II CHAPTER

SIGNIFICANCE AND LEGAL PARAMETERS OF THE CONCEPT OF EXTRADITION

2.1 INTRODUCTION

Extradition is an important legal mechanism the importance of which is growing day by day. From merely being a state practice it has emerged as a concept. In the process of its evolution as a useful legal institution extradition developed significant distinct characteristic features. In this chapter, the meaning, significance, its relationship with other related practices, its legal basis, principles, a general profile of its legal regime, related developments etc., are discussed.

2.2 MEANING AND DEFINITION OF EXTRADITION

The term extradition has its origin in the Latin word “extradere” which means forceful return of a person to his sovereign. Mr. Cherif Bassiouni defined extradition as a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought as an accused criminal or fugitive offender.

The modern word extradition is perhaps derived from the practice which was called “extra-tradition” because it was against the traditional hospitality offered to an alien by a state who had allegedly committed an offence and sought refuge or asylum to save himself from prosecution or punishment.

The Extradition is variously defined as:

“Legal surrender of a fugitive to the jurisdiction of another state, country or government for trial.”

Extradition as a “Process by which one state, at the request of another, returns a person for trial for a crime punishable by the laws of the requesting state and committed outside the state of refuge.”

“Extradition is the delivery on the part of one state to another of those whom it is desired to deal with for crimes of which have been accused or convicted and are justifiable in the courts of other States”.

“Extradition” means the delivering up of a person by one statute to another as provided by treaty, convention or national legislation.²

“Extradition” means the surrender of any person who is sought by the requesting state for criminal prosecution for an extraditable offense or for the imposition or enforcement of a sentence in respect of such an offence.³

“Extradition is 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 to be for the time being.”⁴

“The term ‘extradition’ denotes the process whereby under treaty or upon a basis of reciprocity one State surrenders to another State at it’s the laws of the requesting State, such requesting state being competent to try the alleged offender.”⁵

2.3 SIGNIFICANCE AND PURPOSE OF EXTRADITION

When informal relationships and sanctions prove insufficient to establish and maintain a desired social order, a government or a state may impose more formalized or stricter systems of social control. With institutional and legal machinery at their disposal, agents of the State can compel populations to conform to codes and can opt to punish or attempt to reform those who do not conform.

Authorities employ various mechanisms to regulate (encouraging or discouraging) certain behaviors in general. Governing or administering agencies may for example codify rules into laws, police citizens and visitors to ensure that they comply with those laws, and implement other policies and practices that legislators or administrators have

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2 Art 102 of Rome Statute of the International Criminal Court.
with the aim of discouraging or preventing crime. In addition, authorities provide remedies and sanctions, and collectively these constitute a criminal justice system. Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, or sanctioning those who violate laws with criminal penalties and rehabilitation efforts.

### 2.3.1 General importance of Criminal Justice:

Criminal law serves several purposes and benefits society in the following ways:

- **Maintaining Order**: Criminal law provides predictability, letting people know what to expect from others. Without criminal law, there would be chaos and uncertainty.

- **Resolving disputes**: The law makes it possible to resolve conflicts and disputes between quarreling citizens. It provides a peaceful, orderly way to handle grievances.

- **Protecting individuals and property**: Criminal law protects citizens from criminals who would inflict physical harm on others or take their worldly goods. Because of the importance of property in capitalist America, many criminal laws are intended to punish those who steal.

- **Providing for smooth functioning of society**: General orderliness of the society due to tackling of crimes through well functioned criminal justice allows the society to run itself smoothly.

### 2.3.2 Jurisdictional framework within which National Criminal Justice operates:

The criminal justice system consists of three main parts: (1) Legislative (create laws); (2) adjudication (courts); and (3) corrections (jails, prisons, probation and parole). In the criminal justice system, these distinct agencies operate together both under the rule of law and as the principal means of maintaining the rule of law within society.
International law recognizes five bases of criminal jurisdiction by a country.

a. Territoriality:- the state in whose territory the offence has been committed
b. Nationality:- accused being a national
c. Passive Personality:- Victim being the national
d. Protective Principle:- the national security interests of the state which has been affected by the offence in question
e. Universality;- the crime in question is crime against mankind

On any one of the above consideration a country can claim to exercise its jurisdiction over the concerned individual. However, these are only bases to exercise jurisdiction. To actually exercise its jurisdiction the person must be physically available to subject him to local law, adjudication and correction process. Where a person escapes to another country the sovereign barriers do not permit a country to stretch its jurisdictional authority. The thumb rule is that jurisdictional authority begins and ends within sovereign boundaries.

2.3.3 How Extradition does facilitate Criminal Justice Operations?

A criminal is extradited to the requesting state because of the following reasons;

➢ Extradition is process towards the suppression of crime. Normally a person cannot be prosecuted or punished in a state where he has fled away because of lack of jurisdiction or because of technical rules of criminal law. Criminals therefore are extradited so that crimes may not go unpunished.

➢ Extradition acts as a warning to the criminals that they cannot escape punishment by fleeing to another state. Extradition therefore has a deterring effect.

➢ Criminals are surrendered as it safeguards the interests of the territorial state. If a particular state adopts a policy of non extradition of criminals they would like to flee to that state only. That state therefore, would become a place for international criminals, who indeed would be dangerous for it, because they may again commit crime in that state if they are left free.
Extradition facilitates reciprocity. A state which is currently requested to extradite the criminal may at a later point of time have the similar need of having to request the same requesting state to extradite the wanted criminal who fled to the current requesting state.

Extradition exudes the spirit of goodwill. Comity is most sought after tool to maintain sound international relationship with other countries. The spirit of comity exhibited through the extradition of the fugitive criminal can gain many political, economic or other good will gestures from the requesting state.

Extradition is step towards the achievement of international cooperation in general required for solving international problems of a social character.

The state in which the crime has been committed is in a better position to try the offender the evidence required is better available only in that state.

Punishment of the criminal in the same country in which the crime is committed provides sense of gratification and security of the public of that country.

2.3.4 Increasing importance of Extradition in Contemporary Society:

Contemporary society with all its technological developments has become a play field to criminal activities. Criminals have assumed organized force. The spread of criminal activities assumed wider proportions and greater intensity. Consequently, many countries are experiencing devastating effects politically, economically as well as socially. Easier transportation and communication are aiding the criminals to easily flee from the jurisdictional clutches of victim states. Since the sovereign constraints stop the victim state to effectively exercise their jurisdiction extradition alone offers the legal avenue to overcome the jurisdictional hardship in contrast to illegal abductions. In the era of organized crimes and other serious crimes threatening the national and international well being, international cooperation through extradition alone can be an effective solution to such threat. Therefore, extradition has gained enhanced importance. The incremental importance can be witnessed in the accommodation of this legal avenue in many international conventions being developed to control the crimes.


2.4 DISTINCTION BETWEEN EXTRADITION AND OTHER RELATED TERMS:

2.4.1 Extradition and Asylum

Extradition and Asylum are mutually exclusive or asylum stops, as it were, where Extradition begins. Asylum is the protection which a State grants in its territory or in some of her place under control of certain of its organs to a person who comes to seek it. Extradition is the surrender or delivery of the fugitive criminal to the State on whose territory he is alleged to have committed a crime, by the State on whose territory the alleged criminal happens to be. Asylum confers right upon the State to bring the person concerned within its jurisdiction.

Asylum, the ultimate purpose is to accord protection to the refugee or person concerned and to bring him under the jurisdiction of the granting State. In case of extradition the fugitive criminal is in territory and under the jurisdiction of the territorial State and either under an extradition treaty (or arrangement) or otherwise, it surrenders or returns the fugitive criminal to the State where he is alleged to have committed the crime. Thus the fugitive criminal which is under the jurisdiction of the territorial State is transferred to the jurisdiction of the State where he is alleged to have committed the crime. Thus asylum and extradition are mutually exclusive. Once the State decides to extradite the fugitive criminal, the question of asylum does not at all arise, that is to say, asylum stops where extradition begins. On the other hand, once the State concerned decides to grant asylum to a person the question of his extradition at least for the time being does not at all arise. But after a State has granted asylum to a refugee or fugitive criminal it may subsequently decide to extradite him at the request of the State where he is alleged to have committed the crime or to which State he belongs.

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 and customary international law.

Conversely, findings in the extradition process may have a bearing on the eligibility for international refugee protection of an asylum-seeker, or the status of a refugee who has already been recognised. An extradition request concerning an asylum-seeker may trigger exclusion considerations under Article 1F of the 1951 Convention. Information which comes to light during the extradition process may also set in motion proceedings leading to the revocation of the status of a recognised refugee on the basis of Article 1F (a) or (c) of the 1951 Convention. Such information may also cast doubt on the correctness of the initial refugee recognition, which in turn may result in the cancellation of refugee status.

2.4.2 Extradition and Rendition:

Extradition involves a situation where one state seeks the return of a fugitive criminal from another state to face trial of or serve sentence. The surrender of a fugitive from one state to another is generally is referred to as rendition. A distinct form of rendition is extradition by which a state surrenders a person within its territorial jurisdiction to the requesting state via formal process typically established by the countries. Renditions could take place even irregularly and fugitives may simply be deported. The relative advantage of extradition process is persons subjected to extradition will have access to courts.

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6 Michael John Garcia, ‘Renditions; Constrains imposed by Laws in Torture’, (Sept, 2009) 8th CRS Report for Congress, p.4
2.4.3 Extradition and Abduction:

Issues of international law relating to extradition have proven controversial in cases where a state has abducted and removed an individual from the territory of another state without previously requesting permission, or following normal extradition procedures. Such abductions are usually in violation of the domestic law of the country in which they occur, as infringements of laws forbidding kidnapping. Many also regard abduction as violation of international law - in particular of a prohibition on arbitrary detention. A small number of countries have been reported to use kidnapping to circumvent the formal extradition process. E.g. abduction of Adolf Eichmann from Argentina by Israel in 1960.

2.4.4 Extradition and Expulsion / Deportation:

Deportation or expulsion and extradition are processes in which a person residing in one state is forceably removed and turned over to the judicial control of another state.

In the case of deportation, the state of residence will initiate the action, often for administrative reasons and not for criminal behaviour, and eject the person from their territory. The person is never a citizen of the state of residence. In other words, you can't deport your own citizen (unless you can somehow strip the person of his or her citizenship, which might be possible for someone with dual citizenship).

Expulsion/Deportation and extradition differ in the following respects.7

Extradition serves the interests of requesting state more than the extraditing state. Expulsion serves solely the interests of the expelling state. Extradition involves consensual cooperation between at least two states. But expulsion is a unilateral action, Extradition applies to criminal actions of the concerned individual. But expulsion or deportation can take place on many other grounds.

In Hans Muller of Nuremberg Vs Superintendent, Presidency Jail, Calcutta and others,8 the Supreme Court clarified the distinction between extradition and expulsion. The Supreme Court observed that the Foreigners Act confers the power to expel on

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8 A I R 1953 S C 367
Central Government which is absolute and unfettered. The law of extradition is quite different. Because of treaty obligations it confers right on certain countries to seek persons who have committed certain offences in their territories. But despite this Government of India is not bound to comply with the request and has an absolute and unfettered discretion to refuse. Finally Supreme Court held that Foreigners Act and Indian Extradition Act are distinct and neither impinges the other.

Certainly there has been a growing number of States that have been willing to use deportation or informal surrender rather than a formal extradition process to remove unwanted persons accused of international crimes from their territory. Canada has used denaturalisation and deportation of suspected war criminals for violations of the Citizenship Act and Immigration Act, rather than prosecuting them. The Legal Adviser to the US State Department, John Bellinger, commented recently that deportation is “what all countries do when they find someone in their country and they don’t want to prosecute them inside their countries.

The European Court of Human Rights has determined that a deportation carried out as a disguised extradition in order to circumvent the technicalities of extradition is contrary to Article 5 of the European Convention on Human Rights.  

2.4.5 Extradition and Mutual Legal Assistance

“Mutual legal assistance” and “extradition” are essentially a process of intergovernmental legal cooperation in the investigation, prosecution and punishment of criminal offenders. Accordingly, the basic concepts of mutual legal assistance and extradition are somewhat similar. Nevertheless, the main purpose of mutual legal assistance is different from extradition. Briefly, mutual legal assistance is the cooperation or assistance regarding investigation, prosecution and judicial proceedings in relation to crimes; for example, taking evidence or statements from persons, executing searches and seizures, providing information, evidentiary items, while extradition is a formal process by which a person is surrendered by one state to another.

9 Ibid 374
As regard to mutual legal assistance, there are three bases for it, namely, an international treaty and international administrative agreements. The first two bases are the same as for those in extradition. The third basis is found in an international agreement with Interpol which is taken by police agencies of participating countries.

The primary difference between mutual legal assistance and extradition is extradition involves the “body” of an offender and, consequently, extradition needs more serious consideration and international administrative agreements. The first two bases are the same as for those in extradition. The third basis is found in an international agreement with Interpol which is taken by police agencies of participating countries. Urgent action since the fundamental human rights should be taken care of.\textsuperscript{11} As a result, there are some differences at the practical level between these two processes.

In general, we could say that the objective of assurance of reciprocity, dual criminality and the scope of offences are not fundamentally different in these two forms of cooperation, and most countries use the same concepts in their domestic legislation for both purposes. Generally, the assurance of reciprocity in mutual legal assistance and extradition procedures depends on many factors, for example; the domestic legislature of both countries, dual criminality, previous practices, policies and politics. It seems that this requirement is more strictly observed in extradition, while the assurance of reciprocity in mutual legal assistance seems much more flexible.

As for dual criminality requirement 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 now rendering mutual legal assistance even without the requirement of dual criminality.

2.5 IS THERE A LEGAL DUTY TO EXTRADITE?

Grotius, the father of modern international law took the stand that a state of a refuge has a duty to either punish the offender or surrender him to the state seeking his return\(^\text{12}\) \((\text{aut dedere aut judicare})\). The legal duty according to him is based on natural law. Vattel also had similar view. He regarded extradition as a clear legal duty imposed upon states by international law in the case of serious crimes. However, in practice this practice is not followed by the states and therefore it could not become a rule of international law. In modern time normally the fugitive criminal is not surrendered in the absence of extradition treaties. Of course it goes without saying that going by the basic concept of sovereignty a country enjoys freedom to surrender the fugitive to the requesting state even when there is no extradition treaty with it.

The Supreme Court of USA clearly stated in \textit{Factor Vs Labubenheimer}.

“International law recognizes no right to extradition apart from treaty. While Government if agreeable to its own constitution and laws voluntarily exercise the power to surrender a fugitive from justice to the country from where 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.”\(^\text{13}\)

Since the 18th Century, extradition evolved from being considered as a matter of state practice, and entirely within the discretion of sovereign rulers, into a concept of law.

2.6 BASIC CONDITIONS FOR EXTRADITION

1. Commission of an offence
2. Jurisdictional and legal basis of requesting state to request for extradition
3. Decision of requested state to extradite or not to extradite

2.6.1 Commission of Crime (Extraditable Crime):

Extradition may only be granted if the conduct imputed to the individual concerned constitutes an extraditable offence.

\(^{13}\) 290 US (1933) p.287
In general the offence for which extradition is requested must be enumerated among the list of extraditable offences or established according to the minimum imprisonment rule. In the absence of a treaty, the extradition may be based on the principle of reciprocity and the offences must be mutually recognized as extraditable.

Earlier bilateral extradition treaties and national extradition laws usually contained lists of crimes considered to be extraditable offences. These regularly included crimes such as murder, manslaughter, rape, robbery, arson, bribery or fraud. However, as the precise definition of crimes may vary from one State to another, the practice of enumerating extraditable acts in lists has often led to complications in extradition relations. Moreover, many of the older extradition treaties have become outdated, as their lists of extraditable offences no longer correspond to current needs. To address such difficulties, the enumerative method of defining extraditable offences has increasingly been abandoned in favour of an eliminative approach.

The listing system or enumerative method by which the offences are named and defined, creates undue limitation to the scope of application of extradition, and makes the system inflexible. On the other hand, the minimum imprisonment system or eliminative system, which is indicative rather than limitative, specifies extraditable offences which under the laws of both states are punishable by an agreed degree of severity, usually a minimum imprisonment. UM Models adopted minimum imprisonment approach.

The notion of what constitutes an extraditable offence has changed over time. Until the mid-18th century, it was common practice to extradite political, military or religious offenders rather than those accused of ordinary crimes. The late 18th and early 19th century saw a complete reversal: under the influence of evolving ideas of political liberalism, and as a consequence of changes in society and ways of life, which created an increased need for international cooperation in fighting ordinary crime, it now became the general rule for States to extradite common criminals, and to refuse the surrender of persons whom the requested State considered to be political offenders. The “political offence exemption”, which permits the requested State to refuse to surrender a fugitive if it considers that the offence for which extradition is sought is of a political nature, has
since been included in numerous bilateral extradition agreements and national extradition laws, although its application has been controversial.

Other acts traditionally deemed not to be extraditable are military and fiscal offences. The former are acts which are offences solely under military law, but not also under ordinary criminal law, such as, for example, desertion and insubordination. Military offences continue to be regarded as non-extraditable.14 By contrast, more recent extradition treaties usually permit the surrender of persons accused or convicted of fiscal offences, that is, offences against laws relating to taxation, customs duties, foreign exchange control or other revenue matters.15 This development is linked to the increased need to fight transnational crime, and in particular, money laundering and the infiltration of criminal proceeds into national economies.

Acts which constitute crimes under international law are also extraditable offences. This applies not only to States parties to the international treaties which establish a duty to extradite. As noted above, the prohibition of war crimes and crimes against humanity forms part of *jus cogens* and of the obligations owed by each State to the international community *erga omnes*. As a consequence, every State is entitled to assume jurisdiction over, and to extradite, the perpetrators of such crimes. This also applies to acts of torture.

### 2.6.2 Jurisdictional and Legal basis of Requesting State to request for Extradition

The requesting state must obviously be having a basis to claim its jurisdictional authority over a criminal. As already pointed out, the principles of territoriality, nationality of offender or victim, the effects of crime provide the jurisdictional basis for a country to claim to try and punish the criminal in question. Since the offender is present in the territory of another country, the state which has got the jurisdiction has to have further legal base on which it can legitimately get back the criminal. Treaties, bilateral,

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14 Art 4 of the European Convention on Extradition 1957; Art 7 of the ECOWAS Convention 1984; Art 3(c) of the UN Model Treaty on Extradition, 1990.
15 Art 2 of the Second Additional Protocol to the European Convention on Extradition 1978; Art 9 of the ECOWAS Convention 1984; or Art 2(4)(a) of the London Scheme for Extradition (1966 and 2002), respectively, which leave it to the discretion of the requested State to provide for extradition for fiscal offences. See also Article 2(3) of the UN Model Treaty on Extradition and commentary thereto.
regional or multilateral treaties constitute the legal basis for the requesting state to seek thereof the extradition of the fugitive criminal by the requested state. In the absence of such treaties also the requesting state can make a request for the surrender of the fugitive criminal by the requested state which may or may not be conceded by the other.

### 2.6.3 Requesting State - Extradition request and supporting documentation – questions of evidence.

#### 2.6.3.1 Extradition request:

As a prerequisite for extradition proceedings to be initiated, the State seeking the extradition of a fugitive from another State must present a request to the authorities of the latter. This is usually done by way of a formal request for the arrest and surrender of the person concerned, transmitted through diplomatic channels.\(^{16}\) Under some extradition agreements and conventions which provide for simplified procedures, States may also address extradition requests directly to the competent authorities of the requested State.\(^{17}\)

Applicable conventions and treaties regularly provide that extradition will proceed pursuant to the laws of the requested State. While there is little variation with regard to the type of information which the requesting State must submit, the applicable rules and procedures as well as evidentiary standards may differ substantially between jurisdictions.

In general, however, the request must identify the person whose extradition is sought and specify why his or her surrender is wanted. Extradition treaties and conventions\(^{18}\), as well as bilateral agreements and national extradition laws, regularly require the requesting State to submit:

- the arrest warrant (either in the original or an authenticated copy)

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• the text of the relevant laws (or a description of the law applying to the conduct imputed to the person whose extradition is sought, particularly in the case of common law offences)

• information which permits the identification of the fugitive

• a description of the allegations against the fugitive; or in the case of a person already convicted, the judgment

The above-listed elements are usually deemed sufficient to support a positive decision on an extradition request in civil law countries, where the requesting State is not normally required to provide any evidence to support the case against the fugitive, although the requested State is typically entitled to seek further information if it considers it necessary. In some civil law countries, extradition legislation does require the requesting State to submit evidence in support of the request.

By contrast, common law countries have traditionally required the requesting State to submit, in addition to the arrest warrant, evidence which must amount to a prima facie case against the person whose extradition is being sought. In addition, under the rules of evidence in force in many common law countries, only evidence presented in a certain format – for example, sworn affidavits by direct witnesses – is admissible, while other types of evidence, most notably, hearsay information, is excluded. By contrast, common law countries have traditionally required the requesting State to submit, in


20 This is the case, for example, in the former Yugoslav Republic of Macedonia, Germany, Norway or Slovenia. Under s. 416 of the Criminal Procedure Code (2003) of Bosnia and Herzegovina, the requesting State must submit, in addition to information permitting to identify the wanted person, an indictment or verdict or decision on detention or any other act which is equivalent to such a decision. Denmark has made a reservation to Article 12 of the European Convention on Extradition 1957, according to which, where indicated by special circumstances, the Danish authorities may require the requesting country to produce evidence establishing a sufficient presumption of guilt with respect to the person concerned. Under s. 3(4) of the Extradition Act, extradition for an offence cannot take place if, because of special circumstances, it must be assumed that the criminal charges for which it is requested are not supported by sufficient evidence. In December 2002, Denmark applied this provision to refuse the surrender of Chechen envoy Akhmed Zakayev, whose extradition was sought by Russia with a view to prosecution for a number of offences, including terrorism, hostage-taking and murder. An unofficial translation of the decision by the Danish Ministry of Justice is available at http://www.jm.dk/wimpdoc.asp? page=document&objno=65884 visited on 20.06.2012.

addition to the arrest warrant, evidence which must amount to a prima facie case against the person whose extradition is being sought. In addition, under the rules of evidence in force in many common law countries, only evidence presented in a certain format – for example, sworn affidavits by direct witnesses – is admissible, while other types of evidence, most notably, hearsay information, is excluded.22 Those civil and evidentiary requirements assimilated to those which apply to criminal trials are deemed counterproductive. On the other hand, evidence is needed for the requested State to assess whether extradition would result in a violation of the rights of the individual, and consequently be in breach of its obligations under international human rights and refugee law. As the example of an Australian case shows, evidence is crucial not only for the courts but also for the minister responsible for making the determination at the final executive stage of the process to assess the full circumstances of the case and decide whether a bar to extradition applies.23

2.6.4 Decision of Requested State to extradite or not to extradite

Since the fugitive criminal is present in the requested state the final decision over the extradition falls within the sovereign competence of the requested state. Based upon its treaty obligations, local law and consideration of comity and reciprocity the requested state arrives at a decision. Where there is a treaty creating an obligation to extradite and if it does not comply it as per the treaty framework the requested state incurs state responsibility and not otherwise. The decision would also depend upon the legal framework of its local law pertaining to extradition. The internal decision over extradition requests might be a matter of pure administrative discretion or could be completely judicial or a mix of administrative as well as judicial. It varies from country to country. The decision could even be subject to any regional arrangements.

Individual Rights; Of late, the decisions of the requested countries relating to extradition of fugitive criminals are taking into consideration the factors of possible violations of their human rights. The contemporary thrust on human rights added this new

22 Ibid.
23 This is the case of an Australian national and his wife, whose extradition was requested by the Philippines under its 1988 bilateral extradition treaty with Australia, which does not require any evidence (on extradition treaties which apply the “no evidence”).
factor. So, allegiance to human rights treaties also have a role to play in the decision of requested state regarding the request for extradition of wanted criminal.

2.6.4.1 Requested State:

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. The following sections present an overview of extradition procedures and point out some issues which are particularly relevant from the point of view of the individual concerned.

2.6.4.2 Provisional Arrest Warrant

The requesting State may also approach the judicial authorities in the requested State and seek a “provisional arrest warrant”\(^{24}\), which needs to be followed by the presentation of a formal extradition request within the period of time prescribed under the law of the requested State and/or set by the judge authorising the arrest of the wanted person.\(^{25}\) National laws typically require the requesting State to show that the arrest is a matter of urgency, and it must be evident from the request for a provisional arrest that a formal extradition request will be presented. Once the requesting State has submitted the request, procedures apply.

\(^{24}\)In principle, this possibility applies only to cases where the arrest of a fugitive is a matter of urgency, for example, Article 16(1) of the European Convention on Extradition 1957 or Article 22(1) of the ECOWAS Convention 1984

\(^{25}\)Art 16(4) of the European Convention on Extradition 1957 provides that the extradition request must be presented within 18 days, and in any event not later than 40 days from the date of the provisional arrest. Under Article 20(4) of the ECOWAS Convention 1984, the requesting State has 20 days to submit the formal extradition request.
The arrest of alleged fugitives may be sought through international channels of police co-operation. Thus, the Member States of Interpol may request the arrest of international fugitives with a view to their extradition through “wanted (red) notices”, based on an arrest warrant or court order issued by a judicial authority in the requesting State.\(^{26}\)

Under the law of a number of countries, such “red notices” constitute a valid request for provisional arrest. Where this is not the case, the requesting State must issue a request for provisional arrest after it has been informed that the wanted person has been located. In either case, the “red notice” is not of itself an arrest warrant, but forms the basis on which the judicial authorities of another State decide whether or not to authorise the provisional arrest of the wanted person.

States Parties to the Schengen Convention (1990) may avail themselves of the Schengen Information System (SIS), established pursuant to Title IV of the Convention. Article 95(1) of the Schengen Convention provides that “data relating to persons wanted for arrest for extradition purposes shall be included at the request of the judicial authority of the requesting Contracting Party”. Under Article 95(2), the requesting State must check whether the arrest is authorised by the national law of the requested State(s). A report in the SIS for the purposes of extradition has the same effect as a request for provisional arrest.\(^{27}\)

2.7. **EXTRADITION PROCEDURES - AN OVERVIEW**

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. The following sections present an overview of extradition procedures and point out some issues which are particularly relevant from the point of view of the individual concerned.

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\(^{26}\) Art 16(3) of the European Convention on Extradition (1957) specifically provides that a request for provisional arrest may be made by the requesting State through Interpol. The London Scheme for Extradition (1966 and 2002) and the ECOWAS Convention 1994 contain similar provisions, as does the UN Model Treaty on Extradition, 1990.

\(^{27}\) Art 64 of the Schengen Convention (1990).
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. Usually, this stage of the proceedings consists of an assessment of formal requirements, but applicable legislation may also provide for an initial evaluation of the probability that extradition will be granted. If the request does not meet the relevant criteria, or if it is already apparent that a refusal ground applies, the competent minister may reject the request at this stage.

(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. This includes an assessment of any evidence presented by the requesting State in light of the evidentiary requirements in place. The extradition judge may also be required to examine whether there are any legal obstacles to extradition, including bars to extradition arising from the requested State’s obligations under international human rights and refugee law. There is usually a possibility to appeal against the decision by the judicial authority.

(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 authorised 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.

In the majority of countries, the extradition process follows procedures along the lines described above. This reflects the widely held view that, while extradition should be subject to judicial control, it is also a matter that ultimately is best decided by the executive of the requested country, as in many cases legal considerations only partly determine whether an extradition request will be granted or refused.

In a number of countries, however, the extradition process differs – either in certain details or entirely – from the process described above. In Switzerland, for example, the law provides for an entirely administrative extradition procedure, with the possibility of an appeal to the Bundesgericht only after the Federal Justice Office has issued its final decision.\(^{28}\) In Belgium, the judicial authorities provide an opinion (avis), but the Government is not bound by it.\(^{29}\) In the Netherlands, the courts take binding decisions on some matters, while in others they are only competent to issue non-binding opinions.

Elsewhere, the final decision to extradite is made by the courts. This is the case, for example, in Portugal.\(^{30}\) In Argentina and in Paraguay, extradition is also decided by the judicial authorities, although the Foreign Minister, who receives the extradition request, may reject it under certain circumstances – most notably if it concerns a refugee. In Bolivia, El Salvador and Venezuela, the respective Supreme Court is responsible for deciding on extradition requests. Some countries have not enacted any extradition legislation, and requests for the surrender of a fugitive are handled on the basis of applicable general principles of law as is the case, for example, in Uruguay.

The arrest of the person concerned is ordered by the judicial authorities of the requested State, either on the basis of a request for the provisional arrest of the wanted person submitted by the State seeking extradition, or following the initial administrative


\(^{29}\) In practice, an opinion against extradition is reportedly followed in the majority of cases.

decision to proceed with a formal extradition request. The law of the requested State determines which authority is entitled to order the arrest and subsequent detention, as well as the possibilities for judicial control of such measures.

2.8 CONVENTIONS OR TREATIES RELATING TO EXTRADITION

2.8.1 Bilateral Extradition Agreements

Bilateral agreements establishing a reciprocal duty to extradite have traditionally been the preferred legal instrument used by States in their extradition relations. A large number of such treaties were concluded during the late 19th and early 20th centuries, many of which are still in force. Bilateral treaties continue to provide the legal basis for extradition in many cases. In some countries, national law requires the existence of an extradition treaty as a precondition for permitting the surrender of a fugitive to another State. This has long been the case, in particular, for countries in the common law tradition, and still applies in the United States of America, but also in some civil law countries such as Brazil, the Netherlands or Slovenia.

So far as India is concerned India has extradition treaties with the following countries

India has bilateral extradition treaties in force with 28 countries, including 5 members of the ADB/OECD Initiative (Cook Islands; Hong Kong, China; Korea; Mongolia; and Nepal) and 14 Parties to the OECD Convention (Belgium; Bulgaria; Canada; France; Germany; Korea; Netherlands; Poland; South Africa; Spain; Switzerland; Turkey; United Kingdom; and United States). An extradition treaty has been signed but is not in force between India and the Philippines, a member of the Initiative. India has extradition relations under the London Scheme with 8 countries, including 6 members of the Initiative (Australia; Fiji; Papua New Guinea; Singapore; Sri Lanka; and Thailand) and 1 Party to the OECD Convention (Australia).

There is no rule of international law which prevents States from extraditing in the absence of a treaty. 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. 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.

India has extradition arrangements with the following countries

It also has extradition arrangements with Portugal and Sweden, two Parties to the OECD Convention. India also has 13 bilateral MLA treaties that are in force, including with 4 members of the Initiative (Kazakhstan; Korea; Mongolia; and Thailand) and 7 Parties to the OECD Convention (Canada; France; Korea; Switzerland; Turkey; United Kingdom; and United States). MLA (Mutual Legal Assistance) treaties have also been signed – but not yet in force – with Kyrgyzstan (a member of the Initiative) and South Africa, a Party to the OECD Convention. India has signed but has not ratified the UNCAC and the UNTOC. The Extradition Act and the CCP only set out the basic procedure for MLA and extradition.

2.8.2 Regional Extradition Agreements

States have found it easier to reconcile their differences at a regional or sub-regional level, although in some instances, including in closely integrated regions such as Europe, consensus was achieved through provisions for opt-out clauses or the possibility of making reservations to certain provisions in regional extradition instruments. The regional extradition instruments include the following:

- Montevideo Convention on Extradition (Inter-American) (1933)\textsuperscript{31}
- Convention on Extradition of the League of Arab States (1952)\textsuperscript{32}
- Inter-American Convention on Extradition (1981)
- Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases of the Commonwealth of Independent States (1993)\textsuperscript{33}
- Economic Community of West African States (ECOWAS) Convention on Extradition (1994)\textsuperscript{34}

\textsuperscript{31} Earlier extradition conventions in the Americas include the Montevideo Convention of 1989, a Convention concluded in Mexico in 1902, the Bolivarian Convention adopted in Caracas in 1911, and the Bustamante Code of 1928.
\textsuperscript{32} A supplementary agreement to this Convention was concluded in 1983.
\textsuperscript{33} Minsk Convention 1993.

In addition, States members of the Commonwealth are bound by the London Scheme for Extradition within the Commonwealth, formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders. Though not formally a treaty, this instrument, which was adopted in 1966 and last amended in November 2002, is binding for Commonwealth countries and contains guidelines to be implemented in their extradition laws and agreements.

Historically, extradition relations have been particularly close among European States, and comparatively large number of extradition instruments have been adopted in this region. They include the following: European Convention on Extradition (1957)\(^{35}\) and its additional Protocols of 1975\(^{36}\) and 1978\(^{37}\), adopted under the auspices of the Council of Europe.

- Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters (1962), concluded between Belgium, the Netherlands and Luxembourg
- Nordic States Scheme on extradition (1962), concluded between Denmark, Finland, Iceland, Norway and Sweden
- Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests (1989)
- Title III, Chapter 4 of the Convention implementing the 1985 Schengen Agreement (Schengen Convention, 1990)

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34 ECOWAS Convention 1994.
35 This Convention constitutes the principal legal basis for extradition practice in Europe. For ratification information.
36 This Protocol excludes war crimes and crimes against humanity from the category of political offences. It also defines cases where extradition can be refused on the ground that the offender has already been brought to trial.
37 This Protocol supplements and replaces certain provisions of the European Convention on Extradition concerning fiscal offences, judgments *in absentia*, amnesty etc.
• Convention Relating to Extradition between Member States of the European Union (1996)

These instruments have created a complex web of regulations governing extradition within the European Union as well as between Member States of the latter and third States. Since 2004, the extradition regime under the above-listed instruments is replaced within the European Union by a new system of mutually recognised and enforceable arrest warrants, as provided for in the Council Framework Decision of 13th June 2002 on a European Arrest Warrant and the Surrender Procedures between Member States.\textsuperscript{38}

2.8.2.1 A special note on Extradition Procedure between the Member States of the European Union, 1995

It is drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union. The aim of the Convention on extradition, now replaced in most cases by the Framework Decision on the European arrest warrant, was to facilitate extradition between the Member States in certain cases. It supplemented the other international agreements such as the European Convention on Extradition 1957, the European Convention on the Suppression of Terrorism 1977 and the European Union Convention on Simplified Extradition Procedure 1995.\textsuperscript{39} The report clarifies the provisions of the Convention on the simplified extradition procedure as follows.\textsuperscript{40}

Simplifying the Extradition Procedure

The Convention obliges Member States to surrender persons sought for the purpose of extradition under simplified procedures provided for by the Convention on two conditions namely that the person in question consents to be extradited and that the requested State gives its agreement. In particular it no longer requires the surrender of the person who is the subject of a request for arrest to be subject to submission of a request

\textsuperscript{38} The extradition instruments which will be superseded by the European arrest warrant will continue to apply in extradition relations between member States of the European Union and third States, OJ L 190, 18.7.2002, pp. 1–18.
\textsuperscript{39} Council Act of 10 March 1995, Official Journal C 78 of 30.03.1995
for extradition and the other documents required by Article 12 of the European Convention on Extradition basing on its related Acts.41

The following information from the requesting State is regarded as adequate:

- the identity of the person sought;
- the authority requesting the arrest;
- the existence of an arrest warrant or other document having the same legal effect or of an enforceable judgment;
- the nature and legal description of the offence;
- a description of the circumstances in which the offence was committed;
- the consequences of the offence in so far as this is possible.

Notwithstanding this, the requested State retains the right to request further information if the information provided proves insufficient.

_Persons Arrested in the Territory of a Member State_

When a person wanted for the purpose of extradition is arrested on the territory of another Member State, the competent authority must inform him of this in accordance with its national law. His consent, and, where appropriate, renunciation of the right to be covered by the speciality rule, are irrevocable. However, the Member States may indicate, in a declaration, that consent and, where appropriate, renunciation may be revoked, in accordance with the rules applicable under national law. Furthermore, each Member State may declare that, where the person in question consents to extradition, the speciality rule laid down in Article 14 of the European Convention on Extradition does not apply.

Article 15 of the European Convention on Extradition relating to re-extradition to a third country, does not apply to the re-extradition to another Member State of the person to whom the speciality rule has not been applied, in accordance with the declaration of the Member State, unless this declaration provides otherwise.

Each Member State must indicate in a statement which authorities are competent to apply the simplified extradition procedure.

The Convention enters into force 90 days after the date of the deposit of the instrument of ratification, acceptance or approval by the last Member State to carry out this formality. Any declaration concerning renunciation of the speciality rule takes effect 30 days after deposit thereof. The Convention is open for the accession of any State that becomes a Member of the European Union. In the case of accession, the Convention enters into force 90 days after the deposit of the State's instrument of accession or the date of entry into force of the Convention if it has not already entered into force at the time of the expiry of the said period of 90 days.

On 18 August 2005, the Convention was ratified by 18 Member States. It was applied early by 12 of them in their mutual relations.

The purpose of this Decision is to ensure a clear legal situation concerning the relationship between the above Conventions and the Convention implementing the Schengen Agreement of 19 June 1990, which was incorporated into the framework of the European Union on 1 May 1999. The Decision also seeks to associate the Republic of Iceland and the Kingdom of Norway with the application of the provisions of the Simplified Extradition Convention and the Extradition Convention between the Member States, which constitute a development of the Schengen acquis. In 1999 the Council of the European Union concluded an Agreement with the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis [Official Journal L 176 of 10.07.1999].
Although the Convention has been replaced since 1st January 2004 by the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [Official Journal L 190 of 18.7.2002], it can still be applied in the few cases where the European arrest warrant cannot be used. But it entered into force as between only twelve Member States on 29 June 2005.

The Convention aims to facilitate extradition between the Member States in the cases it specifies. To that end it sets forth a number of principles from which the Member States may depart in certain conditions. Most of the Member States that have ratified the Convention have entered reservations in this respect.

First of all the Convention indicates the circumstances in which the extradition procedure is applicable. These cover offences which are punishable under the law of the requesting Member State by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six months. The Convention specifically mentions extradition in the case of conspiracy or an association to commit offences, provided the conspiracy or the association is to commit:

One or more of the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism;

Any other serious offence in the field of drug trafficking or certain forms of crime against individual freedoms or creating a collective danger.

No offence may be regarded by the requested Member State as a political offence. In the case of tax offences, extradition may not be refused on the ground that the requested Member State does not recognise the same type of offence or tax.

Subject to a reservation entered by a Member State, extradition may not, in principle, be refused on the ground that the person claimed is a national of the requested Member State.
Nor, as a general rule, may extradition be refused on the grounds that the prosecution or punishment of the person would be statute-barred according to the law of the requested Member State; however, it must be refused in respect of an offence covered by amnesty.

A person who has been extradited may, in respect of offences committed before his surrender other than those upon which the request for extradition was based, without it being necessary to obtain the consent of the requested Member State, be prosecuted or tried if this entails no deprivation of liberty. However, if after his surrender he has expressly waived the benefit of the rule of speciality, he may be prosecuted, tried or detained with a view to the execution of a sentence or of a detention order restricting his personal liberty.

Each Member State must designate the authority responsible for centralising the transmission and receipt of extradition requests. But any Member State may declare that it allows other Member States having made the same declaration to enter into direct contact with its judicial authorities to request supplementary information concerning extradition requests.

**European Arrest Warrant**

The European Arrest Warrant was established by an EU Framework Decision in 2002.\(^\text{42}\) It came into force on 1 January 2004 in eight member states, namely Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden, and the United Kingdom. It is a decision towards harmonization of extradition procedures. In fact, measures which sought to harmonising extradition rules across EU member states go back to the mid 1990s. The ever-increasing openness and co-operation within the EU, the lowering of internal borders and the rapid development of telecommunications and the internet have provided a fertile ground for cross-border crime. High profile cases such as the Pinochet case have shown up the current Extradition arrangements as cumbersome and the ultimately political decisions that govern the granting of an extradition request seem out of place in a genuine European judicial space. However it was not until the immediate aftermath of

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\(^{42}\) Framework Decisions are legal instruments of the second pillar of the European Community. They are similar to directives and only take effect when implemented in an EU member state by transposing it into domestic law, 2002/584/JHA of 13 June 2002
the September 11 attacks in the United States that much more far reaching proposals were mooted.43

The idea of a European Arrest Warrant system whereby a judge in one Member State of the EU could directly enforce a warrant for arrest issued by a judicial authority in another Member State has long been under consideration as part of the European Union’s move towards an “area of freedom, security and justice”. The Tampere Conclusions’ (1999) opened the door to the Commission’s work which resulted in the proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States.44

The European Arrest Warrant replaced the 1957 European Convention on Extradition (ECE) which had previously governed extraditions between most member states, and various legal instruments which had been adopted to streamline the process of extradition under the ECE such as the agreement of 26 May 1989 between the 12 member states, on the simplification of the transmission requests for extradition, the Convention on simplified extradition procedure between 1995 and the Convention on Extradition of 1996 and the provisions of the Schengen Agreement regarding extradition.

The introduction of the EAW system was intended to increase the speed and ease of extradition throughout EU countries by removing the political and administrative phases of decision-making which had characterised the previous system of extradition in Europe, and converting the process into a system run entirely by the judiciary. Since it was first implemented in 2004 the use of the EAW has steadily risen. While originally proposed as an anti-terrorist measure the European Arrest Warrant soon became to a wide range of ordinary crimes.45 The political decision to adopt the EAW legislation was made in at the Laeken European Council in December 2001, the text being finally agreed in June that following year.

The European Arrest Warrant (EAW) is an arrest warrant valid throughout all member states of the European Union (EU). Once issued, it requires another member state to arrest and transfer a criminal suspect or sentenced person to the issuing state so that the person can be put on trial or complete a detention period.

An EAW can only be issued for the purposes of conducting a criminal prosecution (not merely an investigation), or enforcing a custodial sentence. It can only be issued for offences carrying a maximum penalty of 12 months or more. Where sentence has already been passed an EAW can only be issued if the prison term to be enforced is at least four months long.

There are several features of the European Arrest Warrant which distinguish it from the treaties and arrangements which previously governed extradition between EU member states. EAWs are not issued through diplomatic channels, they can be executed for a wide variety of offences without any requirement that the offence to which the warrant relates corresponds to an offence under the law of the state asked to execute the warrant, there is no exception for political, military or revenue offences and there is no exception clause allowing a state to refuse to surrender its own nationals.

2.8.3 Extradition obligations under Multilateral Treaties

With regard to certain offences, the legal basis for extradition can be found in international law. This is the case, in particular, with regard to war crimes and certain crimes against humanity, acts considered being terrorism and other types of transnational crime. Some of the international conventions concerned with the suppression, prevention and punishment of such crimes provide for an obligation to extradite for States Parties. Others enable States to extradite, rather than establishing a duty to do so. Customary international law may also serve as the basis for extradition without previous treaty arrangements.

2.8.3.1 Crimes against Humanity and War Crimes:

Crimes against humanity\(^{48}\) and war crimes\(^{49}\) are criminal offences under international law. The prohibition of such crimes imposes upon States obligations owed to the international community as a whole \((\textit{erga omnes})\). It has also become part of \textit{jus cogens}, that is, norms which protect fundamental principles and rank higher than treaty law and even general customary rules not endowed with the same force. One of the consequences of the \textit{jus cogens} character of the prohibition of international crimes is that every State is entitled to investigate, prosecute, punish or extradite individuals accused thereof.\(^{50}\) The fundamental character of the prohibition of war crimes and crimes against humanity also means that certain traditionally accepted grounds for the refusal to extradite will not apply in cases where extradition is requested for such crimes. It does not, however, establish a general duty, based on customary law, to extradite in the absence of a treaty.\(^{51}\)

An obligation to extradite those accused or convicted of certain international crimes is specifically provided for in some of the international instruments dealing with such acts:

- Pursuant to Article 7(2) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), States Parties undertake to extradite suspects to the authorities of the State on whose territory genocide was committed, or to a competent international criminal tribunal.

\(^{48}\) Crimes against humanity are defined in customary international law as serious crimes (such as, for example, murder, extermination, enslavement, torture, rape and other grave acts of sexual violence, the enforced disappearance of persons), when committed as part of an attack directed against a civilian population which is either widespread, or systematic, or both.

\(^{49}\) War crimes are serious violations of international humanitarian law, committed in international and non-international conflict, as defined in international customary law and in treaties, such as, in particular, the four Geneva Conventions of 1949 and the two Additional Protocols thereto of 1977, as well as the relevant provisions of the Rome Statute of the International Criminal Court of 1998.


• Article XI (2) of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) establishes a mutual duty to extradite for States Parties.

• Article III of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) imposes a duty on States Parties to adopt all necessary measures to make possible the extradition, in accordance with international law, of the persons within its scope.

Other international instruments permit States to decide whether or not to extradite, but if they refuse to do so, they are under the obligation to prosecute the person in their own courts. This is known as the principle aut dedere aut judicare (“extradite or prosecute”). On the basis of Article 7(1) of the 1984 United Nations Convention Against Torture (UNCAT), it applies to the States Parties to that Convention. It is also provided for in Article 14 of the Inter-American Convention to Prevent and Punish Torture (1985); Article VI of the Inter-American Convention on Forced Disappearance of Persons (1994); Article 9(2) of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989); and Article 10(4) of the Convention on the Safety of United Nations and Associated Personnel (1994).

With respect to war crimes in international armed conflict – that is, grave breaches of the four Geneva Conventions of 1949 and of Additional Protocol No. I thereto of 1977 – the primary duty of States is to prosecute the perpetrators and instigators of such crimes. These instruments establish mandatory universal jurisdiction for any State Party over those who commit, or order the commission of, war crimes. Each State Party has an obligation to search for such persons and bring them to justice before its own courts, regardless of their nationality. It may also, if it prefers, and in accordance with its own legislation, hand such persons over for trial to another State Party provided the latter has made out a prima facie case against the suspected war criminal. Article 88(2) of Additional Protocol No. I provides that States Parties shall co-operate in the matter of
extradition and give due consideration to the request of the State in whose territory the alleged offence has occurred.\textsuperscript{52}

There is no specific provision establishing a duty to prosecute or extradite persons accused of war crimes committed in non-international armed conflicts, although the principle \textit{aut dedere aut judicare} is provided for in Article 9 of the Draft Code of Crimes of the International Law Commission (1996) for certain war crimes committed in non-international armed conflict, including, in particular, violations of common Article 3 of the Geneva Conventions of 1949.

\textbf{2.8.3.2 Acts of \textquotedblleft Terrorism\textquotedblright{} and other Transnational Crimes}

A number of anti-terrorism conventions also contain provisions which establish a duty to extradite or prosecute those responsible for offences designated as terrorist acts. These include the following:

- European Convention on the Suppression of Terrorism (1977)
- South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (1987)
- Arab Convention on the Suppression of Terrorism (1998)\textsuperscript{53}
- Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999)\textsuperscript{54}

By contrast, the Inter-American Convention against Terrorism (2002) does not impose an obligation to extradite or prosecute, but refers to States’ obligations under


\textsuperscript{53} Article 6(h). The obligation to prosecute in case of non-extradition only applies where extradition is precluded because the legal system of the requested State does not allow it to extradite its nationals.

\textsuperscript{54} Article 6(h). The obligation to prosecute in case of non-extradition only applies where extradition is precluded because the legal system of the requested State does not allow it to extradite its nationals.
already existing international anti-terrorism instruments as well as under their domestic law.

The principle *aut dedere aut judicare* also applies under the following international instruments dealing with the suppression and punishment of specific offences:

- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)
- International Convention against the Taking of Hostages (1979)

A duty to extradite or prosecute also applies to the States Parties to the following international conventions dealing with other types of transnational crime:

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

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55 Art 16(10). The obligation to prosecute in case of non-extradition applies only where extradition is refused solely on the grounds that the person concerned is a national of the requested State, and at the request of the State seeking extradition.
These conventions typically require States Parties to ensure that the acts in question are offences under their criminal law, coupled with an obligation to either extradite a person suspected of having committed such crimes or submit their cases to their own competent authorities for the purpose of prosecution. Many such instruments also contain provisions to the effect that the offences within their scope shall be deemed to be included as an extraditable offence in any existing bilateral treaties that apply between States Parties, as well as enabling States Parties to use them as surrogate extradition treaties in the absence of pre-existing bilateral extradition agreements. Where extradition is not conditional upon the existence of a treaty, these acts are to be considered extraditable offences under national law.56 There are conflicting opinions as to whether the principle aut dedere aut judicare has become part of customary international law.57 The predominant view continues to be that there is no such obligation.

2.9 SIMPLIFIED EXTRADITION PROCEDURES:

The traditional extradition procedure is often time-consuming and perceived by States as cumbersome and costly. States have sought to counteract this by establishing privileged extradition relations with one another through agreements which provide for a simplified, and therefore accelerated procedure. Thus, under bilateral extradition treaties, evidentiary or other procedural requirements may be reduced or eliminated altogether.58

Within the European Union, two conventions permit extradition without the need for a formal procedure in certain circumstances. Under Article 66(1) of the Schengen Convention (1990), the requested State may authorise extradition without formal

56 Such provisions are also contained, for example, in Article 8 of the United Nations UNCAT (1984), and Art 15 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989).
58 The bilateral treaties between Australia and a number of countries which contain a “no-evidence” rule. An extradition treaty between the United Kingdom and Spain signed in November 2001 also provides for expedited procedures. Special arrangements such as the “backing of warrants schemes” in place between Australia and New Zealand or between the United Kingdom and Ireland allow for direct police cooperation in the return of wanted fugitives and provide for reduced evidentiary requirements. The extradition treaty signed on 31 March 2003 between the United Kingdom and the United States of America requires the United Kingdom to present evidence to show a “reasonable basis to believe that the person sought committed the offense for which extradition is requested” (Article 8(3)(c)), while the United States of America must only present “a statement of the facts of the offence(s)” (Article 8(2)(b).
proceedings if this is not obviously prohibited under its laws, and on the condition that the person concerned agrees to their extradition in a statement made before a member of the judiciary after being examined by the latter and informed of their right to formal extradition proceedings. The wanted person may have access to a lawyer during such an examination. The Convention on Simplified Extradition Procedures between the Member States of the European Union (1995) permits the surrender of a fugitive without the need for an extradition request to be presented, and without a formal extradition procedure being applied, if both the person concerned and the requested State consent. As of 1 January 2004, extradition between member States of the European Union will be abolished altogether and replaced by a system of mutually recognised arrest warrants.

Overall, there is a noticeable tendency towards simplified and accelerated extradition procedures. States usually stress that such expedited procedures are made possible by a mutual trust in the quality of procedures and, in particular, safeguards available to protect the rights of the individuals whose surrender is sought.\(^{59}\) Concern has been expressed, however, that such confidence in the fairness of extradition may be lacking foundation, even within the European Union\(^{60}\), and that the streamlining of procedures significantly limits safeguards for the persons concerned.

**Waiver of Extradition Procedures:**

In many countries, extradition law provides that formal extradition proceedings may be dispensed with if both the person concerned and the requested State consent. Multilateral extradition instruments also provide for the possibility of a waiver of extradition procedures. Article 21 of the Inter-American Convention on Extradition (1981) permits extradition without a formal proceeding, subject to this being legal in the

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\(^{59}\) The Explanatory Report to the Convention Relating to Extradition between Member States of the European Union (1996), Official Journal C 191, 23 June 1997, General Considerations, (b), where it is noted that “the considerable similarities in the criminal policies of Member States, and, above all, their mutual confidence in the proper functioning of national justice systems and, in particular, in the ability of Member States to ensure that criminal trials respect the obligations stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms, justified a revision also of the fundamental aspects of extradition (conditions for extradition, grounds for refusal, rule of speciality, etc.).”

\(^{60}\) Liberty, *Briefing on the Extradition Bill, 2nd reading at the House of Commons*, November 2002, at para. 9, with reference to recent cases in which extradition from the United Kingdom to Italy, Portugal and France was refused because of fair trial.
requested State and the informed consent of the person sought. A similar provision is contained in Article 8(1) of the London Scheme for Extradition (1966 and 2002).

2.10 BASIC PRINCIPLES OF EXTRADITION

2.10.1 Political offence

Historically, extraditable crimes were predominantly of a political nature. Common criminals were not viewed as a danger to society, so sovereigns rarely sought them. Persons who acted against the state, however, were frequently pursued and harshly punished. Asylum, in these cases, was only granted if it was to benefit the state. Asylum, therefore, was an exception to extradition.

This practice changed with the evolution of time and the international order. Extradition became the norm, with the granting of asylum considerably limited. Along with this change came the notion of the political offense exception. The eighteenth century, filled with revolutions and accompanied by a frequent political uprising mentality, beset a new attitude towards political offenders and political crimes. Many European democracies were the product of revolution and thus, strongly opposed the extradition of political offenders and refugees.

This exception to extradition is raised by the state to which the accused has fled, and is generally included in extradition treaties. Not only is the exception a unilateral declaration of national policy, but it is also readily apparent in many bilateral and multilateral treaties. The Belgium Extradition Act of 1833 marked the statutory beginning of the political offense doctrine. The exception was worded very broadly. This exception was further developed in the twentieth century. The individual became the primary focus and

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61 Ibid at 5.
62 Great Britain and Belgium (Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals, October 29, 1901, U.K.-Belg., art 7); United States of America and India (Extradition Treaty between the Government of the United States of America and Government of the Republic of India, June 25, 1997, U.S.-Ind., art 4).
64 Belgium Extradition Act, 1833.
concern of the inquiry. Nations began applying the exception not only to persons who committed active crimes, but also to those persons who committed passive crimes. Western nations previously applied the exception to only those persons who acted in favor of democracy, in order to protect those who fought for liberal democracy. These nations, however, now began to apply the doctrine even to those who acted in opposition to democratic ideals. The inception of human rights laws also prompted the trend of preference toward asylum and the broadening of the exception.

*Inherent Problems with the Political Offense Doctrine:*

One problem with the political offense exception in the context of the international community is that the term "political offense" or "political character" is not precisely defined in any one country. Similarly, the "political offender" is also not defined with any great certainty. There is no international consensus, however, as to what constitutes a political offense.

For analytical purposes illegal political conduct has traditionally been divided into two categories. “Pure” political offenses are acts perpetrated directly against the government, such as treason and espionage. These crimes are generally recognized as non-extraditable, even if not extraditable excluded from extradition by the applicable treaty. In contrast, common crimes, such as murder, assault, and robbery, are generally extraditable. Relative political offenses are "ordinary," often violent crimes that occur in connection with political uprisings, these crimes, which are called “relative” political offenses. However, there are some common crimes that are so inseparable from a political act that the entire offense is regarded as political. Ordinary crimes that may actually be on the list of enumerated crimes for which extradition shall take place can attain the status of political offenses. In defining relative political offenses, decision makers should at all times take into consideration the reasons for having a political offense exception. Such motivations range from humanitarian and fairness concerns to foreign policy considerations political offenses can be broken into two sub-categories.

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65 An active crime is one where the individual acts in an overt, affirmative manner that directly causes the result. A passive crime is when the result is caused by a failure of an individual to act when a duty to act was present.
**Ddlit complexe** are those acts "directed at both the political order and private rights."  
**Ddlit connexe** is "in itself not an act directed against the political order, but which is closely connected with another act which is so directed." While the pure political offenses are clearly defined, ample room for interpretation is left in determining what makes a crime a relative political offense.

Despite the widespread acceptance of these analytic constructs, the distinctions are more academic than meaningful. When it comes to real cases, there is no agreement about what transforms a common crime into a political offense.

Most treaties, bilateral and multilateral, do not attempt to define the term exhaustively. The Model Treaty on Extradition states that extradition shall not be granted if, inter alia, ‘the offence for which extradition is requested is regarded by the requested State as an offence of a political nature’. The Organized Crime Convention does not include a specific political offence exception but retains the principle that extradition need not be granted if there are grounds to believe that the request has been made for the purpose of prosecuting or punishing a person on account of race, sex, religion, nationality, ethnic origin or political opinions. This is far removed from the political offence exception.

Bilateral Treaties routinely include the political offence exception. However ‘political offence’ is frequently defined in a negative manner - for example by excluding from the scope of ‘political offences’ crimes such as ‘the murder or other offence against the life, physical integrity or liberty of a Head of State or of Government, or a member of

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66 An example would be when the act is that of a common criminal, such as murder, but the goals and motives of the act are political.

67 These acts are remote from any political goal and are thus difficult to recognize and accept. An illustration would be “the theft of guns in order to prepare for an armed rebellion and robbing a bank in order to provide funds for subversive political activities.”


69 Art 3(a) Model Law on extradition., Art 3, *European Convention on Extradition, 1957* ‘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’.

that person’s family.\textsuperscript{71} It is uncontroversial that it is intended to cover non-violent crimes such as slander of a head of state or offences based on political protest.\textsuperscript{72} However, outside this area of clear exception, there is little consensus regarding which crimes, particularly crimes including violence, should fall within its confines. Moreover there are also practical difficulties with regard to putting appropriate evidence before a court to establish such an exception. Consequently, the political offence exception is declining in importance and practical operation.\textsuperscript{73}

The definitions contained in these treaties were initially so general as to be impossible to apply literally.\textsuperscript{74} [They subsequently became characterised by technical criteria such as proportionality, namely that the offence will not qualify as political unless its nature and degree are in proportion to its political ends.\textsuperscript{75} However, such distinctions have also been criticised for their difficulty and the inevitable subjectivity involved in their application,\textsuperscript{76} depending, as it does, on the judge’s own values in determining whether the accused has ‘overstepped the bounds of permissible political action’.\textsuperscript{77}

In addition to the lack of a clear and objective definition of the exception among nations, the application of the exception varies widely from nation to nation. Also, while domestic legislation may attempt to define the meaning of a political offence, it is potentially in terms which provide little guidance. Commonly judges are ill-equipped and reluctant to engage with these issues. When they do so, they often expose their

\textsuperscript{71} Treaty on Extradition between Australia and the Republic of Korea, 1990
\textsuperscript{72} Art 5 Australia–Mexico Extradition Treaty,
\textsuperscript{73} In T v. Immigration Officer [1996] UKHL 8; [1996] AC 742, 753, Lord Mustill stated in relation to the application of the political exception: ‘What I regard as the exceptional difficulty of this appeal is that the courts here, as in other legal systems, must struggle to apply a concept which is out of date’.
\textsuperscript{74} Schtraks v. Government of Israel [1964] AC 556, 591 (Viscount Radcliffe): ‘In my opinion the idea that lies behind the phrase “offence of a political character” is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country’.
\textsuperscript{75} McMullen v. Immigration and Naturalization Service, [1986] USCA9 797; 788 F 2d 591, 596 (9th Cir, 1985).
\textsuperscript{77} T v Immigration Officer [1996] UKHL 8; [1996] AC 742, 770
predisposition to defer to the interests of the requesting state. The application of the doctrine in Great Britain was first established in the case of In re Castioni.

The political offense doctrine is seen as both a principle of international law and as a mere state practice. For example, at one point, Irish courts refused to extradite individuals involved in the violence in Northern Ireland in the 1970's based on the holding the violence was politically motivated. Moreover, the Irish Constitution obligates the courts to recognize general principles of accepted international law. Because the courts found that denying the extradition of politically motivated criminals was one of these generally recognized principles, the courts have staunchly upheld their decisions. On the other hand, a Sudanese court held in Steiner that although the exception is the "practice of the comity of nations," it is not a strict rule of international law that criminals who fall within the category of political offenders should never be extradited. Thus, there is no uniform way of interpreting or applying the doctrine.

*Political Offence dilemmas in Modern Times with special reference to Acts of Terrorism:*

Terrorism is a major crime with which the contemporary world is grappling with. The wide range of violence, scale of destruction accompanying the terrorism is greatly disturbing the world community. In the last twenty years, myriad extremist terrorist movements have developed in many parts of the world. Additionally, the world is constantly getting smaller with the aid of technology. With the techno aided enhanced connectivity, the pace as well as the range of criminal activities too got multiplied making it extremely difficult for the countries to individually tackle the problem of terrorism and other such international crimes like drug trafficking. Hence the imminent need is concerted global cooperation.

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80 IR. Const. Art 29(3). "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states."
81 It must be noted however, that in more recent decisions, the Republic of Ireland has extradited terrorists to Northern Ireland. The courts held that "[t]he excusing per se of murder, and of offenses involving violence and the infliction of human suffering, done by, or at the behest of self-ordained arbiters, is the very antithesis of the ordinances of Christianity and civilization and of the basic requirements of political activity."
82 In the Trial of F.E. Steiner, 74 *I.L.R.* 478 (1971) (Sudan).
83 Id. at 480.
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 offense exception, contained in all extradition treaties, protects from extradition political offenders of all types, nonviolent and violent alike, including terrorists. Nations responding to the threat of terrorism seem indeed to have decided that their reactions must consist of largely nonviolent means.\(^\text{84}\) Efforts have centered on resolutions, conventions, and, in general, treaties, through both bilateral and multilateral channels. In the latter context, such umbrella groups as the United Nations (UN), the Organization of American States (OAS), and the European Community (EC), all of them uniting a great number of states, have played a particularly important role. Early treaties in these alliances centered on the most frequent kinds of terrorist crimes, such as hijacking of aircraft and attacks on civilians.\(^\text{85}\) Together with other efforts, such as the regular resolutions on terrorism

There is now an increasing trend in multilateral treaties dealing with specific categories of international crime towards excluding certain offences from the scope of political offences. For example, the 1977 European Convention on the Suppression of Terrorism\(^\text{86}\) includes a list of offences which are not to be regarded as political offences for the purposes of extradition, including crimes under the Hague Convention on Unlawful Seizure of Aircraft\(^\text{87}\) and the Montreal Convention, violent offences against


diplomats and other internationally protected persons, kidnapping and hostage taking, and
offences involving bombs and firearms which result in harm to persons.88 Further, under
Article 2 of the European Convention on the Suppression of Terrorism, states have the
discretion not to regard any serious violent offence as a political offence. Continuing the
trend towards stronger extradition powers with fewer exceptions, the 1996 Convention
relating to Extradition between Member States of the European Union89 departed from
the 1957 European Convention on Extradition90 by including the broad principle that no
offences should be regarded as political offences,91 but it also does allow Member States
an alternative position that offences under the European Convention on the Suppression
of Terrorism are, at the least, not regarded as political offences.92

Extradition treaties function significantly in the suppression of terrorism. Extradition
treaties can further international cooperation in reducing the number of safe
harbor states to which a terrorist can retreat after an attack. On a very practical level,
extradition treaties eliminate a number of alternatives for terrorists who have completed
or aborted attack. Based as these treaties are on the principle of “aut dedere aut
judicare,” extradition treaties assure that terrorist offenders are accountable for their acts
either in the country where the terrorist act occurred or in the country that arrested them.
Their advantages, however, seem all too obvious. Extradition treaties signal that the
contracting states accept each other’s sovereign right to prosecute offenders accused of
crimes committed against the requesting state or in its territory. Parties to extradition
treaties document loyalty to each other; such loyalty expresses itself in the refusal to
grant refuge to an alleged offender wanted by the other signatory.

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89 Council of the European Union, Convention relating to Extradition between Member States of the
90 Opened for signature 13 December 1957, 359 UNTS 273, art 3 (entered into force 18 April 1960) (‘1957
European Convention on Extradition’).
91 Art 5(1) Convention relating to Extradition between Member States of the European Union, 1996
92 Ibid, Art 5(2).
With all the potential advantages of extradition agreements in meeting the menace of terrorism and other serious international crimes, extradition treaties cannot be overestimated both as symbols and as effective measures for cooperation among nations. Their effectiveness has been hampered by the fact that the political offense exception, contained in all extradition treaties, protects from extradition political offenders of all types, nonviolent and violent alike, including terrorists. The range of political goals pursued by terrorists and the equally broad range of both violent and nonviolent means used in terrorist attacks has made it virtually impossible to state with certainty what characterizes terrorism per se or how it can be defined.

The generic extradition treaties contain a so-called political offense exception that often also includes a "political protection clause."

Together, these political clauses provide for two eventualities: first, that an offender will not be extradited for offenses of a political character or for offenses committed in the context of a political incident; and second, that extradition will not be granted "if the Requested State has substantial grounds for believing that the request for extradition has, in fact, been made with a view to try or punish the person sought for an offense." This latter provision of the political offense exception is often mirrored by a separate clause containing a "humanitarian exception" that holds that an offender shall not be extradited if there is reason to believe that such "special circumstances" as his "age, health or other personal conditions" will make extradition "incompatible with humanitarian considerations." Often, the humanitarian exception in a slightly different version functions as the "equal protection clause" of the treaty, prohibiting extradition when an offender would be put on trial or punished on account of his "race, religion, nationality, or political opinion," partially overlapping at this point with the political protection clause. The clauses just described have remained virtually unaltered since the first extradition treaties were signed. Recently, however, radical changes have occurred in extradition treaties in order to adapt them to their novel task of suppressing terrorism.

There are two sides to the political offense exception. The reasons for opposition, and again the exception, are strong. While in some cases there is a real and apparent need
for asylum (whether for national political reasons or humanitarian reasons), in others, the criminal gets to use, and will take advantage of, the exception.

Turning to the first proposition, several rationales behind the political offense doctrine become evident in situations and cases that arise between state actors alone - without the interference of an international body. In some instances, it would be morally and politically necessary to grant the accused individual asylum.\(^{93}\)

- Moral and political necessity is self-evident that there exist two positive rights: the right of a state to grant asylum as well as a right of asylum for the individual. The right of the state comes from "the normal exercise of the territorial sovereignty." Many nations have included this right in their own constitutions.\(^{94}\) The right to asylum for the individual may stem from municipal law. In extradition law, the right to grant asylum, however, may "only be exercised with respect to persons not covered by the terms of the treaty or specifically exempted from extradition." This is precisely where the political offense doctrine falls.

- Another rationale for the political offense doctrine is the concept of dual criminality.\(^{95}\) This relates back to one of the fundamental principals of extradition law: if the crime for which the individual is to be tried is not a crime in a given state, the individual should not be sent to a state where he or she will be tried for the crime.\(^{96}\)

- A third reason for the application of the doctrine is that there is no guarantee that the accused will receive a fair trial when sent back to the government of which he is a known opponent. This illustrates the humanitarian argument in support of the doctrine.

\(^{93}\) Asylum is protection against another State, acting through its lawful, duly accredited, and duly authorized organs, or, in some cases, through agencies operating openly or covertly on behalf of the government, the ruling party, or the ruling clique.

\(^{94}\) Hague Academy of International Law, the Right of Asylum 64-71 (Hague Academy of International Law 1989).


\(^{96}\) United States v. Gecas, 120 F.3d 1419 (1997) (holding that even though the defendant faced a "real, substantial, reasonable, and appreciable fear of foreign conviction," id. at 1426, he could not invoke the Fifth Amendment privilege against self-incrimination).
Fourth, the political interest, or allegiance, of a state may dictate whether to extradite. Espionage is a crime that falls within this category. A final rationale has its foundations in the concept of neutrality. Whether to extradite or not could imply taking sides in a situation. An inquiry into the question of extradition may require passing judgment on the political acts within another country.

On the other side of the coin, there are reasons opposing the political offense exception. The first reason offered is the theory of national sovereignty.

A second argument on this point is that the political offense exception supports or encourages criminal activity as long as it has a political tie. Laudable as some of the motivations behind refusing to extradite political offenders are, the very existence of this exception seems to undo the value of extradition treaties in combating terrorism. If terrorists can use the intentionally flexible and loose definition of political offenses to avoid being extradited, extradition treaties have lost all value in combating terrorism.

The Political Offense Exception within the Context of the ICC

The political offense doctrine has certain rationales and purposes that exist when there is an inter-state controversy regarding the decision to extradite. These rationales, however, will cease to exist in the ICC. The ICC, absent the political offense doctrine, will actually cater to both proponents and opponents of the doctrine when used interstate.

2.10.2 Double Jeopardy

A person's extradition can be barred by reason of the rule against double jeopardy; namely if they have already been convicted, or acquitted, of the same offence elsewhere; and if convicted, where there is a sentence, the sentence has been served, is currently being served, or may no longer be executed under the law of the member state. Double jeopardy is also recognized to be one of the general principles of law recognized by civilized nations.

In a judgment handed down on 25th August 2011, District Judge Tubbs of England discharged the defendant (K) on the basis that his extradition was barred by reason of the rule against double jeopardy, in accordance with section 12 of the
Extradition Act 2003. In this case, K, a Polish National, was arrested on a European Arrest Warrant issued by Warsaw Regional Court, Poland in March 2011. The Polish authorities sought K's extradition from England for the purpose of serving a sentence of imprisonment imposed following conviction for an offence of smuggling Cocaine, which had been committed in Holland in 1995. District Court refused on the ground of double jeopardy K was finally convicted, sentenced and served (albeit limited) part of that punishment in the Netherlands on the single offence in the European Arrest Warrant. The rules of English law on Double Jeopardy therefore applied and accordingly his extradition was barred and K was discharged.

2.10.3 Double Criminality

Dual criminality is another standard principle observed in extradition treaties. It is the most significant prerequisite that took shape during the nineteenth century, and continues to exist today. The Dual criminality mandates that extradition only take place for conduct that is criminal in both countries. Thus, the dual criminality prevents extradition of an individual unless the requesting State can show that the individual committed an act which constituted a "crime according to the laws of both the requesting and the requested state." The principle of double criminality can also be termed as the identity rule. The double criminality requirement began blooming in the late eighteenth century and continued to develop throughout the nineteenth century. It is even claimed that the almost universal recognition of dual criminality has made it a well-settled part of customary international law.

Rationale of the Principle:

- The basic policy supporting double criminality is that nations are equal in their powers of self-determination and are guaranteed the right to forbid a requesting country from punishing a fugitive for conduct not considered a crime under the laws of the requested state.

- It is unjust for a country to extradite an individual and let him be punished even when his conduct is not criminal according to its own standards of criminal justice. The double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State. The social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment.

- So far as the reciprocity principle is concerned, the rule ensures that a State is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand.

The ability of the dual criminality requirement to serve these purposes may depend on the form it is given in the applicable extradition treaties.

The role of double criminality gives rise to sometimes difficult promises mainly for the reason, firstly, because of variation of laws and institutions in the two countries and secondly, because the act charged does not amount to a corresponding crime.

There are three approaches to determine whether the offence charged even though criminal in both states falls within the meaning of double criminality:

- Whether the act is chargeable in both states as a criminal offence regardless of its prosecutability.
- Whether the act is chargeable and also prosecutable in both states and
- Whether the act is chargeable, prosecutable, and could also result in the conviction in both states.

There is a nexus between double criminality and extraditable offences.

Because each nation has different standards concerning the treatment of criminals, a complex web of procedural requirements surrounding modern extradition arose to ensure that a fugitive would not be prosecuted for an act not considered criminal by both

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nations or for acts not falling within the scope of the extradition treaty. Some treaties and laws add certain embellishments to the dual criminality requirement which expand or limit the scope of the doctrine. For example, a treaty or law may require that the conduct of the individual facing extradition be not only criminal, but also rise to the level of a serious crime. Other treaties and laws require a showing that the conduct constitutes an extraditable crime, i.e., a crime which is listed in the treaty as one justifying extradition.

Obviously, a firm grasp on all of the possible dual criminality subtleties may be difficult to obtain. A common requirement for extradition which is that the acts which form the basis for the extradition request should constitute a crime under the law of both the requesting and the requested States. This requirement exists whether the request is made under a treaty or apart from a treaty and whether a list of offenses or a minimum-penalty provision is involved. In the case of a treaty or a law providing for extradition for offenses punishable by at least a certain minimum penalty, specific provision is usually made that the offense must be a crime in both States. Where a list of offenses involved is in the treaty or the law, a specific provision on the point is less common. However, even in the absence of a specific provision, the requirement is generally imposed.

The question whether the requirement has been met generally arises with regard to the law of the requested State, and where the requirement is covered by a specific provision in the law or treaty it is often cast only in terms of the law of the requested State, since, if a State requests extradition, it must base its request on an alleged violation of its law.

99 The "seriousness" of a crime is often determined by the minimum sentence which a person could receive if convicted of the crime. For example, Treaty between the United States of America and the Federal Republic of Germany Concerning Extradition, June 20, 1978, U.S.-F.R.G., art 11, qfl 2, 32 U.S.T. 1485, 1489-90 (mandating that extradition is possible only if (a) "the offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a maximum period exceeding one year, or (b) the enforcement of a penalty or a detention order, if the duration of the penalty or the detention order still to be served, or when, in the aggregate, several such penalties or detention orders still to be served, amount to at least six months.").

100 This requirement is a corollary of dual criminality, but is handled separately by most courts. For example, United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988) (showing that extraditable offense and dual criminality requirements are treated separately).
**Dual Criminality as a Bar to Extradition:**

The requested States may justifiably refuse an extradition request on the ground that the requesting State has no jurisdiction over extraterritorial crimes. This occurs when the jurisdictional theory used by the requesting State is not recognized by the requested State. In this situation, the offense is not considered extraditable under the laws of the requesting State. Therefore, the dual criminality principle bars extradition. This is known as the "special use" of the dual criminality requirement. No principled method has been found to overcome this obstacle due to the variety of often mutually exclusive jurisdictional theories utilized by different nations.

Because "jurisdictional issues are determined by the requested State," problems often arise when the basis of the requesting State's extraterritorial jurisdiction is not recognized by the requested State. When this is the case, the "special use" of the dual criminality requirement may bar extradition even when any or all of the traditional bases of extraterritorial jurisdiction are invoked by the requesting nation. One area in which this has consistently been a problem is drug conspiracies. Similarly, acts of international terrorism may go unprosecuted because the requesting and requested States cannot agree on a mutually acceptable jurisdictional theory.

**Special use problem under the Territorial Basis of Extraterritorial Jurisdiction:**

This approach is probably the most likely to survive the "special use" of the dual criminality requirement because nearly all nations recognize this principle of jurisdiction.

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101 Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 *UTAH L. REV* 685, 744-45. Professor Blakesley made the following comment about this "special use" of the dual criminality requirement:

A specialized notion of double criminality that generally works to deny extradition, even when the offense on which the extradition request is based constitutes a crime in each state and is listed in the treaty as extraditable, will be labelled the "special use" of double criminality. Extradition will be denied when the theory of jurisdiction maintained by the requesting state is not accepted by the requested state. Id.

102 Another problem arising in this area is that of concurrent jurisdiction. When both the State requesting extradition and the State receiving the request claim to have jurisdiction over an individual, principles of sovereignty may compel the requested State to deny the extradition request.

103 Christopher L. Blakesley, *Jurisdiction as Legal Protection Against Terrorism;* 19 *CONN. L. REV.* 895 (1987). The political offense exception also may present a barrier to extradition in cases of international terrorism. In addition to his works on extraterritorial jurisdiction, Professor Blakesley has also discussed extradition and acts of international terrorism in Christopher L. Blakesley, *The Evisceration of the Political offense Exception to Extradition*, 15 *DEN.J. INT’L’L. & PoLY* 109 (1986).
However, a strict application of this principle would often preclude extradition for extraterritorial crimes because such an interpretation requires that the act be committed wholly inside the boundaries of the nation requesting extradition. In cases of international activities such as terrorism and drug trafficking, this is rarely the case. Therefore, an expansive interpretation of the requirement, such as the objective territoriality theory, is necessary. But because not all nations have accepted such a broad interpretation, extradition may be denied in instances where the requested State does not recognize the objective territoriality theory.

Even extradition requests involving nations which have accepted the objective territoriality theory may fail because the "effect" on the requesting State required by this theory is so tenuous that it will not be recognized by the requested State. This is often the case with drug conspiracies, or conspiracies to commit terrorist acts, especially when these conspiracies fail. This would include situations in which perpetrators are still in the planning stages, or when they are caught during an attempt to engage in such activities, but prior to doing any actual damage to the requested State. When this occurs, even though the intent to commit an act designed to have an "effect" on the requested State is clear, intent alone is usually not enough to fit squarely under the objective territoriality theory. In such circumstances, dual criminality's "special use" may bar extradition.

2.10.4 Rule of Specialty

The doctrine of specialty compels the requesting state to prosecute the extradited individual upon only those offenses for which the requested country granted extradition. According to this doctrine of specialty when a request has been made to prosecute a person for a particular offense the person should be tried for the same offense subsequent to the extradition. So, a violation of specialty occurs when, after extradition, the requesting nation charges and prosecutes, or seeks to prosecute, the extradited individual for a crime not agreed to by the requested nation in the extradition.

The traditional rationale for this rule is motivated by the importance given to the principle of respect for state sovereignty. This doctrine is premised on the assumption that whenever a state uses its formal processes to surrender a person to another state for a
particular charge, the requesting state shall carry out its intended purpose of prosecuting or punishing the offender only for that offence for which the requested state conceded.\textsuperscript{104} Doing otherwise demonstrates the disrespect for the sovereignty of the requested state.

The doctrine of specialty developed to protect the requested country from abuse of its discretionary act of extradition by the requesting state. Professor Bassiouni offers five factors as the basis for the doctrine of specialty\textsuperscript{105}

1. The requested state could have refused extradition if it knew that the relator would be prosecuted or punished for an offense other than them one for which extradition was granted.

2. The requesting state would 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 without securing that person's surrender from the requested state.

4. The requesting state would be abusing a formal process to secure the surrender of the person it seeks by relying on the requested state, which 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.

The above justification for the principle of specialty stems from the perspective of a state. From the perspective of an individual, implicitly, the doctrine provides protection for the extradited person by an indirect assurance to him against any unexpected prosecution. Thus, there is a second, and from the perspective of the requested person, a


critically more important function of the rule of specialty which is directed to the protection of the rights of the person subject to extradition.\textsuperscript{106}

The doctrine of rule of specialty is very much supportive to the doctrines of political offence and double criminality. As rightly pointed out, the intention of the rule is to require - in respect of all crimes for which an extradited person might be tried - compliance with all of the guarantees of the extradition process, such as double criminality and political objections.\textsuperscript{107} This should have the effect of preventing a requesting state from using the extradition process for an impermissible purpose. In that sense, the other guarantees and protections built into extradition procedures, such as double criminality, political objections, and the death penalty exception, are only as strong as the extent to which the principle of specialty is observed.

An analysis of individual rights under the doctrine of speciality involves two seemingly intertwined issues. The first issue concerns to whom the right of speciality belongs. The second issue, whether the defendant has standing to raise objections to violations of the doctrine of specialty, exists as an extrapolation of the first issue.\textsuperscript{108} While some view that the doctrine of specialty is addressed to requested state alone and it does not confer any right to the concerned individual, others consider that the concerned individual does acquire rights under this doctrine and hence can challenge the violation of the doctrine. The two different perceptions are traceable from the varied standing taken by US courts. For example, Some U.S. courts conclude that the underlying wrong resulting from a violation of speciality harms only the requested country. These courts rely on a theory in international law that extradition treaties only protect the requested country.

\section{Notes}


\textsuperscript{107} Ibid


\textsuperscript{109} United States ex. rel. Donnelly v. Mulligan, 76 F.2d 511, 513 (2d Cir. 1935) (holding that extradition treaties only benefit contracting parties).
Fiocconi evidence this proposition. Legal authorities and subsequent cases, however, have challenged this theory, arguing that the extradited person maintains certain rights under extradition treaties. Nonetheless, many courts hold that extradition treaties extend no rights to the concerned individual.

The most quoted judgment on the doctrine of specialty is a landmark decision from USA, namely, *United States Vs Rauscher*.

Mr. Rauscher, the second mate of a U.S. ship, murdered a crew member while at sea. Subsequently Mr. Rauscher fled to Great Britain. At the request of the United States, Great Britain apprehended and extradited Mr. Rauscher to the Circuit Court of the United States for the Southern District of New York on the charge of murder. Pursuant to an indictment a jury convicted Mr. Rauscher for inflicting cruel and unusual punishment, and not the charge of murder for which Great Britain had extradited him. Mr. Rauscher argued that his conviction on the charge of cruel and unusual punishment constituted a violation of the extradition treaty because the extradition agreement charged him only with murder. The matter was referred to the U.S. Supreme Court.

The Court found that when treaty provisions affect the rights of individuals, courts have the power to enforce and uphold those rights. The court after considering the nature of extradition felt that the intent behind extradition treaties reflects the principle of specialty. From the findings of the court it is obvious that the Court equated a violation of this principle with a violation of the extradited person’s rights under the treaty. Thus the Court held that Mr. Rauscher had acquired a right to exemption from trial upon charges not listed in the extradition agreement without the opportunity of first returning

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110 United States Vs Paroutian, 299 F.2d 486, 490-91 (2d Cir. 1962); Fiocconi, 462 F.2d at 480-81;
111 United States Vs Najohn, 785 F.2d 1420, 1422 (9th Cir.) (allowing defendant to raise objections to violations of specialty);
112 Shapiro Vs Ferrandina, 478 F.2d 894, 906 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973
113 119 U.S. 407 (1886
114 Rauscher, 119 U.S. at 409
115 Mr. Rauscher was convicted under Section 5347 of the statute, entitled "Maltreatment of crew by officers of vessels" It provides that [e]very master or other officer of any American vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, who, from malice, hatred, or revenge, and without justifiable cause, beats, wounds, or imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any cruel and unusual punishment, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than five years, or by both.
to Great Britain. The Supreme Court remedied the violation of the speciality doctrine by stripping the trial court of personal jurisdiction over Mr. Rauscher to try him for the unextradited charge of cruel and unusual punishment.

This judgment is thus a landmark for recognizing the judicial enforceability of individual rights under extradition treaties.

By the 1870s, international law had generally accepted the validity of the doctrine of specialty. Doctrine of Specialty has got a strong presence in extradition law to an extent that it is even claimed to be part of customary international law: in the words of Bassioni ‘specialty is a principle so broadly recognised in international law and practice that it has become a rule of customary international law.’ This contention is not without substantial support because this principle has been accommodated in many international instruments including event the Statute of ICC.

**According to the Model Treaty on Extradition**

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.

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116 At 424, referring to the right conferred upon Mr. Rauscher by the Doctrine of Speciality, the Court stated that [t]hat right, as we understand it, is that he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.
118 *Rome Statute, 1998*.
119 Art 14(1)
120 European Convention on Extradition, 1957 Art 14(1):
Rome Statute States the Principle in Similar Terms.¹²¹

(1) A person surrendered to the Court under this 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 to contents of request for arrest and surrender]. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

As exemplified by the specialty provisions in the 1990 Model Treaty on Extradition and the Rome Statute, the principle does not have an absolute operation, and the prosecution or punishment of crimes other than those for which extradition was granted is enabled if the requested state gives its consent.¹²² However, in a convoluted expression of intention, the Model Extradition Treaty goes on to impose an obligation on states to consent to prosecution of additional prior offences,¹²³ which would appear to make the consent somewhat illusory. It then, however, limits that obligation of consent to offences which are subject to extradition under the treaty, thus effectively importing the same requirements and safeguards on extradition (including double criminality, the political offence exception, the discrimination exceptions and double jeopardy).

Not all treaties contain an appropriate limitation on the circumstances in which consent can be granted. The Australia–Mexico Extradition Treaty, which includes the rule of specialty, contains an exception where consent is granted by the requested state’s

¹²¹ Art 101
Attorney-General.\textsuperscript{124} Significantly it does not explicitly require that other extradition safeguards in the Model Treaty on Extradition, such as double criminality or double jeopardy, be observed.\textsuperscript{125} No doubt such requirements are factors which a decision-maker charged with a request for waiver of specialty should take into account to safeguard the interests of the extradited person - but without such express limitations there is a real possibility for abuse of power.

This absence of clear guidelines on the making of requests for waiver of specialty gives considerable scope for circumvention of the various safeguards on extradition. For example, under the Australian system, a magistrate who is required to review an extradition request to determine eligibility for surrender reviews the relevant material to determine whether the offences are extraditable (including under the double criminality principle) and whether any extradition objections are made out.\textsuperscript{126} This process does not apply to the subject of a request to waive specialty after the extradition. There is potential for offences which do not satisfy double criminality, or which are not based on the same conduct as the conduct on which the extradition requests were founded, to be included in a waiver of specialty request. If those offences had been included in an extradition request, the magistrate would have been in a position to hear evidence and submissions on these issues and to consider the issues collectively. This is a practical problem that can lead to injustice to extradited persons, and undermine the integrity of the extradition system.

While there are no express treaty provisions requiring that specialty should not be waived where the requesting state knew of the basis of the relevant offences at the time of

\textsuperscript{124} Arts 15, 18. Treaty on Extradition between Australia and the United Mexican States, See also Art 16 Treaty on Extradition between Australia and the Republic of Korea.

\textsuperscript{125} Art 18 of Treaty on Extradition between Australia and the United Mexican States,

A person extradited under this Treaty shall not be detained, tried or punished in the territory of the Requesting State for an offence other than that for which extradition has been granted nor be extradited by the Requesting Party to a third State, for any offence committed prior to the extradition, unless:

(a) the person has left the territory of the Requesting State after extradition and has voluntarily returned to it;

(b) the person has not left the territory of the requesting State within 60 days of after being free to do so; or

(c) the Requested Party has given its consent to such detention, trial, punishment or to extradition to a third State

\textsuperscript{126} Australia’s Extradition Act 1988 (Cth) s 19.
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.\textsuperscript{127} 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\textsuperscript{128}

In addition to the dilution of the rule of specialty through the consent provisions in bilateral and multilateral conventions, there are disturbing examples of an apparent disregard of the rule in practice.\textsuperscript{129}

\subsection*{2.10.5 Aut Dedere Aut Judicare}

The formula “extradite or prosecute” (in Latin: “\textit{aut dedere aut judicare}”) is commonly used to designate the alternative obligation concerning the treatment of an alleged offender, “… which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct”.\textsuperscript{130}

\textit{Aut Dedere Aut Judicare} is a Latin legal maxim that means extradite or prosecute. This maxim imposes a legal obligation on the states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition. Accordingly, the state having the custody of a suspect has to either extradite the person to another state having jurisdiction over the case or to instigate its own judicial proceedings. The object of the principle is to avoid crimes being left unpunished because there is no extradition or prosecution.

\textsuperscript{127}Ibid, s 22(3)(d).
\textsuperscript{129}Griffith, Gavan; Harris, Claire --- \textit{Recent Developments in the Law of Extradition} [2005] \textit{MelbJlntLaw} 2; (2005) 6(1) Melbourne Journal of International Law 33 Available at http:// www. austlii. edu.au/au /journals/MelbJIL/2005/2.html#Heading220
\textsuperscript{130}M. Cherif Bassiouni and E.M. ‘Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law’ (1995), p. 3.
The doctrine, “the expression ‘aut dedere aut judicare’ is a modern adaptation of
a phrase used by Grotius: ‘aut dedere aut punire’ (either extradite or punish)”\textsuperscript{131}. It
seems, however, that for applying it now, a more permissive formula of the alternative
obligation to extradition ( “prosecute” [\textit{judicare}] instead of “punish” [\textit{punire}] ) is
suitable, having additionally in mind that Grotius contended that a general obligation to
extradite or punish exists with respect to all offences by which another State is injured.

In particular, the obligation to extradite or prosecute during the last decades has
been included into all, so-called sectoral conventions against terrorism, starting with the
Convention for the Suppression of Unlawful Seizure of Aircraft, signed in The Hague on
16 December 1970.\textsuperscript{132} The Rome Statute of 1998 by which ICC is established to deal
with most serious international crimes like genocide, war crimes, crimes against
humanity, gives a choice between exercising jurisdiction over an offender by the State
itself or having him surrendered to the jurisdiction of the International Criminal Court. It
seems that the existing treaty practice, significantly enriched in recent decades, especially
through various conventions against terrorism and other crimes threatening international
community has already created a sufficient basis for considering that the obligation to
extradite or prosecute, so important as a matter of international criminal policy, has
become a matter of definite legal obligation. The Rome Statute of 1998 by which ICC is
established to deal with most serious international crimes like genocide, war crimes,
crimes against humanity, gives a choice between exercising jurisdiction over an offender
by the State itself or having him surrendered to the jurisdiction of the International
Criminal Court.

There are even contentions that this principle has the status of customary international
law\textsuperscript{133} or even the status of \textit{jus cogens}\textsuperscript{134}

\textsuperscript{131} Ibid., p. 4.
\textsuperscript{132} Art 7 says “The Contracting State in the territory of which the alleged offender is found, shall, if it does
not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed
in its territory, to submit the case to its competent authorities for the purpose of prosecution.”
\textsuperscript{133} Judge Weeramantry – in his dissenting opinion in Questions of Interpretation and Application of the
1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v.
United Kingdom and Libyan Arab Jamahiriya v. United States of America), Provisional Measures”, Orders
of 14 April 1992, I.C.J. Reports, 1992
There is already a judicial practice, which has been dealing with the said obligation and has confirmed its existence in contemporary international law. The Lockerbie Case before the International Court of Justice has brought a lot of interesting materials in this field, especially through dissenting opinions of five judges to the decisions of the Court of 14 April 1992 “not to exercise its power to indicate provisional measures” as requested by Libya. Although the Court itself was rather silent as it concerns the obligation in question, the dissenting judges have confirmed in their opinions the existence of “the principle of customary international law aut dedere aut judicare” and of “a right recognized in international law and even considered by some jurists as jus cogens”. These opinions, though not confirmed by the Court, should be taken into account when considering the trends of contemporary development of the said obligation.

2.10.6 Nationality

Some countries, such as France, Germany, Russia, Austria, the People's Republic of China, the Republic of China (Taiwan) and Japan, forbid extradition of their own nationals. These countries often have laws in place that give them jurisdiction over crimes committed abroad by or against citizens. By virtue of such jurisdiction, they prosecute and try citizens accused of crimes committed abroad as if the crime had occurred within the country's borders. Some nations refuse to extradite their own citizens, holding trials for the persons themselves.

2.10.7 Mode of Punishment

*Human Right Considerations;*

134 Judge Ajibola –in his dissenting opinion in Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamahiriya v. United States of America), Provisional Measures", Orders of 14 April 1992, I.C.J. Reports, 1992

135 Two identical decisions were adopted, concerning “Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamahiriya v. United States of America), Provisional Measures”, Orders of 14 April 1992, I.C.J. Reports, 1992, p. 3 and p. 114.

136 Ibid., pp. 51, 161 (Judge Weeramantry - dissenting

137 Ibid., pp. 82, 187 (Judge Ajibola - dissenting)
Human Right approaches to extradition law have developed new principle of looking at the mode of punishment and dealing with the fugitive criminal. Thus some countries refuse extradition on grounds that the person, if extradited, may receive capital punishment or face torture. A few go as far as to cover all punishments that they themselves would not administer. But prominently, death penalty, torture and non fair trial are given importance. Thus many countries, such as Australia, Canada, Macao,[ and most European nations, will not allow extradition if the death penalty may be imposed on the suspect unless they are assured that the death sentence will not be passed or carried out. Similarly, many countries will not extradite if there is a risk that a requested person will be subjected to torture, inhuman or degrading treatment or punishment. In the case of Soering Vs United Kingdom, the European Court of Human Rights held that it would violate Article 3 of the European Convention on Human Rights to extradite a person to the United States from the United Kingdom in a capital case. This was due to the harsh conditions on death row and the uncertain timescale within which the sentence would be executed.

2.11 UN INITIATIVES AT HARMONIZATION OF LEGAL REGIME OF EXTRADITION

Keeping in view the variations in the terms of extradition treaties concluded by the concerned states and also the variations prevailing in the municipal laws on extradition of different countries, the United nations with a bid to stimulate building up of a uniform legal regime relating to extradition took the initiatives to draft models that could be a guide to the countries in formulating their individual laws and the treaties that they may conclude. These drafts obviously reflect the desirable aspects and trends of the extradition law.


2.11.1 U.N. Model Treaty on Extradition, 1990

Convinced that the establishment of bilateral and multilateral arrangements for extradition will greatly contribute to the development of more effective international co-operation for the control of crime, convinced that in many cases existing bilateral extradition arrangements are outdated and should be replaced by modern arrangements
which take into account recent developments in international criminal law, and further recognizing the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions, the United nations adopted a Model treaty of Extradition. In 1994

The Model Treaty goes as follows:

Article 1

Obligation to extradite

Each Party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of sentence in respect of such an offence.\(^{139}\)

Article 2

Extraditable offences

1. For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition shall be granted only if a period of at least [four/six] months of such sentence remains to be served.

2. In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether:

\(^{138}\) Adopted in 1994 by General Assembly Resolution 45/116, subsequently amended by General Assembly resolution 52/88

\(^{139}\) Reference to the imposition of a sentence may not be necessary for all countries
(a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account.

3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control or other revenue matters, extradition may not be refused on the ground that the law of the requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty or exchange regulation of the same kind as the law of the requesting State.\textsuperscript{140}

4. If the request for extradition includes several separate offences each of which is punishable under the laws of both Parties, but some of which do not fulfil the other conditions set out in paragraph 1 of the present article, the requested Party may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence.

Article 3

Mandatory grounds for refusal

Extradition shall not be granted in any of the following circumstances:

(a) If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature. Reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action

\textsuperscript{140} Some countries may wish to omit this paragraph or provide an optional ground for refusal under Article 4.
where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition;\textsuperscript{141}

(b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic, origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;

(c) If the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law;

(d) If there has been a final judgment rendered against the person in the requested State in respect of the offence for which the person's extradition is requested;

(e) If the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;\textsuperscript{142}

(f) 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 or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;\textsuperscript{143}

(g) If the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to

\textsuperscript{141} Countries may wish to exclude certain conduct, e.g., acts of violence, such as serious offences involving an act of violence against the life, physical integrity or liberty of a person, from the concept of political offence.

\textsuperscript{142} Some countries may wish to make this an optional ground for refusal under Article 4. Countries may also wish to restrict consideration of the issue of lapse of time to the law of the requesting State only or to provide that acts of interruption in the requesting State should be recognized in the requested State.

\textsuperscript{143} General Assembly Resolution 2200 A (XXI), Annex.
arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence.\textsuperscript{144}

Article 4

Optional grounds for refusal

Extradition may be refused in any of the following circumstances:

(a) If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;\textsuperscript{145}.

(b) If the competent authorities of the requested State have decided either not to institute or to terminate proceedings against the person for the offence in respect of which extradition is requested;

(c) If a prosecution in respect of the offence for which extradition is requested is pending in the requested State against the person whose extradition is requested;

(d) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its

\textsuperscript{144} Some countries may wish to add to Article 3 the following ground for refusal: "If there is insufficient proof, according to the evidentiary standards of the requested State, that the person whose extradition is requested is a party to the offence".

\textsuperscript{145} Some countries may also wish to consider, within the framework of national legal systems, other means to ensure that those responsible for crimes do not escape punishment on the basis of nationality, such as, \textit{inter alia}, provisions that would permit surrender for serious offences or permit temporary transfer of the person for trial and return of the person to the requested State for service of sentence.
competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;\textsuperscript{146}

(e) If the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;

(f) If the offence for which extradition is requested is regarded under the law of the requested State as having been committed in whole or in part within that State.\textsuperscript{147}

Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;

(g) If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal;

(h) If the requested State, while also taking into account the nature of the offence and the interests of the requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

Article 5

Channels of communication and required documents\textsuperscript{148}

\textsuperscript{146} Some countries may wish to apply the same restriction to the imposition of a life, or indeterminate, sentence.

\textsuperscript{147} Some countries may wish to make specific reference to a vessel under its flag or an aircraft registered under its laws at the time of the commission of the offence.

\textsuperscript{148} Countries may wish to consider including the most advanced techniques for the communication of requests and means which could establish the authenticity of the documents as emanating from the requesting State.
1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties.

2. A request for extradition shall be accompanied by the following:

   (a) In all cases,

      (i) As accurate a description as possible of the person sought, together with any other information that may help to establish that person's identity, nationality and location;

      (ii) The text of the relevant provision of the law creating the offence or, where necessary, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offence;

   (b) If the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission.149

   (c) If the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;

149 Countries requiring evidence in support of a request for extradition may wish to define the evidentiary requirements necessary to satisfy the test for extradition and in doing so should take into account the need to facilitate effective international cooperation
(d) If the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2 (c) of the present article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;

(e) If the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

3. The documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the requested State or in another language acceptable to that State.

Article 6

Simplified extradition procedure\textsuperscript{150}

The requested State, if not precluded by its law, may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority.

Article 7

Certification and authentication

Except as provided by the present Treaty, a request for extradition and the documents in support thereof, as well as documents or other material supplied in response to such a request, shall not require certification or authentication.\textsuperscript{151}

Article 8

Additional information

\textsuperscript{150} Countries may wish to provide for the waiver of speciality in the case of simplified extradition

\textsuperscript{151} The laws of some countries require authentication before documents transmitted from other countries can be admitted in their courts and, therefore, would require a clause setting out the authentication required
If the requested State considers that the information provided in support of a request for extradition is not sufficient, it may request that additional information be furnished within such reasonable time as it specifies.

Article 9

Provisional arrest

1. In case of urgency the requesting State may apply for the provisional arrest of the person sought pending the presentation of the request for extradition. The application shall be transmitted by means of the facilities of the International Criminal Police Organization, by post or telegraph or by any other means affording a record in writing.

2. The application shall contain a description of the person sought, a statement that extradition is to be requested, a statement of the existence of one of the documents mentioned in paragraph 2 of article 5 of the present Treaty, authorizing the apprehension of the person, a statement of the punishment that can be or has been imposed for the offence, including the time left to be served and a concise statement of the facts of the case, and a statement of the location, where known, of the person.

3. The requested State shall decide on the application in accordance with its law and communicate its decision to the requesting State without delay.

4. The person arrested upon such an application shall be set at liberty upon the expiration of [40] days from the date of arrest if a request for extradition, supported by the relevant documents specified in paragraph 2 of article 5 of the present Treaty, has not been received. The present paragraph does not preclude the possibility of conditional release of the person prior to the expiration of the [40] days.

5. The release of the person pursuant to paragraph 4 of the present article shall not prevent re-arrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received
countries can be admitted in their courts and, therefore, would require a clause setting out the authentication required.

Article 10

Decision on the request

1. The requested State shall deal with the request for extradition pursuant to procedures provided by its own law, and shall promptly communicate its decision to the requesting State.

2. Reasons shall be given for any complete or partial refusal of the request.

Article 11

Surrender of the person

1. Upon being informed that extradition has been granted, the Parties shall, without undue delay, arrange for the surrender of the person sought and the requested State shall inform the requesting State of the length of time for which the person sought was detained with a view to surrender.

2. The person shall be removed from the territory of the requested State within such reasonable period as the requested State specifies and, if the person is not removed within that period, the requested State may release the person and may refuse to extradite that person for the same offence.

3. If circumstances beyond its control prevent a Party from surrendering or removing the person to be extradited, it shall notify the other Party. The two Parties shall mutually decide upon a new date of surrender, and the provisions of paragraph 2 of the present article shall apply.

Article 12

Postponed or conditional surrender

1. The requested State may, after making its decision on the request for extradition, postpone the surrender of a person sought, in order to proceed against that person,
or, if that person has already been convicted, in order to enforce a sentence imposed for an offence other than that for which extradition is sought. In such a case the requested State shall advise the requesting State accordingly.

2. The requested State may instead of postponing surrender, temporarily surrender the person sought to the requesting State in accordance with conditions to be determined between the Parties.

Article 13

Surrender of property

1. To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all property found in the requested State that has been acquired as a result of the offence or that may be required as evidence shall, if the requesting State so requests, be surrendered if extradition is granted.

2. The said property may, if the requesting State so requests, be surrendered to the requesting State even if the extradition agreed to cannot be carried out.

3. When the said property is liable to seizure or confiscation in the requested State, it may retain it or temporarily hand it over.

4. Where the law of the requested State or the protection of the rights of third parties so require, any property so surrendered shall be returned to the requested State free of charge after the completion of the proceedings, if that State so requests.

Article 14

Rule of specialty

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;\textsuperscript{152}

(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.\textsuperscript{153}

2. A request for the consent of the requested State under the present article shall be accompanied by the documents mentioned in paragraph 2 of article 5 of the present Treaty and a legal record of any statement made by the extradited person with respect to the offence.\textsuperscript{154}

3. Paragraph 1 of the present article shall not apply if the person has had an opportunity to leave the requesting State and has not done so within [30/45] days of final discharge in respect of the offence for which that person was extradited or if the person has voluntarily returned to the territory of the requesting State after leaving it.

Article 15

Transit

1. Where a person is to be extradited to a Party from a third State through the territory of the other Party, the Party to which the person is to be extradited shall request the other Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other Party is scheduled.

2. Upon receipt of such a request, which shall contain relevant information, the requested State shall deal with this request pursuant to procedures provided by its

\textsuperscript{152} Countries may also wish to provide that the rule of speciality is not applicable to extraditable offences provable on the same facts and carrying the same or a lesser penalty as the original offence for which extradition was requested

\textsuperscript{153} Some countries may not wish to assume that obligation and may wish to include other grounds in determining whether or not to grant consent

\textsuperscript{154} Countries may wish to waive the requirement for the provision of some or all of these documents
own law. The requested State shall grant the request expeditiously unless its essential interests would be prejudiced thereby.\textsuperscript{155}

3. The State of transit shall ensure that legal provisions exist that would enable detaining the person in custody during transit.

4. In the event of an unscheduled landing, the Party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for [48] hours, pending receipt of the transit request to be made in accordance with paragraph 1 of the present article.

Article 16

Concurrent requests

If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited.

Article 17

Costs

1. The requested State shall meet the cost of any proceedings in its jurisdiction arising out of a request for extradition.

2. The requested State shall also bear the costs incurred in its territory in connection with the seizure and handing over of property, or the arrest and detention of the person whose extradition is sought.\textsuperscript{156}

\textsuperscript{155} Some countries may wish to agree on other grounds for refusal, which may also warrant refusal for extradition, such as those related to the nature of the offence (e.g. political, fiscal, military) or to the status of the person (e.g. their own nationals). However, countries may wish to provide that transit should not be denied on the basis of nationality.

\textsuperscript{156} Some countries may wish to consider reimbursement of costs incurred as a result of withdrawal of a request for extradition or provisional arrest. There may also be cases for consultation between the requesting and requested States for the payment by the requesting State of extraordinary costs, particularly in complex cases where there is a significant disparity in the resources available to the two States.
2.11.2 UN Model Law, 2004- Salient Provisions

The fundamental principle guiding this effort was the acknowledgement that effective cooperation in the field of extradition could be achieved through, inter alia, the existence of streamlined national legislation which can be used in two ways: First, where extradition treaties or arrangements exist, as a procedural or enabling framework not with a view to replacing or substituting a treaty in force, but in order to support its implementation. Secondly, in cases of countries that extradite in the absence of a treaty, as a supplementary, comprehensive and self-standing framework for surrendering fugitives to the requesting State.

Section 1: Few important definitions

For the purposes of the present law, the following definitions shall apply:
“Extradition” means the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.

“Requesting State” means a State which requests of [country adopting the law] the extradition of a person or the provisional arrest of a person with a view to extradition.

“Receiving State” means a State to which a person is to be extradited from a third State through the territory of [country adopting the law].

“Extradition treaty” means a bilateral treaty concluded between [country adopting the law] and a foreign country, or a multilateral treaty to which [country adopting the law] is a Party, which contains provisions governing extradition of persons who are present in the territory of [country adopting the law].

“A person sought” means a person whose extradition or provisional arrest with a view to extradition is requested by means of submitting a relevant request to the competent authorities of country adopting the law.

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157 Section 1 “General Provisions’
Section 2: Legal bases of extradition

1. A person may be extradited in accordance with the present law or a relevant extradition treaty or agreement on the request of a requesting State for the purpose of prosecution or imposition or enforcement of a sentence in respect of an extraditable offence, as such offence is defined under section 3(1)(a), and if applicable 3(2), of the present law or under the terms of the extradition treaty or agreement.

2. Extradition pursuant to a treaty shall be governed by extradition treaties or agreements in force for [country adopting the law].

3. Extradition may be granted by virtue of comity or where, on the basis of assurances given by the competent authorities of the requesting State, it can be anticipated that this State would comply with a comparable request of [country adopting the law], or where it is otherwise deemed in the interests of justice to do so.

4. III. PART 2: Extradition from [Country adopting the law] (Passive Extradition)

Chapter 1: Substantive conditions for extradition

Section 3: Extraditable offences - Double criminality requirement

1. Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of [country adopting the law], extradition shall [may] be granted to the requesting State, if:
   a) The offence for which it is requested is punishable under the law of the requesting State by imprisonment or other deprivation of liberty for a maximum period of at least [one/two year(s)], or by a more severe penalty; and
   b) The conduct that constitutes the offence would, if committed in [country adopting the law], constitute an offence, which, however described, is punishable under the law of [country adopting the law] by imprisonment or other deprivation of liberty for a
maximum period of at least [one/two year(s)] or by a more severe penalty.

2. Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of [country adopting the law], the extradition of a person who has been sentenced to imprisonment or other deprivation of liberty imposed for such an offence, as defined in subsection (1), shall not be granted unless [may only be granted if] a period of at least [six] months of such sentence remains to be served or a more severe punishment remains to be carried out.\textsuperscript{158}

3. In determining whether an offence is an offence punishable under the laws of [country adopting the law] and the requesting State, it shall not matter whether:

   a) The laws of both [country adopting the law] and the requesting State place the acts or omissions constituting the offence within the same category of offences or denominate the offence by the same terminology or define or characterize it in the same way;

   b) The constituent elements of the offence may be different under the laws of both [country adopting the law] and the requesting State, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account.\textsuperscript{159}

4. Acts that infringe the law of the requesting State relating to taxes, duties, customs and exchange shall may be extraditable offences in accordance with subsection (1), if they correspond to offences of the same nature under the law of [country adopting the law]. Extradition shall may not be refused on the ground that the law of [country adopting the law] does not impose the same kind of tax or duty or does not contain a tax, duty, customs or exchange regulation of the same kind as the law of the requesting State.\textsuperscript{160}

\textsuperscript{158} For the application of subsections (1) and (2), paragraphs 15-22 of the Revised Manual on the Model Treaty on Extradition 2002 may also be considered mutatis mutandis as guidance references.

\textsuperscript{159} Revised Manual on the Model Treaty on Extradition, 2002, paragraphs 20-22

\textsuperscript{160} Ibid, paragraphs 23-26
5. If the request for extradition includes several offences each of which is punishable under the laws of both the requesting State and [country adopting the law], but some of which are not extraditable in accordance with subsections (1)(a) and (2) (penalty requirement), extradition may be granted for the latter offences provided that the person sought is to be extradited for at least one extraditable offence.  

Chapter 2: Grounds for refusal of an extradition request

Section 4: Offences of political nature  

1. Extradition [shall not be granted] [may be refused], if the offence for which it is requested is an offence of a political nature.  

2. Where extradition is impeded on the ground provided in subsection (1), the competent authorities of the [country adopting the law] and the requesting State shall, as appropriate, consult with a view to facilitating the resolution of the matter.  

3. Subsection (1) shall not apply to offences in respect of which [country adopting the law] has assumed an obligation, pursuant to any multilateral convention or bilateral treaty or arrangement, either not to consider them as offences of a political nature for the purpose of extradition or to take prosecutorial action in lieu of extradition.  

4. The following conduct also does not constitute an offence of political nature for the purpose of extradition:  
a) murder or manslaughter;  

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161 Ibid, paragraphs 27-33  
162 Ibid, paragraphs 41-46  
163 States may also include in this “exception” subsection more specific references to include certain crimes related to terrorism. An example that could be used is the following approach of the 2002 European Union Framework Decision against Terrorism:  
“Serious crimes or acts of violence committed with the aim of:  
a) causing death or serious bodily harm or intimidating a population; or  
b) unduly compelling a government or international organization to perform or abstain from performing any act; or  
c) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization”.

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b) inflicting serious bodily harm;
c) kidnapping, abduction, hostage-taking or extortion;
d) using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and
e) an attempt or conspiracy to engage in, counselling, aiding or abetting another person to engage in, or being an accessory after the fact in relation to, the conduct referred to in any of the subsections (4)(a) to (4)(d)\(^\text{164}\).

Section 5: Discrimination clause\(^\text{165}\)
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\(^\text{166}\)**
Race, religion, nationality, membership of a particular social group or political opinion, or his position may be prejudiced for any of those reasons.

Section 6: Torture, cruel, inhuman or degrading treatment or punishment
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.\(^\text{167}\)

Section 7: Fair trial standards-Judgement in absentia-Extraordinary or ad hoc court or tribunal

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\(^{164}\) In addition to what is stipulated in subsection (3), this subsection intends to cover cases where an enumerative reference to certain crimes is favoured.

\(^{165}\) Revised Manual on the Model Treaty on Extradition, paragraphs 47-48

\(^{166}\) Based on article 33 paragraph 1 of the 1951 Convention relating to the Status of Refugees

\(^{167}\) Revised Manual on the Model Treaty on Extradition, paragraphs 57-58
1. 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.

2. Extradition requested for the imposition or enforcement of a sentence may be refused, if the judgement has been rendered in absentia in the requesting State, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his defence and he has not had or will not have the opportunity to have the case retried in his presence, unless the competent authorities of the requesting State give assurances considered sufficient to guarantee to that person the right to a re-trial which safeguards his rights of defence, or unless the person has been duly notified and has had the opportunity to appear and arrange for his defence and has elected not to do so.\textsuperscript{168}

3. Extradition may be refused, if the person sought would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal\textsuperscript{169}, unless the competent authorities of the requesting State give assurances considered sufficient that the judgement will be passed by a court which is generally empowered under the rules of judicial administration to pronounce on criminal matters.\textsuperscript{170}

\textbf{Section 8: Ne bis in idem}
Extradition may be refused, if there has been a final judgement rendered and enforced against the person sought in [country adopting the law] [or in a third State] in respect of the offence for which extradition is requested.\textsuperscript{171}

\textsuperscript{168} Ibid, Paragraphs 59-60
\textsuperscript{169} The ad hoc International Criminal Tribunals for the former Yugoslavia (established by Security Council resolution 827 of 25 May 1993) and Rwanda (established by Security Council resolution 955 of 8 November 1994) do not fall within the scope of application of this paragraph, which is also not applicable to other internationalized domestic criminal tribunals, such as the Sierra Leone Special Court (established by treaty between the government of that country and the United Nations on 16 January 2002) or the East Timor Special Panels (established by Regulation (2000/15) promulgated by the United Nations Transitional Administration in East Timor (UNTAET) under its specific mandate).
\textsuperscript{170} Revised Manual on the Model Treaty on Extradition, Paragraphs 90-91
\textsuperscript{171} Revised Manual on the Model Treaty on Extradition, Paragraphs 50-52
Section 9: Statute of limitation

Extradition [shall not be granted] [may be refused], if prosecution or punishment against the person sought is barred, under the law of [country adopting the law] or the requesting State, by lapse of time, prescription or statute of limitation at the time of receipt of the request for extradition.

Section 10: Military offences

Extradition [shall not be granted] [may be refused], if the offence for which it is requested is an offence under military law, which is not also an offence under ordinary criminal law in the requesting State.

Section 11: Nationality

Option 1

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172 Ibid, Paragraph 55
173 It is suggested this ground for refusal be optional, if considered under the law of the requested State. In addition, any acts or events that interrupt or suspend time-limitation in the requesting State should be taken into consideration by the competent authorities of the requested State.
174 No statutory limitation applies to war crimes, crimes against humanity, as well as to crimes of genocide and apartheid (article I of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968).
175 Revised Manual on the Model Treaty on Extradition, Paragraph 49
176 The two alternative options are offered in view of the divergent national approaches on this issue. While traditionally it is common law States that do not restrict the extradition of their nationals (in part on the grounds that they are not always prepared to exercise jurisdiction over such nationals for offences committed outside their respective territories), other States of the civil law tradition have adopted a different view by asserting extraterritorial jurisdiction over nationals, so if nationals are not to be extradited (because of constitutional or policy prohibitions) they may be tried for extraterritorial offences. The approach of making discretionary the extradition of nationals is a way of coordinating the different attitudes (see article 6 of the Council of Europe 1957 Convention on Extradition).

However, an increasing number of civil law States have opted over the last years for not restricting the extradition of their nationals (see art 7 of the 1996 European Union Convention on Extradition, although enabling a system of renewed reservations by the Member States, as well as the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, which does not include nationality as either a mandatory or optional ground for non-execution of the warrant, providing, however, the option of making execution conditional on a guarantee that, upon conviction, the individual is returned to his State of nationality to serve the sentence there (art 5 para. 3) and an optional ground for non-execution where the European Arrest Warrant is issued for the purposes of execution of a custodial sentence against a national of the executing Member State and that State undertakes to execute the sentence in accordance with its domestic law). This trend may be explained in part by the complexity and resource implications of conducting domestic prosecutions in lieu of extradition based on foreign gathered evidence, and the concern that dangerous criminals may be able to remain at large in their societies.
[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].

Section 12: Death penalty

If the offence for which extradition is requested carries the death penalty under the law of the requesting State and is not so punishable under the law of the [country adopting the law], extradition [shall not be granted] [may be refused], unless the competent authorities of the requesting State give assurances considered sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.177

Section 13: Extraterritoriality
Extradition may be refused, if the offence for which it is requested has been committed outside the territory of the requesting State178 and the law of [country adopting the law] does not allow prosecution for the same offence when committed outside its territory.179

Section 14: Surrender to International Criminal Court or Tribunals

The grounds for refusal of an extradition request set out in sections 4-13 of the present law shall not apply in the case of a person who is the subject of a request for surrender by the International Criminal Court or Tribunals.180

It is within the discretion of States to include this section in the domestic extradition legislation, given that many of them have enacted separate laws to regulate surrender to international judicial bodies.

177 Revised Manual on the Model Treaty on Extradition, Paragraphs 81-84
178 The extraterritorial jurisdiction of the requesting State should be exercised in accordance with international law and its domestic legislation.
179 Revised Manual on the Model Treaty on Extradition, Paragraphs 85-87
180 It is within the discretion of States to include this section in the domestic extradition legislation, given that many of them have enacted separate laws to regulate surrender to international judicial bodies
Section 15: Prosecution in case of non-extradition

1. An act or omission committed outside the territory of [country adopting the law] shall be deemed to have been committed in [country adopting the law] and the [competent executive authority of country adopting the law] shall submit the relevant case without undue delay to the [competent prosecutorial authority of country adopting the law] for the purpose of prosecution of the person committing the act or omission, if:

a) that person is after the commission of the act or omission present in the territory of [country adopting the law]; and

b) a request for the extradition of that person has been refused on one of the grounds provided in sections 4, 11 or 12 of the present law, as well as in section 5 of this law, where the position of the person sought may be prejudiced after his extradition on account of his race, religion, nationality, ethnic origin, political opinions, sex [gender] or status\textsuperscript{181}; and

c) the State that requested extradition has subsequently sought the prosecution of the person in [country adopting the law] in respect of the offence for which extradition was requested; and

d) the conduct that constitutes the offence would, if committed in [country adopting the law], constitute an offence, which, however described, is punishable under the law of [country adopting the law], and, under these circumstances, the person sought would be liable to sanction if he had committed the offence in [country adopting the law].

2. For the purpose of subsection (1), the fact that extradition has been refused and that the foreign State has requested prosecution of the person sought in [country

\textsuperscript{181} The wording of Article 33 paragraph 1 of the 1951 Convention relating to the Status of Refugees could also be used (see Section 5 of the Model Law).
adopting the law] may be proved by a certificate to that effect issued by the
[competent executive authority of country adopting the law].

2.12 SUMMARY

Extradition is a very crucial legal tool developed for the purpose of administration of criminal justice by the countries. It is an effective solution for jurisdictional problems encountered by the states due to the sovereign constraints. It is not just the individual countries but the international community as a whole gets the overall benefit from the effective utilization of this legal avenue. The legal basis for initiation of extradition rests either on consensual agreement between states either in the form of treaties or on the considerations of comity and reciprocity. Extradition proceedings are guided by the procedural requirements as well as some basic principles that evolved over a period of time. They all reflect the typical balancing that has to be secured between interests of individual countries and the collective interests of international community. Present extradition regime also is reflective of its willingness to take into consideration the interests of the individual who is the subject matter of extradition. Bilateral, regional and global initiatives for the creation of a sound legal regime of extradition reveal the significance and the general legal parameters of extradition.