CHAPTER I

INTRODUCTION

General

Traditional criminal justice usually begins with the tracing of clues and collecting the evidence after the occurrence of the crime, thereafter arresting of the suspect, putting him under custody, enquiring the witnesses and unless the investigation is conducted by the prosecutor, to referring the case to the prosecutor for screening and institution of prosecution or dropping it and letting the suspect go. In the case of prosecution, the prosecutor then resumes his function in the Court throughout the whole process. However, the complexity in the case develops when it touches upon the components of internationalized character or involves the matters of State’s jurisdiction, then the process generally applicable to the domestic criminal justice may become very difficult or even fail on its entirety. This may be alleged, for instance, when a crime has been committed in one country and the criminal has fled away to another country. How do we bring the offender back to stand trial and punishment? Of course, it would not be viable for the country of the crime scene to send its officers to arrest the fugitive offender directly in the territory of another country because it is against the Principle of State Jurisdiction under International Law.\(^1\) Same problem would arise if the examination or prosecution is carried out in one State but the essential evidence or witnesses are present in another State. How do we obtain

\(^1\) State Jurisdiction can be defined as the authority to affect legal interests. More specifically under International Law, jurisdiction is understood to be allocation of power and authority among the States. Three independent types of jurisdiction are recognized: the right to prescribe or apply laws to persons and activities; the right to enforce those laws through application of sanctions; and the power of Courts to exercise jurisdiction over particular person or object. Jurisdiction draws its substance from Public International Law, Conflict of Laws, Constitutional Law and the powers of the executive and legislative branches of government to allocate resources to be serve the needs of its native society. Linda.A.Malone, *International Law* 55 (Aspen Publishers Online, 2008).
evidence or statements of such witnesses because then again the proceeding country could not send its authorities to conduct an investigation or to collect evidence within the jurisdiction of another country? The situations illustrated here are not exhaustive. There still exist many aspects and problems that are beyond the capacity of a single State to be dealt with, especially under the existing situation whereby many serious “transnational organized crimes” such as narcotics trafficking, money laundering, transportation of illicit firearms, sexual exploitation of women and children, computer fraud, financial crime, terrorism, and so on, have spread all over the world posing a great threat to every country. The tendency of today’s crime is probable to continue and become even more severe in the next millennium. To halt the transnational criminality, States must concretely coordinate with each other in the prevention and suppression of it. Assistance and coordination between States to tackle the crime can take many forms and is collectively known as “International Cooperation.”

Thus the international dimensions of criminality, which is a direct result of the increasing mobility of people and goods, are exacerbated by the increasing ease with which information circulates globally. In this increasingly independent world, no country is in the position to tackle the criminality effectively in isolation and the cooperation among States

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1 The United Nations sought a suitably broad definition of Transnational Organized Crime in its Convention Against Transnational Organized Crime, adopted by General Assembly Resolution 55/25 of November 15, 2000. (Article 3) gives a clear definition: An offence is transnational in nature if:
   (a) It is committed in more than one State;
   (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
   (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
   (d) It is committed in one State but has substantial effects in another State.

The most commonly seen transnational organized crimes are money laundering; human smuggling; cybercrime; and trafficking of humans, drugs, weapons, endangered species, body parts, or nuclear material.

to prevent and punish the acts of criminality is, therefore, of paramount consideration. The
ability of States to assist each other quickly and efficiently is no longer an optional bonus
but an absolute necessity if they are to combat criminality effectively. Therefore, as the
travelling throughout the world has become easier and crime takes on a larger international
dimension, it is increasingly in the interests of all nations that suspected offenders who flee
abroad should be brought to justice. Conversely, the establishment of safe havens for
fugitives would not only result in danger for the State obliged to harbour the protected
person but also tend to undermine the foundations of extradition. In the modern scenario,
where the criminality has set itself deep rooted internationally, it is not adequate to merely
locate and identify suspected criminals. At this stage, it is imperative for all the States to
make obvious, the will to help in the fight against criminality. To meet this problem,
International Law has evolved the practice of extradition; individuals are extradited (that is,
handed over) by one State to another State, in order that they may be tried in the latter State
for offences against its laws. Extradition also includes the surrender of convicted criminals
who have escaped before completing their punishment.4

The process of Extradition is an essential constituent of International Criminal
Law5 as a means of ensuring the repression and preclusion of international crimes.6 It is the

4 Peter Malanczuk, Akehurst’s Modern Introduction to International Law 117(Routledge, New York,7th
   edn.,1997).
5 According to Encyclopedia Britannica, “ International Criminal Law is the body of laws, norms, and
   rules governing international crimes and their repression, as well as rules addressing conflict and
   cooperation between national criminal-law systems. Criminal law prohibits and punishes behavior judged
   to be antisocial. Because each country’s laws are a reflection of its values, there are often large differences
   between the national laws of different countries, both with respect to the nature of the crimes themselves
   and the penalties considered appropriate. The term International Criminal Law refers variously to at least
   three distinct areas: cooperation between different national legal systems through Extradition and other
   forms of mutual legal assistance; the prohibition and punishment of certain behavior by several countries
   acting collectively or by the international community as a whole; and the operation of autonomous
   international legal systems, including Courts and other mechanisms of enforcement, that exist alongside
   national Criminal Law
   (Available at http://www.britannica.com/EBchecked/topic/721820/international-criminal-law, visited on
   June 6, 2013).
6 Crimes which affect the peace or safety of more than one State or which are so reprehensible in nature as
to justify the intervention of international agencies in the investigation and prosecution thereof.
internationally accepted process used by States to surrender a fugitive offender back to the State where the alleged offence was committed so that such an offender can be tried and punished. Without such process, and with the ease of contemporary global travel, offenders would, in all likelihood be able to escape trial and punishment. The majority of organized democratic societies identify that the suppression of crime is necessary for peace and order in society and that the extradition is an effective tool to be used to bring to justice a fugitive attempting to evade the law by fleeing to another State. Extradition has evolved among the States because they are vitally interested in the suppression of crimes and punishment of offenders who infringe their national laws and thus disturb the peace and happiness of the society which is vital for the maintenance of law, order and harmony within their boundaries. In the absence of any super national authority over States, however, they, like, individuals, have to work among themselves through mutual support and assistance for the protection of the person and the property of the subjects and the promotion of justice within and without their domains. Consequently, States can demand the surrender of people who have fled to other States after committing acts that are designated crimes under their legal system. Therefore extradition plays an important role in the international battle against crime. It owes its existence to the so-called principle of territoriality of criminal law, according to which a State will not apply its penal statutes to acts committed outside its own boundaries except where the protection of special national interests is at stake. In view of the solidarity of nations in the repression of criminality, however, a State, though

Traditional examples include war crimes, crimes against humanity and piracy. More recently: genocide and terrorism and in the near future, aggression. Some have evolved as part of the law of nations and others now form part of the body of International Law statutes - more properly called treaties. As part of the latter, they are properly organized with a definition of the prohibited conduct and appropriate referrals to international Courts for trial and sentence. Duhaime Lloyd, Duhaime’s Legal Dictionary available at: http://www.duhaime.org/LegalDictionary/I/InternationalCrime.aspx (visited on June 6, 2013).

refusing to impose direct penal sanctions to offences committed abroad, is usually willing to cooperate otherwise in bringing the perpetrator to justice lest he goes unpunished.

**Extradition as an Exceptional Measure**

In the present thesis the extradition process will only be exclusively dealt. The term, Extradition, originates from the Latin words ‘ex’ and ‘tradium. Such surrender has always been considered unusual, an exceptional measure rather than the norm, and, as a result, it has been suggested that the process came to be known as extradition because it was 'extra-tradition', that is, against the tradition of giving refuge and sanctuary. However, it seems more likely that the origins of the word extradition lie in the Latin *extradere*, which means the forceful return of a person to his sovereign.

**Definition of Extradition**

In the most common application, Extradition means, ‘surrender of criminals’, ‘delivery of fugitives’ or ‘handover of fugitives’. Extradition has been defined by Oppenheim as:

"The delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime by the State on whose territory the alleged criminal happens for the time to be."

Extradition has been further defined in numerous ways. Shearer provides a good working conceptualization:

“Extradition is the formal surrender, based upon reciprocating arrangements, by one nation to another of an individual accused or convicted of an offense outside its own territory and

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within the jurisdiction of the other which, being competent to try and punish, demands the surrender.”

In other words Banoff and Pyle defines Extradition as:

"The process by which one nation surrenders for purposes of trial and punishment, Individual accused of crimes committed outside its borders, to the nation in which the alleged crimes were committed.”

Prof. Verzijil defines Extradition as:

“An act of international cooperation for the repression of criminal activities of the human beings, is one of the various modes whereby one sovereign State delivers up the alleged criminals or the fugitive offenders found within its jurisdiction, on demand, to another sovereign State, so that they might be dealt with according to the penal laws of the latter.”

Cherif Bassiouni, a well-established scholar of International Extradition and International Law, defines Extradition as:

“A formal process through which a person is surrendered by one State to another by virtue of a treaty, reciprocity or comity as between respective States. The participants in such a process are, therefore, the two States and, depending upon value-perspective, the individual who is the object-subject of the proceedings”.

Extradition has been defined by Prof Dugard as:

“The delivery of an accused or convicted individual to the State where he is accused of, or has been convicted of, a crime, by the State on whose territory he happens for the time to be”.

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15 Supra note 11at 2.
Questions of terminology related to other measures taken by the State to compel the aliens to leave their country of residence needs a brief discussion here.

‘Rendition’ and ‘Extraordinary Rendition’

This more generic term ‘Rendition’ covers instances where an offender may be returned to a State to be tried there, under ad hoc special arrangement, or on the basis of reciprocity in the absence of extradition treaty, or even if there be such treaty between the States concerned, irrespective of whether or not the alleged offence is an extraditable offence.\(^{17}\)

There is a dispute over the definition of ‘Rendition’ and ‘Extraordinary Rendition’. The House Commons Library has supplied a helpful analysis:

Definition of ‘Extraordinary Rendition’ and ‘Rendition’ do not exist in international law: they are political terms of art. The phrase ‘Extraordinary Rendition’ is generally used to describe activities involving the clandestine and deliberate transfer of terrorist suspects to foreign countries for interrogation using torture, inhuman or degrading treatment in order to gain intelligence for ‘War Against Terrorism’. The process exists entirely outside normal, formal extradition proceedings. It is also referred to as ‘torture by proxy’ or ‘outsourcing torture’.

In contrast, while Rendition is used to refer to cases when individuals are transferred to other jurisdictions outside normal legal process, the term generally implies that torture is not used.

The House of Commons Library further adds that:

“The distinction is important because although that are used interchangeably. Extraordinary Rendition would almost certainly always be illegal under International Law,

\(^{17}\) I.A Shearer, *Starke’s International Law* 322(Butterworth and Co.(Publishers)Ltd., UK, 1994).
while there are some instances of rendition which, under some interpretations of International Law, may be regarded as legal”.  

**Deportation and Expulsion**

‘Deportation is not a term of art and is used synonymously with ‘Expulsion’; it is compulsory ejection of an alien from the territory of the deporting State, normally accompanied by threats of exclusion should the alien attempt re-entry. ‘Exclusion’ is a similar process but occurring ‘on the threshold’; where an alien has been declared inadmissible, upon arrival, his ejection is strictly termed ‘exclusion’ rather than deportation. Deportation is the means by which State rids itself of an undesired alien. Its purpose is achieved as soon as the alien has deported from its territory; the ultimate destination of a deportee is of no significance. While State has the right to expel aliens, International Law imposes certain restrictions on the circumstances and manner of expulsion. It is not clear whether a State must give reasons for expelling of an alien.

Generally speaking, State practice accepts that expulsion is justified in case of deportation of an alien who entered the country illegally or in breach of the terms of admission; aliens involved in criminal activities; and on the grounds of security and political considerations, taking account of the threat the alien poses to so called public order, a rather vague general legal concept whose content depends on municipal law of the expelling State, leaving there a considerable scope of discretion. As a general rule, it can be suggested that the demands of the public order should be balanced against basic standards of human rights and legitimate interest and expectations of the individual concerned as enshrined in the Principle of non refoulment. The sovereign right to control...

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19 Supra note 13 at 76.

the presence of aliens, among them refugees, is conditioned by the prohibitions of refoulement explicitly worded in Article 33 (1) of the 1951 Convention Relating to the Status of Refugees\textsuperscript{21} i.e. Principle of Non-Refoulement which means that States cannot return aliens to territories in case where they might be subjected to torture, inhumane or degrading treatment.

**Abduction**

Abduction is a process whereby a person is removed without his consent from the jurisdiction of one State to another by force; the threat of force; or by fraud, deception or trickery. This device is devoid of all legal or quasi-legal methods of rendition of criminals sanctioned by law, it is an illegal act by the municipal law of the place where it occurs.

The main purpose of the perpetrators of abduction is to remove the person from the arena of their action so swiftly that he may not have the chance to invoke the protection of law. It may be carried out by the authorities of a foreign State, with or without the connivance of the local officers of the State of refuge; by the private persons at the instigation of foreign State; or by private persons unconnected with State agents but motivated by idealism or expectation of reward\textsuperscript{22}. As abduction is clearly an illegal act, if an attempted abduction is detected, the law of the host State would give a remedy in nature of *habeas corpus*. Where abduction is effectively carried out, an infraction of the territorial Sovereignty of the host State has been committed. For abduction is such a manifestly extralegal act, and in practice so hazardous and uncertain, that it is unworthy of serious consideration as an alternative method to extradition in securing the custody of the fugitive offenders\textsuperscript{23}. For the perspective of inter-State relations, the practice of transnational abduction represents a clear violation of customary principle of territorial sovereignty. As the Permanent Court of Justice said as early as in 1927, “the first and foremost restriction

\begin{footnotes}
\item[22] Supra note 8 at 393-394.
\item[23] Supra note 13 at 72-75.
\end{footnotes}
imposed by International Law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory, except by virtue of a permissive rule derived from international custom or from a Convention\textsuperscript{24}. The asylum State could protest of the violation of its territorial sovereignty, or if an extradition treaty existed in relation to the State which performed the abduction, breach of such duty can be complained.\textsuperscript{25}

**Parties to Extradition**

From the definitions mentioned earlier it is clear that extradition requires the cooperation of at least two States; and thus extradition laws must blend different and often competing legal principles and values. On the one hand, a State has the right and a need to enforce its laws, On the other hand, States are sovereign over their territory and in absence of specific obligation (via treaty), no State is required to extradite. Extradition laws acknowledge and respect both these principles.

There are three main Parties in an Extradition:

1) the country which has made the extradition request (the ‘requesting’ State);
2) the country which has been asked to extradite a person on their territory (the ‘requested’ State); and
3) the person whose extradition is sought (the ‘subject’).

**Legal Basis of Extradition**

Extradition law is an amalgamation of international and domestic law with an obligation on States to extradite due to treaty obligations that work in harmonization with a State’s domestic extradition law. It involves a complex admixture of levels and forms of

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\textsuperscript{24} SS ‘Lotus Case’ (France v. Tukey), 1927 PCIJ (ser. A) No. 10.
\textsuperscript{25} Andrea Bianchi, Yasmin Naqvi, *Enforcing International Law Norms Against Terrorism* 353(Hart Publishing, USA, 2004).
regulation, i.e., incorporating different levels of international and domestic laws. Here, International Law refers to Public International Law. The right to demand extradition and the duty to surrender an alleged offender to the demanding State is created by a treaty. Thus the law of extradition is a dual law operating both in national and International Law. The matter of extradition is decided by the national Courts but on the basis of international commitments as well as the rules of International Law concerning the subject.

It is usually accepted that countries have no general obligation to surrender a person who is within their territory. Because of this, many countries have signed bilateral (between two countries) and multilateral (between several countries) extradition treaties agreeing to transfer ‘fugitive offenders’ in certain circumstances. States also use non-binding schemes and agreements for the same purpose. Extradition may still be possible even where there is no treaty or agreement between two countries, but this will depend on the law of the requested State.

Historically, Extradition dates back as far as the ancient days of the Egyptian, Greek, and Roman empires, and often would concern political refugees. The modern system of extradition evolved in Europe from the 18th century onwards. With the rise of National States and the centrality of the concept of sovereignty, more than 100 extradition

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27 Public International Law concerns the structure and conduct of sovereign States; analogous entities, such as the Holy See; and intergovernmental organizations. To a lesser degree, International Law also may affect multinational corporations and individuals, an impact increasingly evolving beyond domestic legal interpretation and enforcement. Public International Law has increased in use and importance vastly over the twentieth century, due to the increase in global trade, environmental deterioration on a worldwide scale, awareness of human rights violations, rapid and vast increases in international transportation and a boom in global communications. The field of study combines two main branches: the Law of Nations (jus gentium) and international agreements and Conventions (jus intergentes), which have different foundations and should not be confused. Public International Law should not be confused with "private International Law", which is concerned with the resolution of conflict of laws. In its most general sense, International Law "consists of rules and principles of general application dealing with the conduct of States and of intergovernmental organisations and with their relations interse, as well as with some of their relations with persons, whether natural or juridical. Kent McKeever, “Researching Public International Law” Arthur W. Dimond Law Library, Columbia University, available at: http://library.law.columbia.edu/guides/Researching_Public_International_Law (visited on June 13, 2013).
treaties were signed during the 18\textsuperscript{th} and the early part of the 19\textsuperscript{th} centuries.\textsuperscript{29} The development of bilateral treaties between nations has become the norm to regulate extradition. By present day standards, extradition between countries is not considered an obligation in the absence of a formal treaty.\textsuperscript{30} Rather, extradition is understood to be a matter of international comity – that is, a favour accorded by one nation to another, and the conditions under which an extradition request may be granted, or refused, are determined by the law\textsuperscript{31} of the requested State. Many States have enacted specific extradition laws and/or provisions on extradition in legislation on criminal procedure or Penal codes\textsuperscript{32}, which enable States to extradite a fugitive to another State if requested. A legal obligation to extradite exists only where States have entered into bilateral or multilateral extradition agreements, or if they have become Parties to international instruments which impose a duty to extradite with respect to specific offences.\textsuperscript{33} A multitude of bilateral and multilateral extradition treaties exists, but there is no country that has such treaties with all other countries in the world.\textsuperscript{34}

Extradition treaties typically spell out the conditions under which an 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


\textsuperscript{30} Id.

\textsuperscript{31} E.g. Argentina Extradition Law,1885; France Extradition Law,1935; Canada Extradition Act,1952; Indian Extradition Act,1962; South Africa Extradition Act,1962; Australia Extradition (Foreign States) Act, 1966; British Extradition Act 2003.


\textsuperscript{34} Supra note 30.
that the person to be extradited has been convicted under conditions of due process of law.\textsuperscript{35}

The legal basis of extradition has been stipulated by Supreme Court of United States:

“International law does not recognize right of extradition apart from a 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 has fled, and it has been said that it is under a moral duty to do so… the legal duty to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.”\textsuperscript{36}

However there is no rule of International Law which prevents States from extraditing in the absence of a treaty.\textsuperscript{37} In many States, national legislation provides for the possibility of extraditing without a pre-existing agreement. Sometimes, this is subject to the explicit condition of reciprocity.\textsuperscript{38} A number of Common Law countries have recently amended their extradition laws to allow for the possibility of extradition without pre-existing extradition relations with the requesting State.\textsuperscript{39}

In addition to bilateral treaties, an increasing number of multilateral extradition agreements and Conventions establish a mutual duty for State Parties to extradite under the conditions set out by the respective instrument. States have found it easier to reconcile their differences at a regional or sub-regional level. For instances the Inter American

\textsuperscript{35} Id.
\textsuperscript{36} Factor v. Laubenheimer, 290 U S 276 (1933).
\textsuperscript{37} Supra note 3.
\textsuperscript{38} This is the case, for example, in Austria (Section 3 of the Law on Extradition and Mutual Legal Assistance of 1979); Belgium (Section 1 of the Law on Extradition of March 15, 1874); former Yugoslav Republic of Macedonia (Article 29(3) of the Constitution); Germany (Section 5 of the Law on International Mutual Assistance in Criminal Matters of December 23, 1982); Moldova (Article 17 of the Constitution, Section 23(2) of the Aliens Law and Section 13(2) of the Criminal Code); Peru (Section 3 of the Law on Extradition No. 24.710 of 1987).
\textsuperscript{39} For example, the United Kingdom (Extradition Act, 1989) or Canada (Extradition Act, 1999). Australia had introduced a change permitting extradition on an \textit{ad hoc} basis already in 1966 (Extradition (Foreign States) Act, 1966).
Convention, 1933,\textsuperscript{40} Arab League Extradition Agreement, 1952,\textsuperscript{41} the European Convention on Extradition, 1957,\textsuperscript{42} the O.C.A.M. Convention, 1961,\textsuperscript{43} the Benelux Extradition Convention, 1962,\textsuperscript{44} the Nordic States Schemes on Extradition, 1962,\textsuperscript{45} the London Scheme on Rendition of Fugitive Offenders within Commonwealth, 1966.\textsuperscript{46} These regional Conventions contribute to the trend of creating general rules of extradition which can finally lead to the universal codification of the law of extradition by the consistent efforts of international community. A universal extradition Convention regarded as the ideal, is yet an unrealizable form of international arrangement for extradition. In 1990, the United Nations General Assembly adopted a Model Treaty on Extradition\textsuperscript{47}, which, together with a Model Treaty on Mutual Assistance in Criminal Matters, 1990,\textsuperscript{48} its Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, 2004 along with the Model Law on Extradition, 2004 is intended to be “used as a basis for international co-operation and national action against organized crime

\textsuperscript{40} Also known as \textit{Montevideo Convention on Extradition}, Signed on December 26, 1933 at Montevideo (Antigua and Barbuda, Argentina, Bolivia, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama and St. Lucia, Uruguay and Venezuela are Parties to the Convention).

\textsuperscript{41} \textit{Pact of the League of Arab States} (UN 1950,70:237, Registered March 22,1945) signed in Cairo March 22, 1945. The Convention was approved by the Council of the League of Arab States on September 14,1952 (Egypt, Iraq, Jordan, Lebanon, Saudi Arabia and Syria were Parties to the Convention. Only Egypt, Jordan, and Saudi Arabia ratified the treaty. This treaty has been operative since 8/23/1954).

\textsuperscript{42} 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).

\textsuperscript{43} Twelve former French territories in Equatorial and West Africa formed the Organization Commune Africaine et Malgache (OCAM) in 1961 and signed a Convention on Judicial Cooperation at Tananarive on September 12, 1961(Cameroun, Central African Republic, Chad, Congo(Brazzaville), Dahomey Gabon, Ivory Coast, Malagasy Republic, Mauritania, Niger, Senegal, Upper Volta are Parties to the Convention).

\textsuperscript{44} Signed on June 27, 1962 in Brussels and became effective on May15, 1968 (UN1968, 616:79, 8893) (Registered on January 2, 1968) (Belgium, Luxembourg and the Netherlands are Parties to the Convention).

\textsuperscript{45} Denmark, Finland, Iceland, Norway, and Sweden are parties to this extradition treaty of 1962.

\textsuperscript{46} The “Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth” was conceived at a meeting of the Commonwealth Law Ministers in London in 1966. This Scheme was based on the Fugitive Offenders Act of 1881 which provided for the surrender of fugitive criminals between British possessions.


and terrorist crime”.

It is not binding, however, and as yet there is no universal general extradition Convention. Despite a shared interest in effective extradition relations, States, approaches to extradition differ widely in a number of areas.

On the other hand there are various international instruments that impose an obligation to extradite or prosecute, that is, if surrender is refused, the requested State must prosecute the wanted person in its own Courts. This is known as the principle of aut dedere aut judicare, which is also incorporated under a number of anti-terrorism instruments and Conventions dealing with other types of international crimes. In addition, customary International Law also serves as a base for extradition in the lack of previous treaty arrangements, if extradition is sought for crimes against humanity or war crimes,

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51 Crimes against humanity, has been defined by the Rome Statute of the International Criminal Court 1998 in its Explanatory Memorandum, “Crimes that are particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or a degradation of human beings”. For the purpose of this Statute, Article 7 states: “Crime Against Humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of International Law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under International Law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

although there is no general obligation to extradite under such circumstances. Most States are bound by a variety of bilateral and multilateral extradition agreements as well as extradition provisions in international instruments.

At the same time, international human rights law\(^{53}\), refugee law\(^{54}\) and customary International Law prohibit extradition in certain circumstances for example, non-extradition of a person committing a crime of political nature, or military nature or if a person would be subjected to torture or cruel, inhuman or degrading treatment or punishment on extradition, the requested State can refuse to extradite. In practice, this may result in a conflict of obligations for the requested State, which needs to be resolved in accordance with applicable principles and standards of International Law.\(^{55}\)

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\(^{55}\) Supra note 34 at para.35.
Common Themes

One of the most important aspects of an extradition treaty is the determination of those offences for which extradition is possible. The content of an extradition treaty / arrangement varies. However, there are some common clauses that can be found in many extradition treaties and arrangements.

Dual criminality

There are two main types of extradition arrangements; those that rely on lists provided in the treaties and those that follow the principle of ‘dual criminality’. The former specify a list of crimes for which extradition is possible; the latter usually specifies that extradition will be possible if the act is an offence in both the requesting and requested State and punishable by a minimum period of imprisonment (often one year) in both the countries. Dual criminality agreements are more flexible than list agreements, and are seen in most recent extradition treaties.

The reasoning behind the provision is that the requested State should be able to refuse to extradite if it does not view the conduct of the subject as a criminal act. There are two approaches that deal with this theory: subjective and objective. The modern approach i.e. *in abstracto* (subjective) over weights the traditional approach *in concerto* (objective) which pertains that the authorities should look at totality of the conduct and decide whether any combination of those acts and/or omission would constitute an offence in force in the requested State rather than emphasizing on terminology of the offence. The Judicial Precedent for this opinion could be found first in *Kelly Griffin case*.\(^\text{56}\)

Double jeopardy

Many treaties contain a provision that deals with the issue of ‘double jeopardy’ (also known as *ne bis in idem*). This principle essentially means that a person should not

\(^{56}\text{241US6 (1916).}\)
tried or punished twice for the same offence.\textsuperscript{57} This means that extradition for the purpose of prosecution can or should be refused if the subject has already been tried or punished for the offence (whether in the requesting State, requested State or a third country). The rule applies whether or not the subject was found guilty or acquitted in the earlier trial.

**Political offences**

The political offences exception holds that a person cannot be extradited for an offence of a political character. The term ‘political offence’ is not clearly defined under International Law; whether an offence is of a political nature is therefore likely to depend on the domestic law and Courts of the requested State. Although the Courts in Britain have tried to lay down the tests as to how to determine that the offence is a political offence in *Re Castioni Case* 1891\textsuperscript{58} and *Re-Menuier* case.\textsuperscript{59} But the tests have not been universally accepted. It is generally accepted that acts of terrorism do not fall under the exception, even if they were committed with a political motive.

In practice this exception is now rarely used; even if the issue of political asylum may also arise. Similarly, extradition instruments often provide that a person should not be extradited if he is facing prosecution on account of his race, religion, nationality, gender, sexual orientation or political opinions, or if he may be prejudiced at trial for any of these reasons. Again, such grounds may also raise the issue of political asylum.

**Speciality**

The principle of speciality provides that once the subject is transferred to the requesting State, he cannot be tried for an offence different from (or in addition to) the one for which he was extradited, without first obtaining the permission of the requested State.

\textsuperscript{57} *Supra* note 29.
\textsuperscript{58} (1891)1QB149.
\textsuperscript{59} (1894)2 QB 415.
The principle has also been invoked in many cases, for example *United States v. Rausher*\(^{60}\), *Tarasov’s case*,\(^{61}\) *Daya Singh Lahoria v. Union of India*.\(^{62}\) After his surrender, the subject can expressly waive the rule of speciality and be tried for further offences that may attract a punishment of imprisonment. In addition, the requested State can agree to the subject being tried for other offences.

**Prima facie evidence**

The standard of proof necessary for an extradition request to be approved will depend on the relevant extradition treaty / agreement and the domestic law of the requested State. There is no universal standard on the amount of evidence required to grant an extradition request, the sufficiency of evidence required to institute criminal proceedings is governed by national law or is addressed in the various bilateral and multilateral treaties.

**Death Penalty**

If the extraditable offence is punishable by death penalty, most States that prohibit capital punishment refuse to extradite unless they are assured that the offender will not be sentenced to death or, if imposed, death penalty will not be carried out. Thus if the extraditable offence potentially attracts the death penalty, most countries that prohibit capital punishment will refuse to extradite unless they receive assurances that the subject will not be sentenced to death or, if imposed, the death penalty will not be carried out. Such assurances are specifically required in a number of extradition treaties and domestic legislations, and also follow from some State’s obligations under separate human rights treaties. An example of the latter is the Sixth Protocol to the European Convention on Human Rights (ECHR, 1983), which abolishes the death penalty in all States that have ratified the treaty; those States (such as United Kingdom) cannot extradite subjects to a country where they may be sentenced to death or executed. Similarly, States that have

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\(^{60}\) 119 U.S.407 (1886).


ratified the European Convention on Human Rights, 1950 (but not the Sixth Protocol) would also need to take account of case-law from the European Court of Human Rights which, amongst other things, confirms that it may not be possible to extradite subjects to a country where there is risk that they will be subject to death row conditions\textsuperscript{63} that are inhuman and degrading, or sentenced to death after an unfair hearing\textsuperscript{64}. Subsequently, no Member State of the Council of Europe has extradited a subject to a country where he may be executed – without first obtaining assurances – since 1989.\textsuperscript{65}

**Human Right’s Bar to Extradition**

International human rights law provides for an absolute bar to extradition where it would expose the person concerned to a risk of torture, cruel, inhuman or degrading treatment or punishment. The prohibition of torture, cruel, inhuman or degrading treatment is a peremptory norm of International Law, or \textit{jus cogens}. This means, it is binding on all States, including those which have not yet become Parties to relevant international Conventions on human rights.\textsuperscript{66} It is also non-derogable; that is, it applies in all circumstances, including during armed conflict and in times of national emergency, even where national security or the survival of a State or regime are threatened, and regardless of the conduct of the person concerned.

\textsuperscript{63} Death row conditions in many countries fall far short of international norms prohibiting cruel, inhuman or degrading treatment or punishment. Conditions range widely, from the sterile, solitary confinement that pervades death row in many States in the United States, to the unsanitary and overcrowded prisons in some parts of the Caribbean and Sub-Saharan Africa. Solitary confinement leads many prisoners to develop debilitating mental illnesses, and overcrowding, combined with poor nutrition and hygiene, threatens their health and in some cases can lead to premature death. “Death Penalty World Wide”, available at: http://www.deathpenaltyworldwide.org/death-row-conditions.cfm (visited on June 10, 2013).

\textsuperscript{64} \textit{Ocalan v. Turkey}, 37 European Human Rights Reports (EHRR) 10 (2003).


Extradition and Asylum

Extradition and asylum overlap and intersect in various ways, if the person whose extradition is sought is a refugee or asylum-seeker, or if an asylum application is filed after the wanted person learns of a request for his or her extradition. International refugee protection and criminal law enforcement are not mutually exclusive. International refugee law does not as such stand in the way of criminal prosecution or the enforcement of a sentence, nor does it generally exempt refugees and asylum-seekers from extradition. Yet in determining whether a refugee or asylum-seeker may be lawfully extradited, the requested State is bound to take into consideration the legal safeguards in place for those who flee persecution rather than prosecution, and who are, therefore, in need of international refugee protection. In particular, this means that any decision on an extradition request concerning a refugee or asylum-seeker must be in compliance with the Principle of non-refoulement, as guaranteed under Article 33 of the 1951 Convention Relating to the Status of Refugees and customary International Law.67

Extradition: Procedural Aspects

Extradition Conventions and agreements do not usually contain provisions on procedure. The law of the requested State determines the stages of the procedure as well as the competent authorities for reaching a decision on whether or not to grant extradition. While there are certain similarities and common features, extradition procedures may vary considerably from one country to another. Procedural safeguards and guarantees for the person whose extradition is requested also differ, and in order to assess the position of the individual in the extradition process, it is necessary to examine in detail the legal provisions and their implementation in any given country.

In most countries, both the executive and the judiciary of the requested State are involved in extradition proceedings. A decision concerning a formal extradition request is usually reached in three stages:

(i) During the initial, administrative phase, the minister responsible for receiving the extradition request examines it and determines whether it is admissible, according to the criteria applicable in the requested State.

(ii) If the minister decides to proceed, the extradition request is put before the judicial authority responsible for determining whether it satisfies the conditions set forth by the relevant national legislation and/or applicable extradition treaty. The judicial authority conducts the appropriate inquiries.

(iii) The judicial stage is normally followed by a final executive decision. The relevant minister determines whether or not to grant the request. In most countries, a finding by the competent judicial authority that the legal requirements for extradition are not met is binding on the executive; in such cases, the minister must refuse to extradite. Where extradition is authorized by the Courts, the minister usually has discretion either to grant the surrender of the fugitive, possibly subject to conditions, or to refuse extradition. The law may provide for appeal or review of the final executive decision, although in a number of countries, this is not the case.\(^68\)

In a number of countries, however, the extradition process differs – either in certain details or entirely – from this procedure. There is wide variation in the extradition

\(^68\) *Supra* note 34 at para.157.
proceeding which in turn bring difficulties to the authorities that have had to face challenges in obtaining custody of criminals who had run away from the country.

Regarding the roles of the Judiciary and Executive in extradition proceedings, treaties are generally silent as to the designation of organs competent to handle extradition proceedings. The scope of the judiciary in the extradition proceedings largely depend upon the national laws of the requested State, because this is, to a large extent, a matter that comes within the domestic jurisdiction of the individual State and International Law does not control that sphere of State activity. But presently in the international interest in advancing the Rule of Law and the protection of fundamental human rights it seems to be beyond question that constitutionally, impartial organs are better fitted to decide the questions affecting individual’s liberty than the organs that are closely geared to governmental policy.

**Objectives of the Study**

All laws and all legal practices rest upon sets of ideas. In general, those ideas, which are thought to aid the betterment of social order, are referred to as contributing to "justice." Law of Extradition which is one such idea is being taken for the study in the present thesis. An understanding of the framework of ideas that support the notion of international extradition may shed some light on the changing legal context in which it exists and how extradition itself has altered to reflect and adapt to those changes.

The lack of uniformity on the principles that govern the extradition of fugitives and criminals can be looked upon as a major problem that have led the authorities in obtaining the extradition of criminals who had fled away from the country after committing the crime. One such glaring example is of Dawood Ibrahim, who is the head of the organized crime syndicate D-Company in Mumbai. He is currently on the wanted list of Interpol for organized crime and counterfeiting. He was No. 3 on the Forbes' World's Top 10 most
dreaded criminals list of 2011. Dawood Ibrahim is accused of heading a vast and sprawling illegal empire. After the 1993 Bombay bombings, which Ibrahim allegedly organized and financed, he became India's most wanted man. Pakistan denies any knowledge of his existence, Indian intelligence agencies, such as Research and Analysis Wing (RAW), believe that one of his addresses includes White House, Near Saudi Mosque, Clifton, Karachi, Pakistan as per Interpol, and is provided protection, by Pakistani intelligence agency, the Inter-Services Intelligence (ISI). The issue of extradition of Dawood Ibrahim is one of the major hurdles in the frosty (bitter) relations between India and Pakistan. There is no extradition treaty between India and Pakistan. The absence of such a treaty certainly creates legal difficulties. Therefore, this becomes an area where political considerations play a prominent role, unless there is an applicable bilateral extradition treaty. There have been 11 futile attempts made with Pakistan to conclude an extradition treaty. There has been a demand for the extradition of 20 “most wanted militants” from Pakistani including Lashkar-e-Toiba (LeT) chief Hafiz Sayeed. No satisfactory arrangements regarding extradition of fugitive offenders from Pakistan to India and vice – versa have been entered into with Pakistan for the present.

Though extradition is exclusively a judicial matter by nature, political intervention is embedded in the process. The Courts usually establish the admissibility of the extradition request in legal terms but the final decision concerning the actual surrender is left up to the administrative organs. The presence of political interference in extradition matters has become particularly evident in the extradition requests for high profile criminals. These include such people as heads of terror organisations or leaders of organized crime groups. Under the external pressure, the Courts often create

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“unreasonable” pretexts for the refusal of extradition requests for such criminals. For capturing and prosecuting the key persons of organized crime groups and terror organisations, this negative political intervention makes international police cooperation efforts extremely frustrating.

Non extradition of political offenders is another barrier for international police cooperation that is applied by many States as a mandatory ground for refusal of extradition. Although some international Conventions\textsuperscript{71} do not define serious offences such as aircraft hijacking, hostage taking, bombing and other terrorist acts as political offences. But ultimately, it is still up to States to define the conduct upon which the extradition is based. There is no single way to determine whether the decision denying request is arbitrary.

**Research Issues**

The main purpose of this study is to emphasize the importance of workable extradition instruments to fight against the crime more successfully. For a comprehensive understanding of the significance of extradition the study provides information about the evaluation, the general principles pertaining to extradition, the procedure of extradition followed in Civil Law Countries and Commonwealth Countries along with special emphasis on position in India. The importance of extradition mechanism and persistent problems inherent in traditional extradition procedure has been taken in detail in the present study.

There is one primary research question “Do the extradition laws presently prevailing prove to be effective tool to combat against transnational criminality”.

In order to address this primary question, the following issues have been identified for analysis:

1. What are the General Principles that govern extradition?
2. Is there any uniformity in the laws pertaining to extradition?
3. What changes are required to be brought in the present extradition law so that it becomes an effective mechanism to fight against crime?
4. How is Extradition and Asylum related to each other?
5. What role does the Executive and Judiciary play in determining the question of Extradition?

Research Methodology

The methodology used in the research in analytical, critical and comparative. To address the research questions of concern in this descriptive study, a comprehensive literature review approach is being used to analyze the Law of Extradition, its development and the problems related to the present law. In order to completely cover research questions, a detailed literary review has been done as a method. In this study not only library resources but internet played significant role on gathering the most up-to-date and vital information as there are various on line journals, statues, United Nations documents and treaties pertaining to extradition.