition Act, 1962, Chapter II; Israel Extradition Act, 1954, Article 3; Pakistan Extradition Act, 1972, Article 10.[183]These countries prescribed only one condition that extradition can only take place after the signing of the treaty with the requesting country because under the laws of these countries the executive does not possess any power to dispose of the liberty of an individual in the absence of definite statute to implement that treaty. Thus these countries do not ordinarily exempt their nationals from the operation of extradition treaties because the main reason of these treaties is to achieve international peace, security and co-operation against criminals who are considered as enemies of any civilized society.

In one more authoritative case of *Neely v. Hinkel.*[184] Mr. Justice Halarn speaking for the Supreme Court said:

….." We are reminded of the fact that the appellant is the citizen of the United States. But this citizenship does not give him an immunity to commit crime in other countries, nor entitles him to demand a right for trial in any other mode then that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if requested to submit to such modes of trial and to such punishment as the law of that country may prescribe for its own people, unless a different mode be provided for by treaty

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182 *Id* .
183 *Supra* note 147 at181.
184 180 US109(1900).

stipulations between that country and the United States". Judicial decisions pronounced by the Courts of these countries also confirm this principle. They never try to create any hindrance in the way of the executive department of the State as they hold that their duty is to recognize the obligations imposed by such treaties and to interpret them accordingly whenever there is a controversy between the two States.

In *Charlton v. Kelly*[185] the Supreme Court of the United States reaffirmed this principle as it stated:

"That word 'persons' etymologically includes citizens as well as those who are not, can hardly be debatable. The treaty contains no reservations of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary as by implication, from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included".

Recent Developments

Recent media reports have highlighted the risk that criminals could evade justice through naturalization. If the State does not extradite its citizens and is unable or unwilling to prosecute them, then the grant of nationality could equal to providing sanctuary.[186]

In fact, presumably few judges would have serious moral objections today to granting the extradition of fellow nationals for serious crimes committed abroad, which are obviously criminal offences wherever in the world they are committed if prosecution abroad had (procedural) advantages and due process safeguards were provided. Moreover, people doing legal or illegal business abroad may be expected to have acquired sufficient knowledge of legal system of the State where they are active ('When in Rome, do as the Romans do') raising little sympathy in extradition proceedings if they knowingly commit

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[185] 229 US 447(1913).

[186] Zsuzsanna, Deen- Racsmany , "A New Passport to Impunity ?Non Extradition of Naturalized Citizens Versus Criminal Justice"2(3) *Journal of International Criminal Justice* 761(2004)*available at* : http://jicj.oxfordjournals.org/content/2/3/761,abstract (visited on December 13, 2011).

crimes at the seat of their business and flee home.[187] While the statutes of the nationality exception is still unsettled in customary International Law and its moral and practical utility remains debated, most extradition treaties at least permit the Contracting Parties to refuse handing over their own nationals. The United Nations Model Treaty on Extradition, 1990 in Article 4(a) enables a requested State to refuse extradition of its own nationals, but includes "prosecution in lieu" alternatives. This is an optional ground. Section 11 of the Model Law on Extradition, 2004 deals with the refusal on the ground of nationality. It has made this ground optional. It states:

Option 1

(Extradition (shall not be granted) (may be refused) on the ground that the person sought is a national of [country adopting the law)).

Option 2

(Extradition shall not be refused on the ground that the person sought is a national of (country adopting the law)).

However, the international treaty practice is that nationality of the requested person is a ground for optional referral in some treaties and mandatory in others.[188]

Similarly the European Convention on Extradition concluded within the Council of Europe in 1957[189] also confirms the Right of Contracting Parties to refuse extradition of their nationals. The Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters signed in 1962 similarly prevents the extradition of nationals of the Contracting Parties. In contrast, the Convention on Extradition between member States of the European Union drafted in 1966 ambitiously attempted to reverse the traditional regime relating to

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187 Zsuzsanna, Deen- Racsmany and Judge Rob Blekxtoon, "A Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non) surrender of Nationals and Dual Criminality under the European arrest warrant", *13EuropeanJournal of Crime, Criminal Law and Criminal Justice* 317 (*EJCCL & CJ)* (2005).

188 *Supra* note 177 at190.

189 Article 6(1)(a).

the nationality exception. Article 7 declares that: 'Extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the Extradition Convention on Extradition'.

It should be noted that due to French and Italian failure to ratify the Convention, it has not entered into force. As of 1 January 2004, the European Arrest Warrant suspended this Convention in accordance with Article 31 (1) (d) of the frame work decision. The European Arrest Warrant constitutes an ambitious attempt to curb for what has now been accepted as the sovereign right of States to refuse extradition of their nationals. It goes further than other instruments in its restriction of nationality exception[190].

It may be concluded that exception of non-extradition for nationals jeopardizes international efforts to fight transnational organized crime. Thus it is important to note that:

(i) States should take giant strides towards enacting the laws that allow their nationals to be extradited.

(ii) States can extradite their own nationals for trial abroad on condition that convicted fugitive offenders will serve their sentences in their respective countries.

(iii) Extradition of a national can be allowed with the consent of the offender.

(iv) Surrender of nationals can be considered as a new form of bringing fugitive to face justice. This enabled many offenders who committed crimes in Yugoslavia and Rwanda to be tried before the Adhoc International Criminal Court for the former Yugoslavia[191] and the Adhoc International Criminal Court for Rwanda[192] respectively.

(v) The Principle of *Aut dedre aut judicare* (extradite or prosecute) should be implemented to bring fugitive offenders to justice. If the possibility of an

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190 *Supra* note 187.

191 Established under *the United Nations Security Council Resolution* 827 on May25, 1993.

192 Established under *the United Nations Security Council Resolution* 955 on November 8,1994.

> offender's impunity is recognized as the most serious danger caused by the practice of non-extradition of nationals then from the point of criminal justice it should not matter in the territory of which State he/she is prosecuted and punished as long as justice is done.[193]

Military Offences

As seen earlier there has been extradition of fugitives from foreign countries since the early days of European history, but it is also evident that those fugitives were not necessarily fugitives from justice charged with common crimes, but were either political or religious opponent of ruling families or deserters of the armed forces of the requesting States. They usually obliged one another by surrendering these persons who were most likely believed either to disturb the stability of the political order or the very existence of the requesting State, as the army was considered to be the base of any State. As a result, no State used to allow any dissension flourishing among the masses particularly in armed forces as it could lead to rebellion, disorder or lawlessness. Therefore, they formerly entered into arrangements with other States for extraditing or surrendering such persons to maintain peace, order, and tranquility with their realms[194].

The earliest British Treaties providing for the surrender of military deserters date from the second half of the eighteenth century. Some of the earliest were treaties with Middle Eastern rulers, which provided that the local rulers were to surrender all soldiers, sailors, servants and slaves belonging to the England. An example is the treaty with Sheik of Bushier, 12 April 1763[195].

Later on with the rise of Liberalism in the mid-nineteenth century in the Western countries, the Courts of requested countries refused to surrender the individuals who were either guilty of or charged with political or military offences.

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193 *Supra* note 177at191.
194 *Supra* note 147 at 431.
195 *Id.*

Presently there are considerable numbers of bilateral as well as multilateral Conventions along with national statutes that expressly prohibit granting extradition for acts punishable under military laws of the requesting State.

There are however two conditions which limit their exemption namely:

1) That the acts charged do not constitute crime under the ordinary laws of the requesting State.
2) That the acts do not constitute a violation of the Laws of War which would be international crimes.[196]

The broadest application of the exemption arose in the case of In *re Banegas.*[197] The Supreme Federal Court of Brazil held that a request from Bolivia should be denied on the ground that the offence charged was military in nature. The fugitive was charged with 'Common Crime of homicide'. The case arose in the context of armed forces, at the behest of the State authorities, putting down a revolt by executing the military and civilian personal involved. According to Freire J, it was thus rendered a 'military offence'. On this reading, any crime committed by members of armed forces would be military offences; it would even permit a defense of superior orders to war crimes violations. While the instant case was also argued on the basis of the political offence exemption, it is not in conformity with the modern interpretation of the military offences exception[198].

Recent extradition treaties provide that an offence will only fall within the exceptions if it consists solely a breach of military law. The European Convention of 1957 achieves the same result by a negative definition; Article 4 only prohibits extradition if the military offence is not an offence under ordinary criminal law. Although the clause is not

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196 *Supra* note 32 at 429.
197 Supreme Federal Court of Brazil, 15 ILR 300 (1948).
198 *Supra* note 10 at 184.

always included in treaties made by Common Law States, the Commonwealth Schemes for Rendition of Fugitive offenders[199] contains the exception and defines it as follows;

"The return of a fugitive offender will be either precluded by law, or be subject to refusal by the competent authority, if the competent authority is satisfied that the offence is an offence only under military law or law relating to military obligations".

The motive behind is to render non-extradition of those offences which solely appear in the requesting State's military code. It is true that the practice of non extradition for military offences has not been so universally accepted or at least has not been so widely incorporated in treaty and statute law as the practice of non- extradition for political offences. The number of treaties that expressly prohibit the extradition of persons charged with military offences however, is not insignificant. These treaties generally exclude extradition for military offences. There are other treaties which do not contain any provision relating to military offences yet by implication, namely by the use of lists of extraditable offences which do not include acts constituting military offences, decline extradition for military offences.[200]

The rationale for this exclusion rests on the appraisal of the very offence, i.e., it is peculiar rather than general and affects a disciplinary aspect of an internal organisation with in given State without causing any harm to the world community as in the case of international crimes. It is also not worthy to assert that extradition is a means of cooperation between States to combat common criminality and therefore such offences are excludable from that objective. States which are bound by mutual security pacts and other military agreements are, however, likely to include such offences in their treaties or in any event to engage in the practice of disguised extradition to accomplish their purpose of

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[199] 1966, Cmnd 3008. As amended by Commonwealth Law Ministers Meeting, April 1990 (LMM (90)32), Article11, 1990 amended version as cited by *id*.

[200] *Supra* note 147 at 432.

exchanging such fugitive offenders.[201]Thus in confirmity with national legislation or treaty provisions, a State may reject the application of the requesting State for extradition of a person claimed if he is charged with an offence which constitutes a military offence and is punishable only as violation of a military law or regulation, provided that this violation does not constitute a crime under the law.

Fiscal Offences

Theoretically the rationale for exclusion of fiscal offences is said to be the same as in cases of offences of a military character. It should be stated at the outset that even though there is little practice in extradition for fiscal offences, there is nothing in customary International Law which prohibits it. Furthermore the term fiscal has often encompassed offences of an economic nature even though they involve the public interest as opposed to private interest. It must be recalled that extradition before twentieth century was closely interwoven with European history and between the sixteenth and eighteenth century Europe's fiscal and economic structure was chaotic and oppressive, and this explains the origin of exclusion.[202] After that, between eighteenth and early nineteenth century the fiscal and economic reorganisation of these States was interrupted by two World Wars which further led to the development of socialism and communism in Eastern and Central Europe. These factors contributed to the continued lack of acceptance of such violations to warrant extradition except between compatible economic systems. The change has occurred after the political and economic transformations of world have been shaped and with the recognition that States in order to carry their public charges must enforce their economic and fiscal laws.[203]

The socio- economic contract theory of the twentieth century has brought about a major change in the category of economic offences as is the case in the Socialist Countries

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201 *Supra* note 32 at 433.
202 *Id.*
203 *Id.*

of Central and Eastern Europe and those of Asia where such offences rank with more serious common crimes as witnessed by laws on smuggling, traffic in currency etc. There is an increasing agreement in various quarters to incorporate fiscal and similar offences as extraditable offences. For instance, the Second Additional Protocol to the European Convention, 1978, establishes a duty to extradite for "offences in connection with taxes, duties, customs or exchange regulation of the same kind as of the requesting party".[204]

Moreover, while recognizing the different fiscal structures prevailing in various countries, the Second Additional Protocol to the European Convention, 1978, attempts to prevent any possibility of refusal on the ground of dissimilarity of fiscal regulations between requesting and the requested States. The Inter-Governmental Working Group on the Problem of Corrupt Practices in International Commercial Transaction in 1977, in its report, suggested certain measures relating to extradition for the offences of all forms of illicit payments.[205]

The Council of Europe in 1981 having identified as many as sixteen instances as economic offences, recommend that:

"The Government of the Member States intensifies their cooperation at international level in particular by signing and ratifying the European Conventions on Mutual Assistance in criminal matters and on extradition, the Protocols thereto and any other internationals instruments facilitating the prosecution and punishment of economic offences".[206]

International White Collar Crimes figured out as an important item during the review meeting of Commonwealth Scheme relating to Rendition of Fugitive Offenders,

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[204] *International legal Materials* 173(1978) cited by Swan Sik, KoSwan Sik, *African Year Book of International Law*,1996 ,1236 (Martinus Nijhoff Publishers, TheNetherlans,1998).
[205] *International Legal Materials* 1236(1977) as cited by *id.*
[206] *International Legal Materials*, Vol. 21, 886(1982) as cited by *id.*

1982[207]. This resulted in inclusion of a general clause of the list of 'Returnable offences' to the effect that further offences which are returnable under the law of the requested Party of the Commonwealth should be treated as returnable "notwithstanding the fact that any such offences are purely of a fiscal character." It may be pointed out here that in view of 1986 agreement within Commonwealth that is Scheme Relating to Mutual Assistance in Criminal Matters within Commonwealth, 1986 that all offences punishable with two years of imprisonment are returnable, most of fiscal offences would seem to have been covered as extraditable offences.

Now, it is clear that the rule of International Law does not prohibit for the extradition for such offences, such offences are now being incorporated in extradition treaties. Article 2, Para 2 of the Extradition Treaty between India and Russia, 1998 lays down that an offence may be an extradition offence notwithstanding that it relates to taxation or revenue or is one of a purely fiscal character[208]. Article 5 of the European Convention on Extradition, 1957 exclusively authorizes Parties to extradite for fiscal offences if they so decide among themselves. A previous agreement is therefore necessary between the Parties. It rules as under:

"Extradition shall be granted, in accordance with the provisions of this Convention, for offences in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offences or category of offences"[209]

Dr. Stein pointed out that Second Additional Protocol to the European Convention on Extradition, 1978 many national extradition statutes, the Inter American Convention,

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207 *Commonwealth Law Bulletin*, Vol . 9, No.1, 285(1983).

208 Apurv Karmakar, "The Practices of Extradition", *available at* : http:// jurisonline.in/2009/05/the practice _of_ Extradition (visited on November 8, 2011)

209 Signed in Paris on December 13, 1957, (UN1960,359:273,5146) Effective from April 18, 1960 (Reg. May24,1960) (Presently there are fifty Parties to Convention that include all Member States of the Council of Europe, Israel, South Africa and South Korea)

1981 and the 1996 Convention relating to the extradition between Member States of European Union all make provision for the extradition of fiscal offenders.

The revised 2002 Commonwealth scheme also follows for extradition of fiscal offenders.[210]

Prima Facie Evidence

The Latin meaning of Prima Facie is "at first view". The legal definition of Prima Facie Evidence is "An Evidence that is sufficient to raise a presumption of fact or to establish the fact in question unless rebutted."[211]

Background

The origin of the idea that, before a person is surrendered to the foreign State to be prosecuted for an offence committed there, some evidence of guilt should be produced is obscure. It makes its first appearance in the Jay Treaty of 1794 between the United States and Great Britain, under Article XXVII ,which provided for the reciprocal surrender of murderers and forgers provided that this should only be done on such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.[212]

This was the first extradition treaty, in the modern sense of the term, concluded by either Great Britain or the United states. A clue to the reasoning behind the condition of showing a *prima facie* case of guilt imposed by extradition treaties-long familiar concept in municipal criminal law-is afforded by a consideration of the arrangements in force between British dominions after 1843 for the rendition of fugitive criminals among those dominions. Possibly the most contentious area of United Kingdom extradition law used to

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[210] Geoff Gilbert, *Responding to International Crime* 113 (Martinus Nijhoff Publisher, The Netherland, 2006).

[211] The 'Lectric Law Library's Lexicon, "PRIMA FACIE, Evidence, Case", *available at*: http://www.LectLaw.com/def2/p078.htm (visited on September 15, 2011).

[212] *Supra* note 9 at 152.

be the requirement that the requesting State prove a *prima facie* case against the accused.[213] Evidence of guilt was first requirement in the Imperial Apprehension of Offenders Act, 1843. In 1881 a comprehensive enactment, the Fugitive Offenders Act, which applied to all colonies and in respect of all offences for which a maximum penalty of one year's imprisonment or more might be imposed, was passed. The Act provided in Part-1 for the rendition of offenders against whom evidence was produced which raised a strong or probable presumption that the fugitive committed the offence. In Part- II of the Act, on the other hand, no such requirement was made, the offender might be surrendered upon production of a warrant of arrest issued in another part of the dominions to which Part II of the Act applied. This part applied to groups of contiguous possessions, as declared by order in Council.[214]

On the other hand the European States found the requirement of *prima facie* evidence in English Law burdensome and a criticised their criminal processes. The Anglo Spanish treaty lapsed because the Spanish Government had not been able to secure the extradition of its fugitives from the United Kingdom mainly due to the *prima facie* requirement. New talks concluded a fresh treaty and it provided for less stringent evidentiary test[215]. Similarly the law of France and of most other civil law systems look only to the proof of identity and the confirmity of the request to the treaty and statutory requirements. Reference may be made to Article 12 of the European Convention on Extradition, 1957 which makes no reference to the *Prima Facie* case. However Article 13 enables the requested States to seek any supplementary information which is thought to be necessary in order to reach a decision.

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213 *Supra* note 210 at 114.

214 An example of a group under part II: Australia, British Solomon Island, Fiji, Gilbert and Ellice islands, New Guinea, New Zealand, Norfolk Islands .Western Samoa as cited by *Supra* note 9 at 152.

215 69 B.F.S.P. 6, C.2182. Treaty terminated 13 Oct. 1978 : Spain (Extradition) (Revocation) Order 1978, S.I. 1978, No. 1523 as cited by *Supra* note 210 at 115.

The justification of this position is that the extradition is a measure of international judicial assistance in restoring a fugitive to a jurisdiction with the best claim to try him, and it is no part of the function of the assisting authorities to enter upon questions which are the prerogative of that jurisdiction.[216] And the other view point that supports the prima facie evidence as an essential requirement suggested that the imposition of the *prime facie* case requirement is related to distance and relative in convenience, that if a person is to be sent for trial to a place a long distance away, he should not be sent on the mere strength of a warrant of arrest but only upon such evidence of criminality as would show that he had a substantial case to answer.

Present Position

Even though within the Common Law System where in *prima facie* case has been zealously guarded, there are radical views questioning the validity of this rule. There are trends with in England which argue for abolition of the requirement[217] two most important Common Law countries, India and Canada have not adhered to the *prima facie* requirement so stringently in recent agreements.[218] Though such trends are discernible in bilateral and municipal settings, when it comes to the Commonwealth as such, the *prima facie* requirement has been largely retained.

On the other hand as already discussed, the Civil Law countries who follow the inquisitorial method in criminal prosecution do not require the establishment of a *prima*

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216 *Supra* note 9 at 157.

217 "Green Paper on Extradition," *Common Wealth Law Bulletin*, Vol.11, No. 2, 433-499 April 1985, as quoted by *Supra* note 204 at 313.

218 Article 9 of Extradition Treaty between India and Canada, 1987 states as under:

1. The evidence submitted in support of a request for extradition shall be admitted in extradition proceedings in the requested State if it purports to be under the stamp or seal of a department, ministry or minister of the requesting State, without proof of the official character of the stamp or seal.
2. The evidence referred to in paragraph 1 may include originals or copies of statements, depositions or other evidence purporting to have been taken on oath or affirmation whether taken for the purpose of supporting the request for extradition or for some other purpose.
3. The evidence described in paragraph 2 shall be admissible in extradition proceedings in the requested State whether sworn or affirmed to in the requesting State or in some third State.

facie case before granting an extradition request, nevertheless there are exceptions to this rule also. For instance Israel insists upon *prima facie* case in all cases, whereas Norway and Denmark reserve the right to ask for such evidence in any particular case. The Federal Republic of Germany is also in the process of a radical change in this regard. Article 10(2) of the new German statute requires documents establishing a *prima facie* case if in the circumstances of the case there is reasonable doubt whether the requested person has in fact committed the offence. Thus the rule relating to *prima facie* requirements within the Common Law and Civil Law system is changing but no distinct developments are taking place in both systems. Perhaps this is another area in which there could be efforts to harmonize the evidential requirements. One possible compromise is to make the requirement of *Prima Facie* case discretionary.[219] Both the systems have relative advantages: the Continental System greatly facilitates the procedure of extradition; the Common Law System looks more upon the protection of man's Liberty. Altogether the two systems seen apparently irreconcilable, they are not far apart.[220]

As Ivan A. Shearer explains, that the rule of the Common Law goes back only to the middle of the last century. Its aim is not to ask for a *prima facie case* against the request made before the judge of the requested State but to exclude the lengthy procedure of extradition with all its risks and burdens if there is no reasonable ground to hold fugitive guilty. If this view is correct then the resolution of Section IV of the International Congress of Penal Law of Rome of 1969 might be universally adopted. The resolution says that, as a rule, the requested State should be satisfied with an examination of the documents supporting the demand of extradition. But it adds, if the fugitive is not yet convicted, he

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[219] *Supra* note 204 at 313.

[220] Vinod K. Lall, Danil Khemchand, *Encylopedia of International Law* 89 (Anmol Publications Pvt. Ltd., New Delhi, 1997).

shall have the right to give any evidence possible that proves that the accusation is not well found.[221]

Whereas the sufficiency of evidence required to institute criminal proceedings is governed by national law, the sufficiency of evidence required to grant an extradition request is addressed in the various bilateral and multilateral treaties. In terms of the sufficiency of evidence required for extradition, the Model Treaty on Extradition, 1990 requires as a minimum "a statement of the offence, including an indication of the time and place of its commission.[222]" Further in view of the need for simplification of the evidentiary requirements in extradition proceedings it is recommended in Revised Manuals on Model treaty on Extradition 2004 that States not insist on the establishment of a "prima facie evidence of guilt" for granting an extradition request.

However countries are free to add to this article the following further mandatory ground for refusal 'If there is insufficient proof, according to the evidential standards of the requested state, the person whose extradition is requested is a party to the offence'[223]. Inherently, this means that the requested country can refuse an extradition request on the ground that the evidence accompanying the request is insufficient. Moreover the UN Model Treaty 1990, does not specifically define how much evidence is required and who should decide on such an issue. Further Chapter 3of Model Law on Extradition 2004, dealing with documentary requirements in extradition proceedings under Section 16 (b)(ii) prima facie evidence of guilt. It states:

"evidence admissible under the present law, considered sufficient to (establish a prima facie case that the person sought had committed the offence for which extradition is requested) (justify the committal of the person sought for trial for the

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221 *Id.*

222 Article 5, paragraph 2(b).

223 *Model Treaty on Extradition*,1990, foot note -16, *available at* : http://www.unodc.org/pdf/model_treaty_extradition.pdf (visited on September 24, 2011)

offence in respect of which extradition is requested, if that offence had been committed in (country adopting the law) or evidence that would constitute reasonable and probable grounds to believe that the offence had been committed".

Therefore, there is no universal standard on the amount of evidence required to grant an extradition request. Different countries have different standards. It is, therefore, advisable that countries should keep track of the standard of evidence that is required by different countries. This helps in establishing the standard of evidence while making requests.[224] For example presently there is a disagreement between United States and United Kingdom about the Extradition Act, 2003 that dispenses with the need for a *prima facie* case for extradition. The treaty removes the requirement on the United States to provide *prima facie* evidence when requesting the extradition of the people from United Kingdom but maintains the requirement on the UK to satisfy the 'probable cause' requirement in the US when seeking to US nationals[225]. The Cross Party Joint Committee on Human Rights has called for the 2003 US-UK treaty to be "Urgently negotiated" so that the requests should only be considered if the US authorities provide *prima facie* evidence that the suspect has a case to answer to prevent people being sent to face trial abroad on "speculative charges"[226].

The conclusion is, therefore, advanced that the requirement of the showing of a *prima facie case* constitutes not merely a defensible but positive commendable practice in the law of extradition. Although it is true that there is no precise parallel law in all the countries to the concept of the *prima facie case*, it is enough simple idea that could without undue difficulty or confusion be introduced in the extradition laws of the countries at large.

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224 *Supra* note 177 at 193 and194.

225 Extradition, From Wikipedia, the free encyclopedia, *available at*: http://en.wikipedia.org/wiki/Extradition (visited on November 13, 2011).

226 *BBC News*,June22, 2011"Call for overhaul of U.K. Extradition rules" *available at* : http://www.bbc.co.uk/news/uk.politics-13867921 (visited on November21, 2011).

Lapse of Time

The Law of Prescription or the Statute of Limitations prevents State accusations, and thus protects an accused or a convicted person from long delayed prosecutions if immunity has been acquired by that person from prosecution and punishment by the lapse of time. This exemption or exception is based upon the principle of public policy or humanity as no person can be permitted to disturb the status quo and if an aggrieved or injured person does not take any action against the accused with in the period prescribed by statute, he should not be permitted to drag on with his accusations against others until eternity[227]. The restriction that bars or justifies the refusal of surrender of a fugitive offender due to lapse of time is generally incorporated in the national laws as well as treaty arrangements of the States.

The States generally relying on this principle refuse to grant extradition of a person claimed if he has obtained immunity from prosecution or punishment according to the statute of limitation. Thus many States preclude extradition if prosecution for the offence charged, or enforcement of the penalty, has become barred by lapse of time under the applicable law. Under some treaties the applicable law is that of the requested State, in other that of the requesting State and under some treaties, extradition is precluded if either State's statute of limitation has made the offence time barred.[228]

Difference in Opinion

There is a controversy whether the requested State should determine acquisition of immunity from prosecution or punishment according to its own laws or according to the laws of requesting State, or according to both. There is a difference in opinion on this question between the publicist on one hand and between the treaty law and practice on the

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227 *Supra* note 147 at 442.

228 Charles Doyle, *United States Government Accountability office, Extradition to and from United States* 9(Nova Publishers, New York, 2008).

other. Some of the States[229] maintain that the period of prescription should be determined by the laws of the requesting State alone, as it is the requesting State whose legal system or social order has been violated or disturbed by the action of the person demanded[230]. According to this opinion, the offenders should not be allowed to escape the punishment only because the law of limitations is shorter in the requested State than that of the requesting State.

On the contrary, various treaties maintain that the question of lapse of time must be settled in accordance with the law of the requested State.[231] The fact is based upon the opinion that the rule of prescription or lapse of time does not only create a bar to proceedings or punishment but also destroys the *jus puniendi*[232] to the same extent as the maxim *Non bis idem*[233] and amnesty and pardon do. Thus, the requesting State applying the rule of double criminality, which is one of the basic requirements in the proceedings for extradition of fugitives, may decline to surrender the fugitive offender if he has already acquired immunity from prosecution or punishment under its own legal system. Therefore, once prosecution or punishment is barred by lapse of time under the laws of the requested State, the situation is analogous to that where the act done is not a crime under laws and hence one of the essential ingredients of extradition is lacking. Moreover, the requested State cannot be expected to surrender its right to examine a request in the light of its own

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229 *In re Gicca* (1933-1934) A D354 (No. 151) (Argentina) as cited by *Supra* note 19 at 496.

230 *Supra* note 147 at 442.

231 *In re. weill*, Supreme Court of Argentina 1939, (1941-1942) Ann. Dig. 334 (No. 104) in *reAddis*, Court of Appeals of Belgium, 1931, (1931-1932) Ann Dig. 306 (No. 166); in *Romaguerade Mouja*, Supreme Court of Venezuela, 1952, 19.I.L.A. 373 (No. 84 1952) as cited *Supra* note 19 at 496.

232 According to Wikipedia "The *jus puniendi* is a Latin phrase which can be translated literally as *right to punish* .Refers to the power or prerogative sanctioning State.
Etymologically, the term *jus* equals *right*, while the expression *puniendi* equivalent to *punish*, so that if either translate it literally as the *right to punish* or *right to sanction.*
This expression is always used in reference to the State against citizens". *Available at* :
http:/wikipedia.org/wiki/Jus_puniendi(visited on June 14,2013).

233 According to Article 14 (7) of *International Covenant on Civil and Political Rights*,1966, *Non bis idem means that* No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

laws, including the Statute of Limitations except when otherwise provided for in some other agreement.[234]

Thus from this point of view, it is essential, that the due consideration be given to the laws of the requested State before an alleged fugitive offender can be surrendered to the requesting State.

Between these two extreme positions, which refer to the question of lapse of time exclusively to the law of the requesting or requested State, there are number of bilateral and multi-lateral treaties and Conventions that have adopted a compromising solution and provide that the extradition will not or need not be granted if prosecution or punishment is barred by lapse of time according to the law of either the requesting or requested State.

The European Convention on Extradition, 1957 in Article 10 states:

"Extradition shall not be granted when the person claimed has according to the Law of either the requesting or requested party become immune by reason of lapse of time from prosecution or punishment".

There are two approaches to the legal effect of the Statute of Limitation. The first is that it is merely a bar to prosecution and the second that it extinguishes the offence for purpose of its legal effects; but the first is more widely recognized. Often the legal effects of a Statute of Limitation and amnesty are treated alike on the assumption that both are a bar to prosecution. It must be noted, however, that a Statute of Limitation bars prosecution but does not extinguish the criminality of the actor whereas amnesty usually does.[235]

It is to be noted here that lapse of time on its own is not a sufficient ground, under the laws of the Commonwealth Countries to invoke the related provisions in the respective statues. The delay must be such as in the circumstances, would render extradition unjust and oppressive. Mere delay in laying a charge, even for several years will not cause a court

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234 *Supra* note 147 at 443.
235 *Supra* note 32 at 448.

to exercise its discretion under the section if the delay cannot be attributed to the prosecution.

The legal practice of this fact was examined by Lord Diplock in *Kakis v. Government of Republic of Cyprus* (1978)[236] when he observed:

"Unjust is directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would be fair."

In this case man was murdered in Cyprus in 1973 and a warrant for the arrest of Kakis for that offence was promptly issued and his extradition was sought from the United Kingdom in 1976. Following a coupd'e'tat, however, the Cypriot government allowed him to leave and settle in England and in 1975, when the old government resumed power he was permitted to return temporarily to Cyprus to wind up affairs there. Failure to prosecute the fugitive while he is in the place where the offence was committed is an important factor for the court to consider. Taking into consideration all the relevant facts, the lords directed that he be discharged.

On the other hand in another case *The Union India v. Narang Case*[237] the government of India sought the delivery to face charges in relation to the theft of valuable archaeological artifacts. The alleged theft happened in 1967 but was not discovered until 1970, and the wanted person's involvement in the affair came to light only in 1976. Therefore the defense of Lapse of time was not accepted.

Thus it may be concluded that many States preclude extradition if prosecution for the offense charged or enforcement of the penalty has become barred by lapse of time

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[236] (1978) 1 WLR 779.
[237] (1977) 2 All ER 348.

under the applicable law. Under some treaties the applicable law is that of the requested State[238], in others that of the requesting State[239] and under some treaties extradition is precluded if either State's statute of limitations has run.[240]

Thus Whiteman has rightly described the defense of lapse of time or Statue of Limitations as follows:

"One of the most common exemptions from extradition relates to offenses for which prosecution or punishment is barred by lapse of time, usually referred to as barring by 'lapse of time', prescription or statute of Limitation".

A provision prohibiting extradition in such cases appears in most treaties and laws dealing with the subject of extradition. In treaties, the provision sometimes appears in the form of a prohibition of extradition where punishment or enforcement of penalty is barred by law of the requesting state or it would be barred by the laws of the requesting or the requested State.[241]

Thus from all the above discussion, it may be concluded that under international law, states have considerable latitude in establishing their national legal frame work for extradition. Conditions and requirements may vary significantly from one country to another. The next chapter deals the relation between extradition and asylum as the two concepts operate on the related but separated tracks. A comparative analysis of extradition has been made with asylum.

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238 For Example: US- *Argentina Extradition Treaty*, Article -7, entered into force on June 15, 2000, S. Treaty Doc. 105-18, TIAS12866; *US French Extradition Treaty*, Article – 9 (1) 2002 as cited by Michael John Garcia Legislative Attorney, Charles Doyle Senior Specialist in American Public Law, "Extradition To and From the United States: Overview of the Law and Recent Treaties", 15 ,*Congressional Research Service Report*, 7-5700 ,March 17, 2010 , *available at :* http://www.fas.org/sgp/crs/misc/98-958.pdf (visited on December 21 ,2011).

239 For Example : Extradition treaty between U.S.- Austria, 2000 (Article-7); US- India,1999 (Article-7), 1999 as cited by *id*.

240 An example is United States Extradition Treaty with Uruguay, 1971 (Article 5) as cited by *Id*.

241 Whiteman, Digest 859, Vol.6 (1968) as cited by *Supra* note 32 at 447.