CHAPTER 2

Growth of Extradition under International Legal Regime

2.1. OVERVIEW

“Extradition” under Public International Law regime has always been developing with the needs of the society, and the growing demand for prosecutions for accused individuals has lent more functionality to this branch of study. In the last few decades we have witnessed some very important decisions being given by domestic as well as international courts, on extradition matters, which have encouraged the victims more and more to seek justice.

Extradition laws like any other discipline under international law has been developed from state practices, which eventually have led to recognizing of some basic principles, which are now widely adopted in the bi-lateral and multilateral treaties.

This chapter would firstly, explain the origin and meaning of the term “extradition”, while referring to both primary and secondary sources of literature, with the objective of understanding the general principles of extradition, as has developed over centuries. With the changing dynamics of international relations, the scope of extradition laws also have been changing, making it pertinent to understand the development of the extradition laws with reference to some watershed moments in history.

It is well known that extradition while keeping up with the needs of the society have been amenable to changes in its way of being executed. However, if we try to locate the most important phase of its development in the recent decades, then the existing terrorist
threats or successful terrorist attacks definitely needs to be zeroed down. Terrorism on the other hand can be safely be said to have become global, in the sense of being carried out and the effects being felt by more than one nation at the same time. To meet the challenges of the threats posed by acts of terrorism, the comity of nations have also with the passage of time developed a well detailed multi-lateral treaty system, which monitors the extradition issues as well. The researcher intends to lay out the major developments in the extradition laws with reference to terrorism in particular and the way the treaty laws have developed to keep up with the new challenges imposed by the threat of terrorist attacks.

2.1.1 EXTRADITION – GENERAL PRINCIPLES

To begin with, the term “extradition” is ordinarily understood as the act of surrendering an accused or convicted person by one state to another usually under the provisions of a statute or treaty. However the term “extradition”, has its etymological roots in Latin and French language and is supposed to be in use since early nineteenth century in France. It is “apparently a coinage of Voltaire’s, from Latin ex “out/former” + traditionem (nominative traditio) “a delivering up, handing over,” noun of action from tradere “to hand over”.91

“Extradition” is defined as the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of, a crime, by the state on whose territory he happens for the time being to be,92 under legal perspective.

There has been extensive writing on extradition laws in international and regional perspective and all of them have adopted the legalistic meaning, as mentioned above, without any deviation.93

The general principles of extradition can be found mostly in treaties and even the model laws on the said subject. We can identify the general principles of extradition by referring

93 Supra note 86.
to definitions given by the International Organizations as well as textual sources. Some of
the most important works have been put together by international organizations like UN; European Union; and SAARC.

At the very outset, it must be understood that since a very long time, countries have been
generally bothered about the evolving nature of crimes being committed, which are
increasingly transnational in nature, also popularly known as ‘organized crimes’. Organized
crimes manifest in many forms, like trafficking in drugs, firearms and even persons. These
kinds of crimes threaten peace and human security, violates human rights and undermines
economic, social, cultural, political and civil development of societies around the world. 94
To this extent the UN Office on Drugs and Crimes has adopted UN Convention against
Transnational Organized Crime95 (Organized Crime Convention) and the three Protocols
related to trafficking in persons, smuggling of migrants and trafficking of firearms - that
supplement it. In addition to it the UN has developed a common universal legal framework
against terrorism which is comprised of the 18 universal legal instruments against
terrorism along with the relevant UNSC Resolutions.96 One of the common threads of all
these efforts have been to ease the way of extraditing individuals engaged in such crimes.
The UN Congresses on Crime Prevention and Criminal Justice97 approved the  MTE98.

Fundamental principles of extradition laws can be identified from the provisions as
found in the treaties 99, like:

98 UN General Assembly, Model Treaty on Extradition: resolution adopted by the General Assembly., (14
99 Id.; See Supra Note. 12; Convention On Offences And Certain Other Acts Committed On Board Aircraft,
   Sept. 14, 1963, 704 U.N.T.S 220; Convention For The Suppression Of Unlawful Seizure Of Aircraft, Dec. 16,
   International Civil Aviation, Feb. 24, 1988,1589 U.N.T.S 474; Convention for the Suppression of Unlawful
a. Existence of an obligation to extradite

b. The offences must fall in the category of extraditable offences or even known as ‘PODC’;

c. Grounds of mandatory refusal and optional refusal

d. RoS.

All the above-mentioned principles have found their rightful place in multi-lateral, bi-lateral treaties as well as national legislations. The existence of an obligation to extradite arises for the requested State upon receiving of a request to extradite and is subject to the treaty requirements. Such obligation covers within its ambit individuals wanted for prosecution, or with the purpose of sentence enforcement, with respect to extraditable offences. Obligation is further strengthened by the national processes which are necessary to put treaty obligations into effect. The PODC is a simple requirement of the offence to be punishable under the laws of both parties, which is further subjected to a minimum period of imprisonment. This approach is a different from the earlier approach of countries sharing a list of offences. However the success of this principle depends on the municipal courts not giving restrictive interpretation to the enumerated offences in treaties so as to require in each case that the offence actually charged should correspond with an offence by the law of the requested state, which is within the treaty, but with the offence of the same name, as the requested states law defines. PoDC is also suffering a decline because of the recent developments in European laws of extradition. A recent Framework Decision adopted by the CEU removes the principle entirely in relation to certain types of crimes. Following these developments the United Kingdom has enacted the Extradition Act 2003 (UK), which would allow extradition from the UK for persons sentenced for

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100 Supra Note 25
101 Supra Note 4
102 Chapter 41, s. 65 of the Extradition Act (2003)
offences carrying a maximum sentence of one year or more, without any requirement that they are also offences in the UK. The extradition in the space of EU has been essentially simplified by the introduction of the European Arrest Warrant.

The development of human rights instruments, have resulted in more guarantees to individuals in the form of mandatory and optional grounds for refusing extradition requests. The grounds of refusal have developed initially through national legislations, but with the emergence of treaty system covering multiple offences; it has made a strong influence on the municipal laws as well. One such ground being the ‘political offence exemption’, which includes acts like treason, sedition, even possessing membership to a banned political, which can be viewed as assaults directly on the states security and integrity. Still, some acts to fulfill any political agenda has long been attempted to be kept out of political offence category, like acts of apartheid, genocide, WCs, crimes against humanity, taking or any attempt to take life of the Head of the state or the family members. In the light of terrorism, however, the nations have maintained almost a uniform policy of de-politicizing the acts of terrorism, as defined in the Conventions, while imposing a duty to either prosecute or extradite.

The recent trends in extradition treaty practice has been to reduce the grounds of refusal, but still grounds like extradition of nationals, death penalty, extraterritoriality, extraordinary / ad-hoc tribunal, humanitarian exceptions, give the requested countries an opportunity to exercise their discretion, to decide on extradition matters.

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103 Supra Note. 38
104 Supra Note. 29
Rule of specialty, is a widely recognized principle, which limits the power that the requesting State has over the person so surrendered. This principle is treated as a safeguard to protect the rights of an individual sough to be extradited. RoS requires that a person extradited to a requesting state is not to be detained, prosecuted or punished by the requesting state for any offence committed prior to the extradition, apart from that for which extradition was granted.\textsuperscript{110} This rule has been recognized in several international instruments\textsuperscript{111}.

2.1.2 EXTRADITION UNDER INTERNATIONAL TREATIES:

International law in the present day is mostly governed by treaties, which are an end product of deliberation by the representatives of States. Like any other branch the laws of extradition have also developed with the increasing number of treaties. We are yet to have any single multi-lateral instrument solely dedicated to the issue of extradition. Till date there is only one Model Law on extradition by the UNGA, which at the most possesses only some persuasive value. The other document which also provides support to laws of extradition is MTMACM, by the UNGA. However, the fact that such model treaties have still not been adopted as international convention, should not cause worry as the nations using the offices of regional organizations have adopted binding legal obligations, both with respect to mutual assistance as well as extradition related issues. Growth and development of extradition law using treaty system has been slow and steadily keeping up with the new challenges.

2.2 EXTRADITION AND INTERNATIONAL LAW—HISTORICAL PERSPECTIVE

The relationship between extradition and international law has a long history, which has only had a firm base after the UN had come into existence. This relationship between both will be studied in different time-frames.

2.2.1 PRE FIRST WORLD WAR:

\textsuperscript{110} Supra Note 38 at p.49
\textsuperscript{111} Supra Note. 108, Art.101; Supra Note. 4
Major developments in international law have taken place after the two world wars, but however, laws of extradition have been strengthening by the presence of treaties and judicial decisions even before the First World War. Extradition laws mostly consisted of bilateral treaties between nations.\textsuperscript{112} Most of the development with regard to extradition laws, till the early nineteenth century is seen between U.S.A and the other European nations. The term ‘extradition’ was not found in treaties and convention until 1828.\textsuperscript{113} Before that the French in its treaties used terms like restituter and remettre, which meant to restore or send back.\textsuperscript{114} The development of the law of extradition can be traced from times of antiquity to middle ages and thereafter.

One of the oldest treaties which find reference is treaty of Kadesh entered between Rameses II of Egypt and the Hittite prince Hattusili III (1280 B.C), which made both sides to agree to repatriate criminals and political refugees from the other side.\textsuperscript{115} It is believed that extradition in the earlier times was the result of political occurrences in which the political enemies of the various sovereigns were the objects and the basis of such action was coercion. Contrary to the present notions of extradition which is rooted in legality, earlier extradition was seen more as challenging the sovereignty of the requested ruler. In the ancient times, the common crimes like theft, murder or rape were considered as matters requiring private justice, than the interference of the sovereign power. Even these societies required rendition for common and political crimes. The law of extradition further developed during middle ages to early modern era in the form of treaty laws mostly concerning political offences, like the Treaty of 1174, between Henry II and Guillaume of Scotland, and the 1303 Treaty of Paris, between Edward II of England and Philippe leBel of France; The Convention of March 4, 1376, between Charles V (“the Wise”), King of France, and the Count of Savoy.\textsuperscript{116} With the passage of time extradition was being

\textsuperscript{112} SIR EDWARD CLARKE, A TREATISE UPON THE LAW OF EXTRADITION, APPENDIX P. III – CLX VII.
\textsuperscript{114} Id
\textsuperscript{115} Supra Note. 2 p. 5. See Supra Note. 74
\textsuperscript{116} Supra Note, at p. 48
considered as part of the overall criminal justice system. Criminalist Baccaria, had in fact incorporated principles of humanity, milder penalties and influenced by principle of fairness.\textsuperscript{117}

Extradition treaties in the modern era were a much finer version of the earlier treaties extending to political crimes, desertion from armed forces as well as common crimes, like the one in 1736 between France and Holland, which were followed by similar treaties between France and Egypt, Switzerland, Sardinia, and several German States.\textsuperscript{118} France entered into maximum number of extradition treaties, except with Britain and these treaties had established some of the basic extradition procedures which are still relevant and practiced. The ‘RoS’ developed during 18\textsuperscript{th} to 19\textsuperscript{th} century period through treaty laws\textsuperscript{119}. U.S.A also developed extradition laws by it first extradition treaty with Britain known as Jay Treaty in 1794 and the subsequent one known as Webster-Ashburton Treaty of 1842, which unlike the earlier one extended to offences of murder, physical attack with objective to perpetrate murder, forgery, robbery, piracy, and the utterance of counterfeit document, followed by another comprehensive extradition treaty in July 15, 1889.\textsuperscript{120} Back in 1879, efforts were taken by approving a Treaty on Extradition which was the first multi-lateral treaty with the idea of establishing special rules on extradition, for nine countries in the American continent.\textsuperscript{121}

Britain also had contributed into developing the standard procedures of extradition. Earlier it entered into only five treaties between 1174\textsuperscript{122} and 1794 and it had remained meagre till 1870, after which it is estimated that Britain entered into such treaties with thirty four countries till 1910.\textsuperscript{123}

\textsuperscript{117}C. BECCARIA, DEI DELITTI E DELLE PENE (1764), translated in J. FARRER, CRIMES AND PUNISHMENTS 193-94 (1880)
\textsuperscript{118} Supra Note 116 at p. 50
\textsuperscript{119} Treaty, France – Luxembourg, 1844; Convention on Extradition, France – Saxony, April 28, 1850
\textsuperscript{121} Supra Note. 41.
\textsuperscript{122} Supra Note. 112
\textsuperscript{123} Ivan Supra Note. 2, at p 15
Very negligible amount of literature is devoted to the laws of extradition as developed in the Asian countries, especially India. One of the reasons could be the kind of governance the country had before it had become a British colony. However, the first legislation with regard to extradition is the Indian Extradition Act, 1903, which was enacted by the British colonial rulers. The said statute dealt with the surrender of fugitive criminals to States outside the British Empire. It was heavily influenced by the English Extradition Acts, 1870 and 1873. Historically extradition within the empire (later the Commonwealth) was governed by separate legislation from that which governed extradition to foreign states. Prior to this The Fugitive Offenders Act 1881 enabled arrest warrants issued (in relation to accused persons) to be endorsed by the Secretary of State or a magistrate sitting at Bow Street Magistrates’ Court. Subsequently all these laws have gone through changes keeping up with the de-colonisation process.

2.2.2 POST FIRST WORLD WAR:

The First World War had taken extradition beyond the ambit of bi-lateral treaties and extended itself to then unknown territory of WCs, which were considered to be in breach of international law. As the war was coming to an end, the Allied powers had made efforts to give effect to their ambition of putting the wheels of justice in motion by punishing individuals for committing acts in violation of international law made during war. To fulfill this ambition the allied powers had to secure the individuals in their custody before they could be tried, and the only means to that was by having them extradited to their countries, or before the Tribunal, to face trial. To this effect the two most important provisions of the treaty of Versailles are Article 227 and 228. The attempts to set the motion of extradition of Kaiser Wilhelm II (1859-1941), Germany’s last Kaiser, met with failure as

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124 The procedure for surrender of fugitive criminals to such “Foreign States” is laid down in Chapter II of the Indian Extradition Act (which has been declared a part of the English Extradition Act, 1870, by an Order-in-Council. See http://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile_9DVDSM0G.PDF
125 NICHOLLS, Supra note 86, at 7.
126 A Review Of The United Kingdom’s Extradition Arrangements , p. 42 [https://www.gov.uk/...data/.../extradition-review.pdf]
128 Id. Art. 228
Netherlands, refused the requests made through diplomatic channels, saying that the offenses charged against the Kaiser were unknown to Dutch law; didn’t find mention in any treaty to which Holland was party, thereby concluding that the efforts to try the Kaiser were as a result of political than of criminal character. The efforts to extradite around 895 Germans, who were accused of committing WC, by the Allies, were also rejected on the basis of nationality and instead offered them to be tried before German courts itself. However, this failure didn’t stop the countries make similar efforts after Second World War and thereafter, for similar violations. Post WW I, further developments in extradition laws can be seen in the form of mostly bilateral and few closed multi-lateral treaties as registered under the LON. Most of treaties were entered by Britain and U.S.A with other European

129 M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW – INTERNATIONAL CRIMINAL LAW SERIES 546(2nd ed. 2012).
130 Id. at p. 547.
131 Extradition Treaty among the U.S.A and Lithuania; Supplementary Convention to the Extradition Convention of October 26th, 1901, among the U.S.A and Belgium; Supplementary Treaty to the Extradition Treaty of April 9th, 1924 among the U.S.A and Lithuania; Additional Treaty to the Extradition Treaty of January 14th, 1893, among the U.S.A and Sweden; Supplementary Treaty to the Extradition Treaty of August 1st, 1924, between the U.S.A and Finland; Supplementary Treaty to the Extradition Treaty of November 8th 1923 among the U.S.A and Estonia; Supplementary Extradition Convention. Signed at Washington, December 23, 1925; Extradition Treaty between Great Britain and Austria; Supplementary Convention to the Extradition Convention of 31 January 1930 between the U.S.A and Austria; Treaty among the Government of Austria and the Government of the U.S.A for the extradition of fugitives from justice; Exchange of notes respecting the extension to Transjordan of the provisions of the Extradition Treaty between Austria-Hungary and Great Britain, signed at Vienna, 3 December 1873, as amended by the Declaration signed at London, 26 June 1901; Convention regarding Extradition and Judicial Assistance in Criminal Matters, (with Final Protocol), 1930; Extradition Convention between the U.S.A and Estonia, 1923; Extradition Treaty between Great Britain and Sweden and Norway, 1873; Convention relating to Extradition and Judicial Assistance in Criminal Matters, 1928; Extradition Treaty between Great Britain and Chile, 1897; Extradition Convention, 1922; Treaty between Great Britain and Latvia for the extradition of criminals, 1924; Supplementary Convention to the Extradition Treaty of September 20th, 1880; Convention regarding the Extradition of Criminals and Judicial Assistance in Criminal Matters, 1931; Extradition Convention additional to the Convention of January 6, 1909; Supplementary Convention to the Extradition Convention of January 6th, 1909; Convention on Extradition adopted by the Seventh International Conference of American States, 1933; Extradition Treaty among the United States of Mexico and the Republic of Panama, 1928; Supplementary Extradition Convention, 1939; Supplementary Convention to the Extradition Treaty of 29 October 1883 among the U.S.A and the Grand Duchy of Luxemburg, 1935; Extradition Treaty among the U.S.A and Great Britain and Northern Ireland, 1931; Extradition Treaty among the U.S.A and Great Britain and Northern Ireland, 1931; Declaration amending Extradition Treaty between Great Britain and Austria, 1901; Treaty for the Extradition of Criminals, signed at London, May 30, 1924; Extradition Treaty between Great Britain and the Netherlands, 1898; Convention supplementary to the Extradition Treaty of October 17, 1892; Extradition Treaty, 1923; Extradition Treaty signed at Helsingfors, 1 August, 1924; Exchange of notes between His Majesty Government in the United Kingdom and the Hungarian Government respecting the application to Transjordan of the provisions of the Extradition Treaty between Austria-Hungary and Great Britain, signed at
nations and their colonies and they had adhered to the basic principles of extradition as it is settled now.

2.2.3 POST SECOND WORLD WAR:

Post WW II, the world has witnessed more NIACs, involving rebel groups, mercenaries, large scale money laundering as well as the nuclear threats. From the end of WW II to the end of cold war, the laws of extradition had faced different kinds of challenges, firstly in the form of efforts to punish individuals for committing violations of IHL as well as the acts of terrorism attacks, which continues till date. The following developments almost changed the course of development of extradition laws, like the replacement of LON with the UN, which had greater participation from the international community; as well as the tension between the two power blocks [U.S.A and erstwhile U.S.S.R]; decolonization of the former colonies of Britain. All the above-mentioned development had led to the conclusion of extradition laws in the form of pure bi-lateral extradition treaties; multilateral conventions whose purposes were to prevent or repress specific categories of offenses, containing provisions on extradition under the good offices of the UN; similar efforts as undertaken by the regional organizations. The cold war period had affected the relations between both U.S.A and Russia to the extent that till date there is no extradition treaty

Vienna, 3 December 1873; Supplementary Convention to the Extradition Treaty of November 26th, 1880; Extradition Treaty, 1930; Convention relating to Extradition and Judicial Assistance in Criminal Matters, with Additional Protocol, 1927; Convention with regard to the mutual extradition of deserters from the Navy and Mercantile Marine, 1874; Extradition Treaty, 1907; Extradition Treaty between Austria-Hungary and Greece, 1904. [https://treaties.un.org/Pages/LONonline.aspx]


133 Supra Note 53.

134 Supra Note 63.
between them and leading to impunity of individuals\textsuperscript{135}, except in two cases\textsuperscript{136}. It also led to the Non-Aligned Movement, which led its members to take a cautious approach with the super-powers, for e.g., till 1997 both India and U.S.A didn’t have any extradition treaty between them\textsuperscript{137}. Adding to this, in the cold war period, the nature of warfare had also changed with the innocent civilians being made targets as well as perpetrators of wars being fought under the new method called ‘terrorism’. To combat such organized crimes, the UN felt the need for having a single treaty dealing only with extradition, but the best it could do was come up with it in soft law version. The other major development in this period was the ability of the Council of Europe to adopt ECE\textsuperscript{138}; Additional Protocol\textsuperscript{139} and, the Second Additional Protocol\textsuperscript{140}. In late 1970s, movement favouring the abolition of political exception had begun. Political exception clause was found to be largely misused, by helping individuals secure safe haven who were accused of bombing buildings, killing civilians, hijacking aircraft, etc to fulfill political ends, than the freedom fighters\textsuperscript{141}.

Therefore overall there has been more participation from states to engage into concluding extradition treaties in spite of all the.

.2.4 POST COLD WAR ERA:

Most of the work after the cold war period to the present day has been either a continuation of the previous work or to meet new challenges as put forward by new technologies. This time frame has also witnessed an increase in the number of bi-lateral treaties as well as regional organizations adopting treaties dealing with both extradition and mutual legal

\textsuperscript{135}Ilyas Akhmadov, a former senior leader of the Chechen separatist movement who is accused by Russia of terrorism, and TamazNalbandov, who is accused of kidnapping and extortion as part of an organized crime group. Both have been living in the United States for several years. [http://www.npr.org/blogs/thetwo-way/2013/08/07/209846990/3-extradition-cases-that-help-explain-u-s-russia-relations]


\textsuperscript{137}http://www.state.gov/documents/organization/71600.pdf (visited on 20.04.2014)

\textsuperscript{138}European Convention on Extradition, 13 December, 1957, ETS No. 24: 18 April 1960

\textsuperscript{139}Additional Protocol to the European Convention on Extradition, 15 October, 1975, ETS No. 86 Entered into force: 20 August 1979


\textsuperscript{141}Supra Note. 37
existence matters. The growth of extradition laws has been influenced by the following factors, like adopting the principles of human rights in barring extradition process in certain situations; growth in the acts of terrorism; rise of supra-national entities; emergence of multi-lateral treaty system, and chances of individuals being prosecuted for breaches of ICL.

Extradition, for centuries has been dominated by considerations and concerns deeply rooted in State interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances.\textsuperscript{142} The human rights movement has changed that perspective with instruments related to human rights imposing prohibitions on extradition procedures under circumstances like, if a person has the risk of being exposed to torture/degrading treatment or punishment; capital punishment, and unfair trial in the requesting state.\textsuperscript{143} States are bound to apply certain basic human rights standards while processing any extradition request, either under explicitly mentioned provision in treaties, or by international legal standards as enumerated in ICCPR (1966). For e.g., inclusion of provisions related to unfairness in both multi-lateral and regional anti-terrorism conventions\textsuperscript{144}.

One of the most important phenomena which changed some fundamental principles of extradition has been acts of terrorism. The problem of prosecuting individuals accused of committing acts of terrorism was aggravated by the citing the well-noted defense of

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{143} Supra Note 3
\item\textsuperscript{144} Art. 3(2) of the European Convention on Extradition (1957); Art. 5 the European Convention on the Suppression of Terrorism (1977); Art. 9(1) of the International Convention against the Taking of Hostages (1979); Art. 12 of the International Convention for the Suppression of Terrorist Bombings (1997); Art. 15 of the International Convention for the Suppression of the Financing of Terrorism (1999); Art. 14 of the Inter-American Convention against Terrorism (2002); Art. 13(1)(a) of the London Scheme for Extradition (1966 and 2002); Art. 33(1) of the 1951 Refugee Convention; Supra Note 98 Art. 3(b); Art. VII of SAARC Regional Convention On Suppression Of Terrorism; Supra Note 12 Art. 17 and 19; Para 13 of Preamble and Art. 23 (4) of Council Framework Decision On The European Arrest Warrant And Surrender Procedures Between Member States, 2002; Art. 13 of the London Scheme For Extradition Within The Commonwealth.
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‘political offense’. Throughout the 70s’ decade a fundamental, philosophic dispute between the Western nations and the Third World over ends and means has paralyzed efforts by the UN to combat politically-motivated violence through broad reaching conventions. The earlier effort to have a treaty to prevent and punish acts of terrorism has been thwarted by the third world and communist nations emphasising that the causes of terrorism must be examined before taking action against its effects. Some success has been achieved in reaching international according specific types of terrorist conduct. However, the municipal courts had to often decide the scope of ‘political offence’ and in doing so at times terrorist activities were also allowed to take the same defence, at times leading to impunity. Internationally, a rising figure of crimes have been categorised non-political for matters related to extradition in both regional as well as multi-lateral conventions dealing with terrorism specific offences, thereby disqualifying application of the political offence exception.

Post second WW II; there has been a growth of supra-national institutions, whereby the nations transcend national boundaries or interests to share in the decision making and

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150 See, for example: Art. 2(1) of the European Convention on the Suppression of Terrorism(1977); Art. II of the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (1987); Art. 3(2) of the OAU Convention on the Prevention and Combating of Terrorism (1999); Art. 2(b) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999); Art. 2(b) of the Arab Convention on the Suppression of Terrorism (1999); Art. 11 of the Inter-American Convention against Terrorism (2002). See also: Art. 11 of the International Convention for the Suppression of Terrorist Bombings (1997); Art. 14 of the International Convention for the Suppression of the Financing of Terrorism (1999).
151 See The List of Supra-National Organizations In http://www.int-comp.org/ICASNO (visited on 17.06.2014).
vote on issues relating to the wider grouping. With the expansion of treaty system, the states have also undertaken the duty to give up persons in their control to supranational institutions, like ICC, and other international and hybrid tribunals. The traditional country to country extradition process has evolved to become state to international entity process, requiring more political will for the tribunals to exercise jurisdiction over reluctant indicted individuals.

2.3 EXTRADITION UNDER INTERNATIONAL LAW – IN THE BACKDROP OF GLOBAL TERRORISM

The core term “terror” (Latin “terrere”—“to frighten”) penetrated the Western European languages’ lexicons via the French in the 14th century and used in English in early 16th century. Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. It has gained significance in the background of IHR, IHL as well as, ICL. Under IHL, terrorism is understood to be the systematic attack on non-military objectives in order to force the military elements of the adverse Party to comply with the wishes of the attacker by means of the fear and anguish induced by such an attack. In fact terrorism includes acts targeting people directly as well as who become victims when such attack is targeted towards installations. The obligation to extradite applies in respect of a wide range of offences affecting the world population has been included in all sectoral conventions against international terrorism concluded since 1970.

2.3.1 EMERGENCE OF GLOBAL TERRORISM AS THREAT TO INTERNATIONAL PEACE AND SECURITY

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152 Supra Note. 53.; See also Supra Note. 87.
153 Human Rights, Terrorism And Counter-Terrorism, Fact Sheet No. 32, P 5.
154 COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS, 526 (Yves Sandoz et al. eds., 1987)
155 Id. p. 1411, para. 4538.
‘Terrorism’ has been frequently qualified by terms like domestic, international, transnational, referring to the way it is carried out and the ambit of the effects felt by it, without changing the basic elements of the act. Such conceptualization has gained currency among policy-makers, particularly in “global powers” of the West, as it appears, on surface, to focus on a particular subset of terrorist actions with “global scope,” thereby inferring that this subset of terrorism stands as a direct threat to the “global social order.”

Since the 1920s nations have realised that the solution to curb terrorism as a transnational offence, lies within international law. The term international terrorism means terrorism involving citizens or the territory of more than one country. With better and faster means of communication and travelling, there has been a steep rise in acts of ‘international terrorism’. Throughout history, ‘terrorist’ has been used by militant groups of different religious orientation, often blended with nationalist and socio-political ideological elements. The nature of terrorist activities has shifted from “traditional international terrorism of the late 20th century into a new form of transnational non-state warfare.” Terrorism is a complex and highly pervasive global problem which defies courts, police, intelligence agencies, national governments, and the UN alike, thereby continuing to threaten the international community. The factors which make terrorism of global nature are, it has spread to more

157 Terrorism is often, though not always, defined in terms of four characteristics: (1) the threat or use of violence; (2) a political objective; the desire to change the status quo; (3) the intention to spread fear by committing spectacular public acts; (4) the intentional targeting of civilians. [http://www.azdema.gov/museum/famousbattles/pdf/Terrorism%20Definitions%20072809.pdf (visited on 17.06.2014).]


159 Supra Note. 53.


162 Jaideep Ssaikia and Ekaterina Stepanova, Terrorism Patterns of Internationalization, 191. In 1998-2006, religious terrorists carried out 352 attacks internationally, as compared to 353 attacks by violent nationalists. Since the early 1990s, religious, mostly Islamist, terrorism has been far more deadly at the international level than any other type of terrorism, including nationalist terrorism.

than one jurisdiction; its global settings as facilitated by advanced communication systems; the victims of such terror attacks are not contained among the citizens of the same state.\textsuperscript{164}

Terrorism, be it national or international strikes on the most fundamental human right i.e. ‘right to life’, which enjoins duty upon the State to provide security required to live a dignified existence. It attacks the values that lie at the heart of the UN charter and many more international documents: the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.\textsuperscript{165} In 2001 the United Nation adopted a resolution\textsuperscript{166} stating explicitly that every act of terrorism comprises “threat to international peace and security” and the “acts, methods, and practices of terrorism are contrary to the purposes and principles of the UN.”. Under the present circumstances, the states have obligation to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist, which includes terrorist threats too. Therefore it has become a nexus between the global forces of terrorism and internationalized antiterrorist efforts.\textsuperscript{167}

2.3.2 DEVELOPMENT OF EXTRADITION LAW UNDER INTERNATIONAL LAW -- PRIOR TO 9/11 ATTACK:

There has been a number of terrorist attacks throughout the globe, but none of them had prompted the states to revamp their counter-terrorism mechanisms, like it did post 9/11 terrorist attack on U.S.A. Before 9/11 attacks had happened there have been very limited efforts to have collective counter-terrorism efforts on behalf of the nations as well as the international organizations.

\textsuperscript{165} Supra Note 153.
\textsuperscript{167} Supra Note 164
Since the ancient time, concepts like respondeat superior; vicarious liability; noxaededitio\textsuperscript{168}, a Roman private law principle found its way into international relations too and influenced extradition laws. Therefore a state harbouring a foreign criminal was believed to be tainted by the presence of the accused, and if not returned on demand, it could lead to diplomatic talks or even use of armed force. Such pressures lead the states to surrender the fugitive.

In the earlier period, focus was mainly on the political and religious offenders, which reflected countries’ great apprehension to conserve their command arrangement, which was motivated with the need to preserve religious values and suppressing political factions. From 18\textsuperscript{th} to early 19\textsuperscript{th} century, because of continuous wars of acquisition between states, military deserters were in the focus of extradition treaties.\textsuperscript{169} However, in 1736, France and Holland established an agreement for the extradition of individuals charged with having committed common crimes, and such compact was followed by accords between France and Egypt, Switzerland, Sardinia, and several German States.\textsuperscript{170} This period also witnessed the emergence of the new concept of State, which was based on constitutional document and people derived their rights not from divine power anymore. It shaped the new course of extradition laws, with the inclusion of ‘political offence’ as an exception to extradition.\textsuperscript{171} Terrorism, originally related with state-sponsored violence, moved to relating non-state actors after its application to French and Russian anarchists of late 19\textsuperscript{th} century.\textsuperscript{172}

Based on the theory of ‘natural duty’ under international law, on the states to extradite or prosecute fugitives, led to the practice of extradition even in the absence of treaty

\textsuperscript{168} Supra Note 85.
\textsuperscript{170} Supra Note. 114
\textsuperscript{171} Extradition Treaty, Nov. 22, 1834, Belg.-Fr., art.5, 84 Consol. T.S. 457,462; Treaty of Extradition, Nov. 9, 1843, U.S.-Fr., art.4, 8 Stat. 580.
\textsuperscript{172} Supra Note. 53.
obligation. Therefore, existence of extradition in antiquity, as well as the controversy between the “natural law” and “positivist” schools with respect to the basis for an obligation to extradite, has framed the basic issue of contemporary law related to extradition.

The first effort to codify was taken up by LON in 1937 by adopting a CPPT\(^{174}\), signed by twenty-four states, was ratified by only one and never came into force.\(^{175}\) It intended to suppress acts of terrorism having an ‘international character’ only, and most of its provisions are devoted to a definition of the international element.\(^{176}\) Article 8 of the convention described ‘extraditable offences’ and also sought to oblige the members to extradite all offenders under the Convention, which due to pressures of the western powers, led by U.K., was made subject to the exception to political offenders. The other significant effort towards international extradition was made after the end of WW I.\(^{177}\)

Post WW II, more concerted efforts were undertaken in regulating extradition through both regional and multilateral treaty laws.

The *Jus in Bello* branch of international law, had taken the initial steps on matters of extradition, by putting forth a similar an identical system to prosecute individuals alleged to have committed grave breaches.\(^{178}\)

There were significant developments through regional treaties, which was more prevalent in the inter-American\(^{179}\) and European\(^{180}\) context, and gradually spread to the

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\(^{173}\) Supra Note. 114; The French Extradition Law of 1927 played the dual role of *droitcommun* (basic law) for extradition in the absence of a treaty and *droitsupplitif* (where lacunae are found in existing extradition treaties. Whereas U.S.A had taken the exactly opposite stand, like in Valentine v. United States, 299 U.S. 5 (1936).

\(^{174}\) (1938) 19 LNOJ 23


\(^{176}\) Id.

\(^{177}\) Supra Note 127.

treaties as entered by African union; Southern African Development Community (SADC); Commonwealth Secretariat; SAARC.

Prior to 9/11, there were a total of thirteen international conventions related to terrorism in particular and they operate on a common model, establishing the basis of quasi-universal jurisdiction with an interlocking network of international obligations. All the treaties comprises a definition of the offence in question and the automatic incorporation of such offences within all extradition agreements between states parties coupled with obligations on states parties to make these offences an offence in domestic law, to exercise jurisdiction and, where the alleged offender is present in the territory, either to prosecute or to extradite to another state that will, the available.

Apart from the above-mentioned measures the Security Council, has since the early 1990s consistently dealt with issues of terrorism by imposing sanctions against states which had links to certain acts of terrorism. It has also supplemented the efforts of other regional organizations and nations in bringing terrorists to justice by passing resolutions to compel states to fulfill their obligations to extradite in fulfillment of their legal obligations

182 Supra Note. 108
183 See, Upendra D. Acharya, War On Terror Or Terror Wars: The Problem In Defining Terrorism, Denv. J. Int’l L. & Pol’y, Vol. 37:4 at p.659; Supra Note 98; Supra note 99; See Supra note 12;
184 MALCOLM, Supra note 86, at 1161.
185 id.
under bi-lateral treaties.\textsuperscript{187} The council has not been hesitant in putting sanctions on the non-complying states, in pursuance of its basic duty to maintain international peace and security.\textsuperscript{188}

2.3.3 DEVELOPMENT OF EXTRADITION LAW UNDER INTERNATIONAL LAW -- POST 9/11 ATTACK:

The heinous attack on the twin towers of the New York world trade centre on 11\textsuperscript{th} September 2001 killing some 3000 innocent people belonging to sixty different countries has been a record of sorts ‘achieved’ by international terrorism.\textsuperscript{189} Post 9/11, the world has consolidated its efforts to counter terrorism, by both legal and at times extra-legal mechanisms. The traditional principles of extradition have been used in a restrictive manner, like the principle of non-inquiry; treaties not including exceptions for citizens.

There have been efforts to improve the ability to arrest, interrogate, and prosecute individuals suspected of terrorism. As a result of 9/11, the bush administration abandoned its initial proclivity for strategic disengagement; ad has challenged the world to either bandwagon with it, or balance against it.\textsuperscript{190} Post 9/11, the nations had come together


\textsuperscript{189} AFTER THE IRAQ WAR: THE FUTURE OF THE UN AND INTERNATIONAL LAW 77 (Bernhard Vogel & Rudolf Dolzer eds., 2005).

\textsuperscript{190} EUROPEAN SECURITY AFTER 9/11, 3 (Peter Shearman & Matthew Sussex eds., 2004).}
strategically to counter terrorism, by declaring ‘war on terror’, which saw deployment of troops in Afghanistan, and Iraq. It also led U.S.A to drop the sanctions against Pakistan and India, which followed they had conducted nuclear tests. In the wake of September 11, the Bush administration developed pre-emptive strategies in which military strikes, overt or covert operations, were to be conducted against terrorist groups or those that harbor or support them before they able to inflict damage on the U.S., as we had witnessed in Iraq. On 16th October 2001, EU justice ministers discussed a common definition of ‘terrorism’, in order to facilitate a co-operative application of national criminal codes. They also agreed on procedures for a common EAW facilitating the detention and extradition of terrorist suspects.¹⁹¹ Pre-9/11 research on European terrorism was traditionally concentrated on individual European states and the challenges faced from endogenous separatist or revolutionary groups.¹⁹² The terrorist attacks in New York and Washington in 2001, 2004 in Madrid, and 2005 in London brought counter-terrorism within the ambit of policy making.¹⁹³ The terrorist assault on WTC on 2001 led to the adoption of the FDEAW. It is now widely regarded as the most important operational instrument in the European fight against terrorism for its impact on the reduction of the length of time of the extradition procedures and its extensive utilization by national authorities. The 13th June 2002 FD on JIT was another important aspect with a view to combating trafficking in drugs and human beings, as well as terrorism. Over the last decade, the extradition treaties have focused more on restricting judicial discretion in extradition decisions¹⁹⁴, which insulates government officials from domestic pressure. Similarly there has been a rise of treaties where exceptions for citizens are not allowed.¹⁹⁵ Together with the legal mechanism, there has

¹⁹¹Id. at p. 91.
¹⁹³Id at p. 19
¹⁹⁵The extradition treaty between the United States and Israel, for example, states that a “requested Party shall not decline to extradite a person sought because such person is a national of the requesting Party.” Similar provisions occur in U.S. extradition treaties with the United Kingdom, Italy, and Uruguay. See Supra Note. 74
also been rise of less time consuming practices of taking fugitives into custody like, ad hoc agreement, secret abduction, and extraordinary rendition.  

2.4 DEVELOPMENT OF EXTRADITION LAWS UNDER MULTILATERAL TREATY SYSTEM

Since 1970, the threat of various international terrorist activities prompted the nations to undertake counter-terrorism measures, having the goal to save lives by proactively preventing or decreasing the number of terrorist attacks. The measures taken broadly fall under any one of the following categories, like: diplomacy, financial controls, military force, intelligence, and covert action; legal, repressive, and conciliatory responses to terrorism; and targeted and untargeted prevention. Under the legalistic responses, nations develop legal protocols with the aim to promote rule of law and regular legal proceedings. The legalistic options involve the following instruments, like law enforcement agencies and criminal investigative techniques; bringing in effect counter-terrorist laws which attempt to criminalize terrorist behavior; developing international law by which parties attempt to combat terrorists by permitting them no refuge or sanctuary for their behavior.

Nations frequently enter into treaties that allow law enforcement agencies to share intelligence and operational information that can be used to track and capture terrorists, through agencies like INTERPOL and EUROPOL. Adding to such mechanisms are, extradition treaties, which require treaties to bind over terrorist suspects at the request of fellow signatories. Such legal counter-terrorism mechanisms have been in existence since the early 1970s, but international efforts were further consolidated with the adoption of UN Global Counter-Terrorism Strategy, on 8th September 2006[199].

[196] Supra Note. 74.
[198] Id at p.465
2.4.1 GROWTH OF EXTRADITION LAWS UNDER THE AEGIS OF UNITED NATIONS ORGANIZATIONS

At present the UN has currently adopted around seventeen universal instruments against terrorism, including the Protocols to some of the main treaties. All the treaties have identified certain specific acts as acts of terrorism, including measures of extradition as well. Before the growth of extradition laws under international treaties, there has been very less work addressing the issue of terrorism and extradition related to it. The first effort was visible in the year 1972, with the passage of UNGA Resolution 3034 (XXVII)\(^{200}\), which called upon states to prevent international terrorism and even proposed the formation of an Ad Hoc committee on international terrorism to put concrete proposals for finding an effective solution to the problem. Thereafter the committee has been formed and been instrumental in bringing CSTB, CSNT, for supplementing existing international documents, to further deal with way of building wide-ranging legal structure of international terrorism related treaties (Resolution 51/210).\(^{201}\) Within these initiatives, the UN had spoken about extradition number of times as a legal tool to counter terrorism\(^{202}\).

1960 onwards four issues dominated international anxiety over global terrorism, i.e., acts targeting safety of international aviation, maritime navigation, and other violent terror related acts.\(^{203}\) From beginning the very purpose of these legal initiatives has been to recognize certain specific nature of acts as offences and encouraging the state parties to also do the same through their domestic legislations and promote co-operation among them to prevent and punish such individual offenders. The international community had travelled a long distance in shaping the provisions with respect to extradition and mutual legal assistance, to fulfil the objective of such laws.

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\(^{200}\) UN General Assembly, Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes: resolution / adopted by the General Assembly, 9 December 1985, A/RES/40/61, available at: http://www.refworld.org/docid/3b00f228c.html [accessed 15 June 2014]


\(^{202}\) Id Part II, ¶ 5 (b) and ¶ 6, Supra Note. 199.

\(^{203}\) Supra Note. 32
The 1963 Tokyo Convention\textsuperscript{204}, the first successful initiative of the UN to punish offences like seizure, unlawful use of control of an aircraft during flight, had some very basic provisions on extradition which are enshrined under the powers and obligation of nations. Under the aforementioned convention, the contracting states custody and other measures applied on the apprehended person can only last for a reasonable period of time so as to enable criminal or extradition procedures to be instituted.\textsuperscript{205} It also obliges the apprehending state to inform the country in which the aircraft is registered; also the country of which the detained person holds nationality or to any other interested state, so that individual can be prosecuted.\textsuperscript{206} Both the place where the act has occurred but also the state where the aircraft is registered can make extradition requests.\textsuperscript{207} However, the convention does not create an obligation to grant extradition\textsuperscript{208} nor any duty to prosecute otherwise, giving a setback to the principle of ADAJ. The Convention is also silent on grounds of refusal to comply with extradition requests, like principle of non-discrimination, as we find in good measure in subsequent treaties. Another significant drawback of this treaty is that it falls short of identifying such offences as terrorist acts of international nature. In comparison to the Tokyo convention, the subsequent treaties are better drafted and have been able to establish the basic obligation of the states to either prosecute or extradite. The, 1970 Hague Convention\textsuperscript{209}, imposed the duty on the contracting states is further crystallised by the language of the Preamble of the convention, which requires members to take proper measures to punish offenders is clearly to focus on the. The elaborate extradition provisions as laid down in The Hague convention has been adopted in most of the subsequent treaties. Some of the essential features of this convention are as follows: obliging contracting states to make the offences as described in the convention to be punishable by “severe penalties”;\textsuperscript{210} compelling the states to take positive steps to establish jurisdiction over such

\textsuperscript{204}The Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963.
\textsuperscript{205}Id. Art. 13 (2)
\textsuperscript{206}Id. Art 13 (5)
\textsuperscript{207}Id. Art 16 (1)
\textsuperscript{208}Id. Art 16 (2)
\textsuperscript{210}Id Art. 2
individuals, if not extraditing the person under Art 8, at the same time encouraging states to exercise criminal jurisdiction in accordance to its national law; custody of persons can be only for reasonable period to enable any extradition proceeding. Articles 7 and 8 have comprehensively covered the principle of ADAJ, also popularly known as “Hague Formula” or “German Formula”. The Hague formula has made it obligatory on the part of the contracting parties, when refusing extradition requests, to submit the case their own authorities, who would decide the same way as any ordinary crime of grave nature as under the respective municipal law. For the first time it laid down the following rules which have adopted in all the anti-terrorism conventions, like:

- Offences as specified in the convention to be deemed as included in the existing extradition treaties between the contracting states;
- The contracting parties being obliged to make these offences as extraditable offences in any future extradition treaties that may come into effect between them;
- When extradition is made subject to the existence of extradition treaty, which is absent, then the requested state might deem/accept the treaty as foundation for matters related to extradition in relation to such offences;
- When surrendering is not conditioned on the existence of extradition treaty, then the requested state must acknowledge it, subject to the requirements of the municipal law of the requested nation;
- Both requested and the requesting state, for the purpose of extradition, need to take into account the place where the act has been committed and also the territories which could exercise jurisdiction under the convention.

It also initiated the process of reporting the results of any extradition or legal proceedings which may have been initiated to other international organizations, like the ICAO, under the present treaty.

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211 Id. Art. 4
212 Id. Art. 6
213 Supra Note. at 127
214 Supra Note. 209, Art. 7
215 Id Art 8
216 Id Art 11.
The same drafting pattern regarding extradition provisions are found in the 1971 Montreal Convention\textsuperscript{217}; 1973 Diplomatic Agents Convention\textsuperscript{218}, 1979 Hostage Convention\textsuperscript{219}, 1980 Nuclear Materials Convention\textsuperscript{220}, 1988 maritime safety convention\textsuperscript{221}, 1988 fixed platforms protocol\textsuperscript{222}, Protocol of 2005 to the Protocol For The Suppression Of Unlawful Acts against the Safety of Fixed Platforms Located On the Continental Shelf\textsuperscript{223}, 1997 Bombings Convention\textsuperscript{224},1999 Financing Convention\textsuperscript{225} and 2005 Nuclear Terrorism Convention\textsuperscript{226}

The Hostage Convention has been path-breaking in many ways, like it has considered the offence to be of such grave nature, impinging the duty on the state parties to either prosecute or extradite the person committing such offence. It also the first time considers the offences under the said convention to be a manifestation of “international terrorism”. This convention also for the first time guarantees fair treatment of the accused person as well as stating the grounds of refusal, when the person can be discriminated based on

\textsuperscript{220} Id. Arts.9, 10, 11.
\textsuperscript{221} UN General Assembly, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, No. 29004, available at: http://www.refworld.org/docid/3ae6b3664.html [accessed 17 November 2014] Arts. 6 (4), 7, 10, 11 the convention refers to the general assembly resolution 40/611 on international terrorism in the paragraphs 7 and 8 of the Preamble. This convention also mandates the state parties to pay due regard to the interests and responsibilities of the state party whose flag the ship was flying at the time of the commission of the offence, when there are more than one request for extradition from states, under art. 11 (5).
\textsuperscript{222} Id. Art. 1
\textsuperscript{223} International Maritime Organization (IMO), Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 14 October 2005, available at: http://www.refworld.org/docid/49f58cee2.html [accessed 9 March 2014]; “It extends the obligation to criminalize acts directed against the safety of fixed platforms in a similar manner to the extension just described for acts against the safety of maritime navigation.”
\textsuperscript{224} Id Arts.7 (2), 8, 9, 11, 12.
\textsuperscript{225} Id Arts.10, 11, 13, 14 and 15.
religious conviction, nationality, race or political opinion.\textsuperscript{227} It also modifies the existing extradition treaties between the member states only as far as they are incompatible with respect to the Convention.\textsuperscript{228} The Hostage Convention has expressly given primacy to IHL by stating that state parties are bound under the GC and Additional Protocol to prosecute or hand over the hostage taken, in which people are fighting to realize right of self-determination.\textsuperscript{229} Post 1997, the International Convention on Suppression of Terrorist Bombing has created more comprehensive provisions on extradition, which have been further adopted subsequent conventions. It mandates the state parties not to allow justifications motivated by on grounds like philosophical, racial or of same kinds, while criminalizing these offences by their domestic legislations.\textsuperscript{230} It also enables the state parties to surrender the person to discharge the obligation to extradite as per the treaty requirement with the condition that the person would be serving his sentence in the requested country.\textsuperscript{231} Bombing, Financing, and nuclear terrorism conventions have laid that none of the offences mentioned in the respective treaties are considered as political offence, but at the same implores states not to refuse extradition requests citing only the ground of political offence exception.\textsuperscript{232}

All the above-mentioned multi-lateral treaties under the UN have focused on the duty of the state parties to incorporate such offences as grave offences within their municipal law and thereby facilitate punishment of the persons committing or attempting to commit the offences. To fulfill this objective the treaties laid the onus on the member nations to surrender or try such individuals. The farthest the treaties have gone is in guaranteeing protection to the individuals from being extradited in any country where they might be discriminated on grounds like race, religion, political opinion, or otherwise. The treaty laws

\textsuperscript{227} See Supra Note 219, Art. 9
\textsuperscript{228} Id.
\textsuperscript{230} Art. 5, International Convention on Suppression of Terrorist Bombing
\textsuperscript{231} Id. Art. 8 (2)
\textsuperscript{232} See Art 11 of Bombing Convention and Art 14 of Terrorist Financing Convention. Art. 15 of the Nuclear Terrorism Convention.
have almost left the existing extradition treaties untouched, except where the offences in these treaties are considered to be included in the existing extradition treaties between the state parties. The state parties are further legally obliged to include such offences in future extradition treaties. However, these treaties fall short of consolidating the basic features of extradition, like RoS; double criminality; etc. On the other hand, these anti-terrorism treaties have almost put an end to the age-old practice of refusing extradition citing grounds of political offence; or related to political offence. So overall, extradition practices have remained untouched by the development of anti-terrorism laws.

However, the UN did feel the need to consolidate extradition laws in one place which can take the shape of a separate treaty, and such efforts have so far only resulted in the ‘MTE’ [hereinafter referred as ‘Model Treaty’] in 1990 as adopted by the UNGA. The model treaty however is not limited to any specific kind of offence; rather it is purely a document consolidating all the practices of extradition, as developed by state practices, through their domestic legislations on extradition, as well as, bi-lateral and regional treaties regulating extradition. The purpose behind the model treaty has been to encourage the States to develop a more effective international co-operation in matters of crime prevention and criminal justice. It imposes clear and concise obligations, and contains acceptable safeguards for the requesting State (to whom extradition cannot be arbitrarily refused), the requested State (which maintains sovereignty and rights to protect persons wanted and nationals from unacceptable detention or treatment) and the person wanted (who has ample opportunity to have his or her particular circumstances examined). The Model Treaty has been further supplemented by UNGA Resolution 52/88 of 1997 on international co-operation on criminal matters. The Model Treaty is primarily to assist States in
negotiating and implementing extradition treaties as well as provide with information on the practice and principles of extradition that may be very relevant to the drafting of extradition legislations. It can be implemented in both monist and dualist states, where the former still has to have implementing legislation or regulations governing the procedure applicable to conduct extradition hearings, when they are the requested state; and in the latter case having a general, self-contained legislation and an adequate internal legal framework in this field. The Model Treaty has dealt with all the essential features of extradition practice, like the basic obligation of states to extradite\textsuperscript{236}; the PODC\textsuperscript{237}; mandatory and optional grounds of refusal\textsuperscript{238}; procedural requirements\textsuperscript{239}; simplified extradition procedure\textsuperscript{240}; provisional arrest and subsequent procedures\textsuperscript{241}; kinds of surrender\textsuperscript{242}; RoS\textsuperscript{243}.

2.4.2 EXPANSION OF EXtradition LAWS UNDER THE REGIONAL ARRANGEMENTS:
2.4.2.1 European Union

EU countries are mainly governed by the 1957 European convention on extradition\textsuperscript{244}, which has been further amended by the 1975 and 1978 Additional Protocols to the European Convention on Extradition\textsuperscript{245}. These legally binding instruments are further supplemented with an exhaustive body of Recommendations by the committee of ministers to the member states. Collectively this body of law establishes the obligation of the member

\textsuperscript{237} Id. Art. 2.
\textsuperscript{238} Id. Art. 3 and 4.
\textsuperscript{239} Id. Art. 5;
\textsuperscript{240} Id. Art. 6.
\textsuperscript{241} Id. Art. 9 and 10. .
\textsuperscript{242} Id. Art.12 and 13.
\textsuperscript{243} Id. Art. 14.
\textsuperscript{244} Supra Note 138; Supra Note 180
\textsuperscript{245} Supra Note 139; and Supra Note 140
states to extradite\textsuperscript{246}; PoDC, where it also allows the members to follow the principle of reciprocity with regard to non-extraditable offences\textsuperscript{247}; allowing member states to refuse extradition citing political offence\textsuperscript{248}, where among other things, it has been expressly laid down that attempt to kill Head of the State, including the family members, which shall not be within the scope of offence of political nature\textsuperscript{249}; obligations undertaken under any other convention will prevail over this treaty, with respect to political offences\textsuperscript{250}; perpetrators of offences like genocide, crimes under the four GC as well as any comparable violations of war are can’t be refused to be extradited under the garb of political offence\textsuperscript{251}; grounds to refuse extradition, like if the requested country is the place of commission of the offence\textsuperscript{252}, or the individual possessing nationality of the nation so requested\textsuperscript{253}, or proceedings pending in the requested state for the same offences\textsuperscript{254}, or lapse of time\textsuperscript{255}, or the requesting nation allowing capital punishment for the extraditable offence\textsuperscript{256}, or refusal on the grounds of applying the principle of non bis in idem\textsuperscript{257}; or where when the person to be extradited has a judgement against him in absentia\textsuperscript{258}; in situations where amnesty has been granted for an offence in the requested nation, and where it possesses the capability to hold trial, by applying principles of active or passive personality jurisdiction\textsuperscript{259}. The other important principles of extradition which have been exhaustively dealt by the extradition law are RoS; procedure to be followed in situations of re-extradition of the individual to a third state; provisional arrest; where there are conflicting requests; postponed or conditional

\textsuperscript{246} Supra Note 180 art. 1; See also Supra Note 140
\textsuperscript{247} Supra note 138 ; Supra Note 180 Art.2.
\textsuperscript{248} Id. Art.3
\textsuperscript{249} Id. Art.3 (3)
\textsuperscript{250} Id. Art.3 (4)
\textsuperscript{251} Supra Note 139
\textsuperscript{252} Supra Note 180 Art. 7
\textsuperscript{253} Supra Note 180Art. 6
\textsuperscript{254} Supra Note 180 Art. 8.
\textsuperscript{255} Supra Note 180 Art. 10.
\textsuperscript{256} Supra Note 180 Art. 11
\textsuperscript{257} Supra Note 180 Art. 9, 1957; see also Supra Note 139 art. 2.
\textsuperscript{258} Supra Note 140, Art.3
\textsuperscript{259} Id. Art.4
When we speak about primacy of treaties, the EU Convention on extradition clearly says that it shall prevail over the provisions of any other bi-lateral treaty between members, and such treaties can only supplement the provisions of the Convention. The convention at the same time allows the contracting parties to have an extradition system based on uniform laws, based on reciprocity to regulate their mutual relations on the sole basis of that system.

It is worth noting that ECE and the Addl Protocols unify the legislation of the contracting states as far as extradition is concerned, but they do not adopt any provision especially centred on the rights of the individual involved. Nevertheless, the provisions of ECE must be construed under the influence of ECHR, Article 5, paragraphs 1, 2 and 4. Extradition is not, *per se*, among the matters covered by the ECHR and according to the Court it is not possible to complain of a violation of the provisions of a treaty on extradition or of a violation of the conditions under which extradition may be granted. To this end, the Committee of Ministers has adopted a package of principles to guide the member states in the practical application of ECE, which in fact endorses the multidimensional form of the right to defence. The principle of ADAJ is adequately represented in ECE and in

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260 Supra Note 180 Art. 14, 15, 16, 17, 19.
261 Supra Note 180 Art. 28
262 Supra Note 180 Art. 28 (3)
263 Extradition European standards Explanatory notes on the Council of Europe convention and protocols and minimum standards protecting persons subject to transnational criminal proceedings, p.97, December 2006 Printed at the Council of Europe.
265 Supra Note. 263
266 Resolution (75) 12 of the Committee of Ministers to member states on the practical application of the European Convention on Extradition, 21st May, 1975; Resolution (78) 43 of the Committee of Ministers to member states on reservations made to certain provisions of the European Convention on Extradition, 25th October, 1978 [This resolution replaces Resolution (78) 30 of 11 May 1978.]; Recommendation No. R (80) 7 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition, 27th June, 1980; Recommendation No. R (80) 9 of the Committee of Ministers to member states concerning extradition to states not party to the European Convention on Human Rights, 27th June, 1980; Recommendation No. R (86) 13 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition in respect of detention pending extradition 16th September, 1986; Recommendation No. R (96) 9 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition 5 September, 1996.
other instruments\textsuperscript{267}. The researcher would now study extradition measures within EU in the backdrop of terrorism, which started featuring in the discussions only after 1970. From 1975 onwards meetings took place between the Home Affairs Ministers, which initially only led to the exchange of knowledge about terror outfits.\textsuperscript{268} The MTEU of 1992 established the EU supplemented by CFSP\textsuperscript{269} and JHA\textsuperscript{270}. Terrorism has been observed by EU Members as a criminal law issue, dealt mostly within the JHA pillar. However after 9/11, the EU’s terrorism-related actions have permeated every aspect of its activities. Prior efforts of EU adopted the 1977 ECST\textsuperscript{271} which was further amended by the 2003 Protocol amending the ECST\textsuperscript{272}. Post 9/11 the EU brought into effect the measures which were planned initially and they were not only focussing on terrorism related aspect, but generally strengthening judicial cooperation in criminal matters, which led to adoption of legal measures like Framework Decisions\textsuperscript{273} and the establishment of Eurojust adding to Europol and JIT. Some of the major developments have been like adopting the 2002 CFDCT\textsuperscript{274}; 2002 FDEAW\textsuperscript{275}; 2005 CECPT\textsuperscript{276}. All the above–mentioned instruments

\textsuperscript{267} Supra Note 180 Art. 6; European Convention on the Transfer of Proceedings in Criminal Matters, Art.8, 15th May, 1972, ETS No. 73 : It provides for the initiation of proceedings against an individual who has committed a crime, according to the domestic law of the requesting state, in another contracting state, which would also have considered it an offence if it had been committed in its territory. It, therefore, favours proceedings in that state and not extradition. The requesting state bases its entitlement to proceed to the request on all forms of jurisdictions: territorial jurisdiction, when the offence has been committed in its own territory; the active personality principle, meaning that the offender, who acts outside the territory of the state, is a national of the state; passive personality, meaning the nationality link between the requesting state and the victim of the offence; and universal jurisdiction, which is based on the nature of the offence itself, whereby every state shares an equal concern.; Convention on the Protection of the Environment through Criminal Law, Art.5, 4 June 1998, ETS No. 172; CECPT, Art.14, 6 May, 2005, CETS No. 196; European convention on the suppression of terrorism, Art. 6-7, 4th August, 1978, CETS No. 090 ; Council of Europe Convention on Action against Trafficking in Human Beings, Art.31, 16 May 2005, CETS No. 197.

\textsuperscript{268} TREVI-group (TREVI stands for ‘Terrorisme, Radicalisme, Extrémisme et Violence Internationale’); See Supra Note. 49.


\textsuperscript{270} See Id. Title VI (art. K-K.9) and especially art.K.1.9, now EU TREATY Art. 2 and Title VI (art. 29-42).

\textsuperscript{271} European Convention on the Suppression of Terrorism, 4th August, 1978, CETS No. 090


\textsuperscript{273} EU Treaty, Art. 34 (2) (b). Framework decisions are binding on the member nations but at the same time it leaves to the national authorities to choose the form and method to achieve the result of the

\textsuperscript{274} Council Framework Decision on Combating Terrorism, 2002/475/JHA, (13 June, 2002).

\textsuperscript{275} Supra Note 4

\textsuperscript{276} Council of Europe Treaty Series – No. 196, 16 May, 2005, CETS No.196.
supplement extradition measures as suggested in earlier documents. In order to combat terrorism, extradition was at the very outset recognised as an effective measure for suppressing terrorism\textsuperscript{277}, clearly demarcated certain acts inspired from the UN Conventions and otherwise which were not to be regarded as political offence\textsuperscript{278}; no obligation to extradite if the requested state has substantial grounds to believe that there would be discrimination on grounds like religion, race, political opinion or otherwise\textsuperscript{279}; primary obligation to extradite or prosecute\textsuperscript{280}; encourages mutual assistance in criminal matters\textsuperscript{281}; the right to reserve the right to refuse extradition as mentioned under Article 1 can be done only after evaluating certain factors like collective danger to life and others\textsuperscript{282}; such reservation being made time-bound and on refusal being obliged to prosecute and on the delay of prosecution, the requesting state is enabled to communicate the fact to the secretary general and finally the conference would issue an opinion on the conformity of the refusal and further submit it to the Committee of Ministers for the purpose of issuing a declaration thereon\textsuperscript{283}. The 2003 Protocol amending the ECST made further important amendments to the 1977 convention, like it drew inspiration from the GA Resolutions, GHRFT of 2002; including UN Conventions till 1998; extended liability to the perpetrators, attempts, accomplice; situations when the convention can be treated as the basis of extradition; there being no obligation to extradite when the there are chances that the person may be subject to torture, death penalty, life sentence unless otherwise agreed between the parties.\textsuperscript{284}

\textsuperscript{277} Supra Note 271, Preamble
\textsuperscript{278} Supra Note 271, Art. 1.
\textsuperscript{279} Supra Note 271, Art. 5.
\textsuperscript{280} Supra Note 271, Art. 6 (1) and 7.
\textsuperscript{281} Supra Note 271, Art. 8.
\textsuperscript{282} Supra Note 271, Art. 16.
\textsuperscript{283} id.
\textsuperscript{284} Supra Note 272
offences as under Articles 5 to 7 and 9 can’t be regarded for the purpose of extradition or mutual legal assistance as a political offence; the procedure that needs to be followed when the Party citing reservation is unable to take any action to initiate prosecution; protections given to the individual to be protected from discriminatory regimes, torture, cruelty and other degrading treatment.\textsuperscript{285}

One of the watershed moments in the European legal framework to facilitate speedier surrendering of fugitives has been the introduction of EAW system in the year 2002. But before, we go into the working of EAW; there has been a multitude of extradition agreements such as ECE of the Council of Europe, an international organisation that is separate from the European Union (EU).\textsuperscript{286} In 1995, the council adopted a CSEEU. It laid emphasis on judicial collaboration with respect to extradition matters. The fact that most of the extraditions were happening with the consent of the concerned individual, the convention sought to simplify and improve the mechanism of extradition. The convention doesn’t undo any of the existing extradition laws which facilitate a speedier mechanism. The two essential factors required for this convention to work are the consent of such person and an agreement of the requested state in accordance with this convention. It further simplifies the mechanism of surrendering an individual under provisional arrest, as under Article 16 of ECE.\textsuperscript{287} The other significant addition to the laws related to extradition was 1996 CEEU\textsuperscript{288}, replaced since 1 January 2004 by the FDEAW [Official Journal L 190 of 18.7.2002], it can still be applied in the few cases where the EAW cannot be used.\textsuperscript{289} It entered into force as between only twelve Member States on 29 June 2005.\textsuperscript{290} It supplements the ECST and tries to facilitate extradition between members by not allowing the requested states to take certain defenses like, with respect to tax offences, the requested

\textsuperscript{285} CECTP, Art. 14 (3), 15, 17, 18, 19, 20, 21 (2005)
\textsuperscript{287} See Convention on Simplified Extradition Procedure between the Member States of the European Union, Art. 4-11, 12 (1), 30 March, 1995(\textit{Official Journal of the European Communities}, C 078)
\textsuperscript{288} Convention relating to Extradition between the Member States of the European Union, 23 October, 1996(\textit{Official Journal of the European Communities}, C 313)
\textsuperscript{289} Supra Note. 286
\textsuperscript{290} Id.
state can’t refuse extradition citing that such offence is not recognised as the same type of offence or tax. Overall the convention is on the same lines of European convention on extradition. On certain aspects it has laid down more safeguards for the individual, when the RoS is applied, like specifying the conditions on which an extradited person may be prosecuted for even offences not mentioned during extradition proceedings; regulates re-extradition to another member state, form central authority in the member states which will be responsible to transmit and receive documents related to extradition proceedings.

However the 1995 and 1996 EU Extradition Treaties were ineffective as these were not ratified by all Member States and never entered into force, although they did apply between some Member States.

Since 1st January 2004, there has been a paradigm shift in the European Union from the concept of mutual legal assistance to mutual recognition, after the adoption of the FD on the EAW and the surrender procedures between Member States. There was a strong belief among the European institutions that traditional extradition measures were too slow and cumbersome and it was also unable to bear up to the increase in cross-border crimes following the abolition of internal border controls in the Schengen Area. The main difference between the mutual legal assistance system and the mutual recognition principle lies in the procedure of recognition and the grounds for refusal. Under the principle of mutual recognition, a decision made by a judicial authority in one Member State must be recognised and enforced by judicial authorities in the other Member States, without enquiring into the merits of the decision. Therefore effectively a judicial decision from another Member State shall have the same effect and value as a national judicial decision. It is a system which is based on mutual trust between Member States in their respective

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291 Supra Note. 288 Art. 10
292 Supra Note. 288 Art. 12
293 Supra Note. 288 Art. 13
295 Id.
criminal justice systems.\textsuperscript{296} It assumes this trust to be present in each concrete case. The EAW is the first instrument to implement the new principle of mutual recognition. The European Criminal Area is a common expression used in practise for the cooperation of the EU Member States within their criminal justice systems. Over a period of few decades the EU has shifted its emphasis from the traditional international legal instruments of cooperation to innovative supranational methods. The supranational method of cooperation functions on the engagement and readiness on the part of the both government and the organs and agencies which apply the respective law on a daily basis. The collaboration among EU nations in crime related is based on the shared values of human rights, democracy, fundamental freedoms, liberty, and solidarity making it possible to create a single area of justice in criminal matters.\textsuperscript{297} The idea of the European Criminal Area assumes that every individual should have the same high level of confidence in protection of the law within every Member State, irrespective of nationality.\textsuperscript{298} The essence of mutual trust constitutes a conviction that other Member States will comply with agreed-upon rules, this assumption being based on concrete, significant knowledge. The EAW functions on cooperation among Member nations.\textsuperscript{299} The existence of mutual trust was also reported in the Council’s FD on the EAW in 2002. In the preamble, it is expressly stated that the required high level of trust has already been achieved.\textsuperscript{300} However, while the respective FD requires the proper control of each issued

\textsuperscript{296} According to the Commission, this trust “is grounded, in particular, on the shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.” (European Comission 2001).


\textsuperscript{298} Id. at p.75

\textsuperscript{299} COUNCIL FRAMEWORK DECISION, European arrest warrant and the surrender procedures between Member States, 13th June 2002, (2002/584/JHA Art. 10)]; See also Case C-123/08 Criminal proceeding against Dominik Wolzenburg[2009] ECR I-09621; See also Resolution of the Polish Supreme Court (2006) I KZP 21/06; See also Opinion of the Advocate General in C-297/07 Staatsanwaltschaft Regensburg v. Klaus Bourquain[2008] ECR I-09425; He stated that though the principle of mutual trust is still novel in the whole concept of the European system of justice in criminal matters, it is however a foundation of the principle of mutual recognition, which undoubtedly constitutes the cornerstone of the emerging European Criminal Area.

\textsuperscript{300} Opinion of the Advocate General attached to case C-297/07 Staatsanwaltschaft Regensburg v. Klaus Bourquain[2008] ECR I-09425, ¶ 39
EAW in every situation, it does not always prevent mistakes due to automatism.\textsuperscript{301} However, factors like differences in national legislations, the lack of the full conformity with the EU directive and the lack of consistency within all 28 Member States’ solutions can lead to mistrust, to the undesired differentiation of the situations of EU citizens.\textsuperscript{302}

The EU FD on the EAW Scheme has replaced the political and administrative phase of the process with a judicial mechanism, embedding the principle of mutual recognition, while also replacing the CEEU as of July 2004.\textsuperscript{303} It allows the members to apply its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media. The framework preserves the obligation of the member states to value basic rights and legal values as ensured under Art 6 EU treaty. The scope of EAW is quite wide as it is not limited to only serious offences, which again is identified under thirty two kinds of offences, but also to petty offences where the quantum of punishment is less as well as the PODC is still applicable.\textsuperscript{304} Decisions with regard to implementation of EAW is subjected to exceptions, controls, independent judicial authorities, while deciding if the concerned individual has to be surrendered or not.\textsuperscript{305} The framework lists grounds for compulsory (Art. 3) and optional (Art. 4) non-execution, as well as conditions that may be imposed in specific cases (Art. 6).

An executing nation is well within its rights to refuse EAWs implementation if the alleged crime is statute barred and in a position to its own jurisdiction; takes upon itself to carry out punishment, if the individual is possessing the nationality of the executing nation; if the offences have been carried out wholly or partially in the territory of the executing nation.\textsuperscript{306} The concerned individual possessing nationality of the executing nation will not

\textsuperscript{301} Supra Note. 297, at p.87; See also M. Ficher, Mutual trust in European Criminal Law, p.13 (University of Edinburgh School of Law Working Paper Series 2009/10), [the existence and extent of this trust is not finally determined and it depends on further action to be undertaken by the interested parties]

\textsuperscript{302} Id.

\textsuperscript{303} ¶ 11 of the Preamble, Art. 1(1) , 1(2), 7[COUNCIL FRAMEWORK DECISION of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)]

\textsuperscript{304} Art. 2 § 2 of COUNCIL FRAMEWORK DECISION of 13 June 2002.

\textsuperscript{305} Sergio Carrera, Elspeth Guild and Nicholas Hernanz, Europe’s most wanted? Recalibrating Trust in the European Arrest Warrant System, No. 76/ p.2, March 2013; SeeArt. 3 [grounds for mandatory non-execution] , Art. 4 [grounds for optional non-execution of the EAW]

\textsuperscript{306} Id. Art. 4
be taken into account for refusing the implementation of the instrument, although it may be made conditional that the sentence imposed be carried out in the requested state. Abolition of nationality based exception would necessitate constitutional amendments in some Member nations. Tax offences are no more retained as ground for refusal. The RoS has been retained while making it conditional to numerous exceptions and nations are given the liberty to relinquish these requirements based on reciprocity, unless in any particular matter, it is desired otherwise. Similar rules apply for non re-extradition, although in severely restricted format. Decisions related to implementation of EAW, and surrenders made thereafter have been made subject to time limits under Arts 17 and 23. The executing member upon arresting, the concerned individual has to inform about the warrant content, his/her right to counsel, an interpreter, and in case the individual refuses to consent his/her own surrender, must be given the opportunity to be heard by the implementing judicial authority.

2.4.2.2 SOUTH ASIA ASSOCIATION FOR REGIONAL CO-OPERATION:

The South Asian region has been also been a victim of acts of terrorism for decades, which have been mostly international in character. In spite of political tension existing in between the members of the SAARC, they have been able to find a common ground through the SAARC Charter. The mistrust between some members of the SAARC has never allowed the members look beyond their jurisdiction in matters of security and justice. The international organization exists, but it comes across as a half-hearted effort. After the adoption of the Charter, the organization has been able to frame very basic instruments which aim to suppress terrorism within the region. The SAARC members have been regulating extradition between them through bi-lateral treaties or arrangements. However, it is only in the late 80’s and post 9/11, that the members have connected these two factors, terrorism and extradition to suppress terrorism and punish individuals for committing terroristic acts. Prior to these efforts the SAARC members have been British colonies and

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307 Id. Art. 5
308 Id. Art. 27; Supra Note. 49
309 Id. Art. 28; Supra Note. 49
310 Id. Art. 11 and 14
thereafter members of the commonwealth, and thereby they have been party to the London Scheme for Extradition within the Commonwealth, which was last amended in the year 2002. Therefore some members of SAARC have an obligation to extradite under both the systems, like India.

The LSEC enumerates the fundamental principles of extradition like extraditable offence; dual criminality; RoS; arrest warrants and provisional warrants; committal proceedings; allows parties to go for optional alternative committal proceedings; creates time-bound process for return or discharge of the fugitive under the executive authority; allows the individual to file Habeas Corpus proceedings and reviewing of verdict as delivered by the judicial authority; empowers competent executive authority to categories any offence as political in character and therefore exempted and such certification will be conclusive in nature and binding on the competent judicial authorities; protects individuals from death penalty, oppressive punishment; incorporates principle of ADAJ to prevent state parties from becoming safe havens.

The members of the SAARC till date have only one treaty dealing with suppression of terrorism and an Additional Protocol to it, which has the sole objective to prevent and eliminate terrorist attacks by strengthening extradition mechanisms and the efforts are further consolidated by the SAARCMACM.

The SAARCRCST admits that terrorism affects security and stability of the region, thereby making it important to take measures to prevent and eliminate it. To this effect, it has also accepted the significance of UN Resolution 2625 (XXV), which requires states to refrain from engaging in terrorist acts in another state. The primary objective of the convention is to successfully prosecute and punish individuals through the tool of

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312 Supra Note. 108
extradition. Majority of the provisions incorporate the fundamental principles of the law of extradition.\textsuperscript{315} It looks forward to parties to, subject to their respective municipal laws, offences so found among the UN treaties, to which they are parties, and otherwise as mentioned in article 1 (d), (e) and (f) of the Convention, as terroristic and not to be regarded as political offence. It allows parties to extend the list of offences, which the parties don’t want to be treated as political offence. The convention incorporates similar provisions as under the ‘Hague Formula’\textsuperscript{316}. The principle of ADAJ is laid down in Article IV, when the person is in the territory of the requested country. It limits the obligation to extradite, if the nation assesses it to be of trivial nature, need of good faith.\textsuperscript{317} The states are required to co-operate in exchange of information, intelligence, to the extent permitted by their national laws.

The Additional Protocol\textsuperscript{318}, is an effort to fulfill the objectives of UN Security Council Resolution 1373 of September 28, 2001, and also supplements the Convention by taking measures to strengthen co-operation to prevent and suppress financing of such acts as enumerated under Articles 3 and 4 on the lines of the 1999 Convention of financing terrorism. It implores the state parties to become parties to the international instrument in the annexure as updated, in accordance to their domestic legal requirements. It applies the same provision in matters related to extradition and MLA of the Convention. The Protocol doesn’t exempt a State from executing extradition or MLA request, defending it by suggesting it to be fiscal offence. It also mandates the parties to take measures as consistent with national and international law to not grant refugee status to any person who has committed any offence as under Article 4 of the Protocol. It also protects individuals when they are vulnerable to discrimination on grounds like race, religion, political opinion, etc and States must in all situations act in accordance with principles of sovereign equality and territorial integrity.

\textsuperscript{315} See SAARC Regional Convention On Suppression Of Terrorism, Art. 1, 2, 3, 4, 6 and 7, 4\textsuperscript{th} November 1987.
\textsuperscript{316} Supra Note 168 and 169.
\textsuperscript{317} Supra Note 12.
\textsuperscript{318} Supra Note 12.
2.4.3 COMPETING OBLIGATIONS UNDER EXTRADITION ARRANGEMENTS AND CUSTOMARY INTERNATIONAL LAW:

States are mostly under the obligation to extradite under multilateral or bi-lateral treaties, treaty provisions as included in the terrorism and transnational offences related. States are obligated not to grant extradition in some situations, like where it might violate human rights, refugee law, and CIL. To resolve such conflicts states have to often look act in accordance to applicable principles and standards of international law. Often a country undertakes the obligation to extradite under multiple instruments and in those situations the treaty subsequently entered shall prevail over the one which has been in existence, and the specialised prevails over the general, as per Art 30 of VCLT. But different standards apply when obligations arise under different kinds of treaties which range from covering matters like human rights and refugee rights as well, as they aim to create a particular kind of legal order where the primary aim has been to protect human rights. Most of such rights which flow from such treaties have already attained jus cogen status, thereby any treaty provision which allows doing otherwise would be considered void as per Art 53 and 64 of VCLT (1969). In situations of conflict between obligations arising from extradition agreements and human rights related treaties, not constituting peremptory norms, will be settled in the light of the nation’s obligation as per the UN charter. Therefore human rights based prohibitions would proceed over any obligation to extradite, irrespective of any agreement between the nations. The other bar to extradition requests can arise from any CIL principle or jus cogens. Thus, when a requested State’s obligation to extradite as per treaty provisions will precede the surfacing of a new rule of CIL, putting a prohibition on extradition, it is going to be outdated by the latter, like , with regard to the principle of non-refoulement under CIL.

319 Art. 30, VCLT, 1969
320 Supra Note.3
321 Art. 55 (c), UN Charter
322 Supra note.3
The other pertinent issue that arises at this point of time is whether, the duty to extradite or prosecute can be established by CIL. The supporters of CIL duty to prosecute or extradite often cite the 1967 UN Declaration on Territorial Asylum\textsuperscript{323}, which being a soft law, provides that an individual who is believed to have committed CAH, might not have the right to seek and enjoy asylum. But in the light of widespread state practice of granting amnesties and exile arrangements, to those who commit crimes against humanity during the past thirty years, shows that CIL has not crystallized in this area. It is even more disheartening to know that there was no consensus on the recommendation by the UN Secretary General in its report\textsuperscript{324}, to disallow approvals of amnesty for committing international crimes including the ones having link to gender, ethnic, and even sexual in nature, and to make sure that amnesty granted previously would be not obstruct any prosecution before UN assisted court.

2.5 A SUM UP

Extradition laws have travelled a long distance and have been under constant monitoring of the nations, as evident from this chapter. Over the centuries the following points have been agreed conclusively, like: nations agree that extradition is an effective tool for bringing criminals to justice; States have an obligation to extradite or surrender; persons to be surrendered to the requesting country are entitled to basic human rights; mandatory and optional grounds of refusal; and other fundamental principles of extradition.

EXTRADITION – GENERAL PRINCIPLES

The general principles of extradition can be found mostly in treaties, model on the subject as well state practices over centuries. The general principles have been introduced in the national legislations also with necessary changes, in line with their regional commitments. Over the years, these general principles have been further relaxed or qualified in the light of the rise in number of human rights instruments.

\textsuperscript{323} UNGA Res 2312 [XXII] [14 DECEMBER 1967]
a. EXTRADITION UNDER INTERNATIONAL TREATIES

Extradition laws have been consolidated by the increasing body of both multi-lateral and bi-lateral treaties, covering a range of matters like organized crimes, acts of terrorism, and others. However till date the Model law on extradition is yet to become a binding treaty, which can be applicable on all situations. However, it should not cause worry as the nations using the offices of regional organizations have adopted binding legal obligations, both with respect to extradition and mutual assistance.

b. EXTRADITION AND INTERNATIONAL LAW—HISTORICAL PERSPECTIVE

Under this heading the researcher has traced how the major events affecting international relations, cutting across centuries have helped shape the modern principles and laws of extradition. The two world wars, the cold war and the rise of NIACs, have pushed the international judicial bodies as well as the national courts to interpret and develop the then extradition laws to be used more effectively. With the rise of supra-national and international organizations, the traditional state to state extradition process has evolved to become state to international entity process, requiring more political will for the tribunals to exercise jurisdiction over reluctant indicted individuals.

c. EXTRADITION UNDER INTERNATIONAL LAW – IN THE BACKDROP OF GLOBAL TERRORISM

Given the fact that the nature of terrorism today has shifted from being just “traditional international terrorism of the late 20th century into a new form of transnational non-state warfare, the law with respect to extradition in the backdrop of terrorism has developed through a multitude of existing treaties, which obliges the member parties to either prosecute or extradite. Even in situations of failure of treaty mechanisms, the UN through the offices of the Security Council has emphasized on the need to surrender individual suspects.\(^{325}\) However, it has been difficult to establish the same duty on the part of nations, in situations of dealing with individuals who have committed such terroristic acts during, armed conflict, in the light of establishing judicial forums to try such individuals and

\(^{325}\) Supra Note. 90
increasing number of impunity agreements as being entered by governments. Post 9/11, the world consolidated its efforts to counter terrorism by making new breakthroughs, like replacing extradition laws with European warrant system where the role of the executive has been replaced by the judiciary. There has also been rise of less time consuming practices of taking fugitives into custody like, ad hoc agreement, secret abduction, and extraordinary rendition.\textsuperscript{326} It is worth noting that pursuant to constant efforts of the UN, the nations have come together in drafting a wide-ranging Convention against International Terrorism, yet to be adopted by nations in its present form. The draft convention intends to be applicable in situations which are not covered under any of the existing conventions on terrorism\textsuperscript{327}. It mandates States to not grant refugee status to persons accused of committing offences as mentioned under Article 2. It seeks better co-ordination between the members in way exchanging information\textsuperscript{328}; make legal entities liable in criminal, civil or administrative manner, including monetary sanctions for committing acts in breach of the convention\textsuperscript{329}; obligation to extradite or prosecute\textsuperscript{330}; guarantees enjoyment of all rights and fair treatment in the requesting country\textsuperscript{331}; seek assistance in matters related to investigation governing criminal or extradition related proceedings; no crimes to be categorized as political crimes, for states to refuse extradition or MLA requests\textsuperscript{332}; allows the members to refuse such requests if there is any ground that the person will be victimized for his/her political, racial or religious background; incorporates the ‘Hague formula’.\textsuperscript{333}

d. DEVELOPMENT OF EXTRADITION LAWS UNDER MULTILATERAL TREATY SYSTEM

Since 1960s the threat of various international terrorist activities prompted the nations to undertake counter-terrorism measures. The UN has adopted numerous universal

\textsuperscript{326}Supra Note. 74.
\textsuperscript{328}Id. Art 9
\textsuperscript{329}Id. Art 10
\textsuperscript{330}Id. Art 12
\textsuperscript{331}Id. Art 13
\textsuperscript{332}Id. Art 15
\textsuperscript{333}Id. Art 18
instruments against terrorism, including the Protocols to some of the main treaties. However, these treaties fall short of consolidating the basic features of extradition, like RoS; double criminality; etc. On the other hand, these anti-terrorism treaties have almost put an end to the age-old practice of refusing extradition citing grounds of political offence; or related to political offence. So overall, extradition practices have remained untouched by the development of anti-terrorism laws. On the international front also we have seen that countries have to a large extent restricted their sovereign powers, in matters of extradition by not granting exemptions on the ground of only being a political offence or fiscal offence. Several States have made reservations or interpretative declarations in respect of the above-mentioned conventions, which sometimes affect the legal effect of the provisions for the punishment of offenders.334 Through their reservations and declarations, members have generally defined the scope of the relevant provisions. The reservations range from stating that wordings like “alleged offender”, used in some conventions, is in contradiction with the presumption of innocence, thereby understating it as “accused”; duty to prosecute to include “the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws”; if the crime ascribed entails the death sentence in the requesting State; the handing over of a person could only be based on “strong suspicions” that he committed the crimes he is accused of, and would depend on a court decision. At times certain reservations have been objected, to on the ground that they would be irreconcilable with both object and purpose of the related treaty, since they intend to rule out application of fundamental provisions included in the convention.335 A reservation made by Belgium to some of the above-mentioned conventions, whereby “in exceptional circumstances” it reserved “the right to refuse extradition or mutual legal


335 Id. at p.63. Objections by Moldova, Germany and Argentina to the reservation by the Democratic People’s Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism, on their reservation that requests for extradition would be refused for persons granted to whom political asylum has been or for persons accused of political crimes or for their opinions.
assistance in respect of any [relevant] offence … which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives”, has been objected stating that it seeks to limit the scope of application of a critical provision that should be applied in all circumstances and, by referring to subjective criteria, introduces uncertainty into conventional relations, and that it was therefore irreconcilable with both object and purpose of relevant conventions, finally Belgium has withdrawn its reservation with respect to these conventions.336

e. EXPANSION OF EXTRADITION LAWS UNDER THE REGIONAL ARRANGEMENTS

After the 1963 Tokyo Convention, the regional organizations also took measures to establish counter-terrorism measures. The EU has framed the most extensive body of laws on extradition. However, the very idea of speeding up trials have also brought to the fore issues of disproportionate use of European arrest warrants, like, retrospective proportionality337, prospective proportionality338, differing application of proportionality tests throughout the Member States339. The complicated link between EAW and proportionality standard has been established by European Commission’s 2011 Evaluation Report of the EAW, which highlighted as one of the unresolved problems with the EAW operation.340 The EAW itself does not stipulate the necessity of a proportionality test to be conducted by the issuing state, nor does it include a ground for refusal based on the

336 Id.

337 In such cases, the executing state deems the sentence imposed by the issuing state to be disproportionate in relation to the offence and it might not recognize the act on which an EAW is based as worthy of criminal prosecution, whereas at the same time, the issuing state considers the same act to be punishable with a custodial sentence for a maximum period of at least three years. ; See Sandru v Government of Romania, 28 October 2009, [2009] EWHC 2879 (Admin), ¶ 15. ; the European Parliament, under the rapporteurship of British Liberal MEP Sarah Ludford, in legislative initiative report promised to look in to “issues of proportionality and observance of human rights.” EU Arrest Warrant Needs Urgent Reform 08.07.13, By Libby Clarke [available at euobserver.com/justice/120783]

338 In these situations the extradition and the associated human and financial costs are disproportionate to the offence.

339 Poland, which has issued the most EAWs in the past years10, argue that due to the legality principle they are obliged to prosecute all offences, and therefore cannot make prosecution conditional on a proportionality test.

seriousness of the offence. The grounds to refuse includes: the concerned act not being an offence in the executing state; criminal trial being statute-barred; the EAW being incomplete or lacking evidence; EAW when withdrawn by executive judicial authority; the implementing nation undertaking to carry out; the individual being tried in the executing nation for the same offence (*lispendens*). The other hindrance to proper functioning of EAW has been the problem of identifying the competent national judicial authorities to ensure adequate reins on the freedom of judiciary while implementing EAW. At the same time one can’t deny the positive changes also brought about by this mechanism, like fastening the procedure; abolishing the PODC for 32 crimes; abolishing the political stage of extradition; making European Union citizens responsible for their acts before national courts across the European Union; ensuring that member States and national courts abide by provisions of the ECHR. The overall success of EAW is evidenced by the fact that till 2009 when 15,827 EAWs were issued in total and of those 4,431 was executed, out of Poland, Germany, and Romania and UK issues most.

In comparison the SAARC members have been regulating extradition between them through bi-lateral treaties or arrangements. However, the existing structure for extradition in the SAARC nations still remains affected by the lack of mutual trust and severe political differences. In the light of the subsequent terror attacks on the Indian soil, perpetrated by Pakistani nationality, as evidenced in the 13th December parliament attack or 26/11 attacks, and the inaction on behalf of the Pakistan government in surrendering such individuals, has evidently proved the futility of such SAARC arrangements.

f. COMPETING OBLIGATIONS UNDER EXTRADITION ARRANGEMENTS AND CUSTOMARY INTERNATIONAL LAW

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341 Supra Note 294.
342 Supra Note. 340 at p 11.
344 The executing State has to return the individual to the State to the issuing Sate within a maximum period of 90 days of the arrest. If the individual gives consent to the surrender, the decision shall be taken within 10 days

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A State has multiple legal obligations by way of treaties and CIL. The rights so ensured within the human rights instruments, considered as jus cogens would apply and treaties in conflict would be void.\textsuperscript{346} Therefore prohibition set by human rights on extradition would preside over any obligation to extradite. Thus, a new rule of CIL which establishes a bar to extradition will supersede any prior treaty which obligates any nation to extradite, like, with regard to the principle of non-refoulement under CIL. On the other hand on the duty to extradite or prosecute can’t be established under CIL, because of widespread practice by the nations of granting amnesties and exile arrangements, to those who commit crimes against humanity during the past thirty years.

It can’t be denied anymore that the overall success of extradition with respect to terrorism depends on States paving way for more transparent mechanism which should be subject to confirming with human rights standards and at the same time rise above their political differences. States should also have a zero tolerance policy in allowing terrorist activities within their soil, to fulfill their political ambitions; else there would always be problem in putting the accused on trial.

\textsuperscript{346} Supra note. 340