CHAPTER II

LAW OF EXTRADITION
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In the fast shrinking world of today, where interdependence of states is but natural, problems of extradition are bound to increase. Air traffic has made the flight of criminal more easier than before. If the law has to take its course and pursue the fleeing offender, extradition proceedings are a necessary instrument to secure the return of the fugitive at the altar of law.

Extradition or the mutual rendition of fugitive from justice is of comparatively modern origin. In ancient and medivial times the practice appears to have been sporadic, it was involved generally in case of political rather than common offenders. The notion was widely held that fugitive offenders should be given Asylum. With the rise of modern state system, however, and the development of means of travel and communication cooperation in the suppression of crime became a matter of international concern. It became evident that states must either find a way to administer the penal laws of other states; develop a cosmopolitan system of criminal jurisprudence or provide for the surrender of fugitives. The first alternative presented the gravest practical difficulties, the second was obviously utopian; the third was developed
Extradition is the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the state of refuge to the authorities of another for the purpose of criminal prosecution or the execution of a state sentence. Thus extradition constitutes only one, albeit the most important aspect of the broader spectrum of mutual and legal assistance between states in criminal matters. Every single extradition is regarded as an agreement under international law, notwithstanding the fact that the two state parties to such an agreement may have established general extradition relations by concluding a bilateral or acceding to a multilateral extradition.

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

Extradition, says Stark, denotes the process whereby under treaty or upon a basis of reciprocity, one state surrenders to another state at its request, a person accused or convicted of a criminal offence committed against the laws of the requesting state, such requesting being competent to try

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the alleged offender. Normally the alleged offence has been committed with in the territory or abroad a ship flying the flag of the requesting, and normally it is of the surrendering state that the alleged offender has taken refuge. Request for extradition are usually made and answered through the diplomatic channel.⁴

Extradition, throughout the history of practice has remained a system consisting of several processes where by one sovereign surrenders to another sovereign a person sought after as an accused criminal or fugitive offender. The practice originated in earlier non-western civilization such as Egyptian Chinese, Chaldean and Assyro-Babylonian civilization. In these early days of practice the delivery of a requested person to the requesting sovereign was based on facts and treaties but, also occurred by reciprocity and comity as a matter of courtesy and good will between sovereigns. The delivered person was usually a subject of the requesting sovereign or that of another sovereign but seldom if ever was the person delivered a subject of the requested sovereign. Undertakings involving the rendition of fugitives were deemed an essential feature of friendly relations between sovereigns, and consequently the performance of such acts was often unsolicited. Thus, rendition did not always derive from the process of extradition but was more likely a gesture of friendship and co-operation between sovereigns. Indeed the

formal process of extradition are only one of the modes of rendition. In fact, in contemporary practice there are more persons who are surrendered, delivered, or returned by one state to another in a variety of ways both legal and extra-legal, then there are renditions through formal extraditions.⁵

In contemporary practice extradition means a formal processess through which a person is surrendered by one state to another by virtue of treaty, reciprocity or comity as between the respective states. To a large extend the process and its participants have not changed much in the course of time but the rationale and purposes of the practice have changed, and as a consequence so have the formal aspects of the proceedings. The emergence of humanitarian international law gave rise to a new legal status to the individual and thus, placing some limitation on the power of the respective sovereigns.⁶

The first recorded extradition treaty in the world dates circa 1280.BC. Rames II, Pharaoh of of Egypt, who Signed a peace treaty with Hittites after he defeated their attempt to invade Egypt. The peace treaty provided expressly for the return of the persons sought by each sovereign who had taken refuge on the others territory. Since then, however, only the practice of Greece and Rome's extradition agreements found

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⁵ Bassiouni M.C: International Law and world public opinion, Oceana publication, 1974 pp.1-2.
their way into European texts of International law. Surrendering persons sought by another state did not necessarily mean that the person sought after was fugitive from justice charged with a common crime. In fact from antiquity until the late eighteenth century, such persons were sought because of political reasons. Sovereigns obliged one another by surrendering those persons who most likely affected the stability of their political order of the requesting state. Thus the stronger the relationship between the sovereigns, the more interest and concern they had for each others welfare and the more intent they would be on surrendering their political offender who had created the greatest danger to their respective welfare. Common criminals were the least sought after species of offenders because their harmful conduct affected only other individuals and not the sovereign or the public order.  

Although the word extradition has received universal recognition by now, its use has been relatively recent. It was first used in French decree in 1791 and later again by France in a treaty in 1828 after which the word has been uniformly used.  

A criminal may take refuge in a state which has no jurisdiction to try him, or in a state which is unable or unwilling to try him because all the evidences and witnesses

7 Ibid, p.3-4.

are abroad. To meet this problem, International law has evolved the practice of extradition; individuals are extradited by one state to another state in order that they may be tried in the latter state for offences against its laws. Extradition also includes the surrender of convicted criminals who have escaped before completing their punishment.\(^9\)

The jurisdiction of the state over all persons within its territorial boundaries and its right in consequence to punish them for violation of its laws is frequently defeated for the time being by the escape of an offender into the jurisdiction of a neighbouring state. So strictly is the independence and sovereignty of states interpreted that not even the repression of the most outrageous crimes will warrant the exercise by one state of the slightest act of jurisdictional authority within the territory of another state. Under these circumstances a mutual interest in the maintenance of law and order and the administration of justice has led nations to cooperate with one another by surrendering fugitives criminals to the state in which the crime was committed, this surrender in compliance with a formal demand and in accordance with the conditions attached to the general obligation assumed in the treaty agreement is known as extradition.\(^10\)

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The great expansion in recent times of the system of extradition is an evidence of the gradual recognition by nations, in their intercourse with one another of common sense as a controlling principle. Extradition employees, simply, the enforcement of law. Formerly, each state seemed to endeavour so far as possible to defeat that end, making itself a refuge for offenders against the laws of other states. Domestic criminals were prosecuted and punished. Foreign criminals were regarded as objects of peculiar favour and were not given up except in the presence of superior force.\textsuperscript{11}

In the last half century or so there has been a revolution in opinion on the subject of extradition. In place of the idea of Asylum as a right belonging to the fugitive, there has been established the right of the state either to extradite or to expel any offender who comes within the jurisdiction. This right is recognised in the laws of all the civilized states and in none more fully than in those of the united states. The change in opinion on the subject of extradition, though been rapid, has been the result of modern development the result and the necessary result of the modern development. The present century has been characterised by a wonderful improvement in facilities of travel and by vast movements of population, and as flights from justice has become more easy and more frequent, the necessity to check it has become more apparent.\textsuperscript{12}

\textsuperscript{11} Moore J.B.: Selected papers of J.B. Moore, Volume 1, 1944, p.-274.
\textsuperscript{12} Ibid - p. 274.
Since extradition demands delivering up of fugitives offenders general international law neither imposes the duty on states to extradite common criminals nor does it oblige them to prosecute or punish fugitives offenders when extradition fails. As early as 1625 Grotius recognised the social necessity, and hence the duty under the natural law, that a state either punish such fugitives criminals itself or else surrender them to the state whose laws were immediately concerned in bringing the offender to justice. This moral duty of extradition did not however become a legal obligation until states began to enter into special treaties, providing, for the surrender of the particular fugitive although apart from these treaty arrangements states frequently surrendered fugitives by voluntary act.\textsuperscript{13}

On the contrary states have always upheld their right to grant asylum to foreign individual as an inference from their territorial supremacy, those cases excepted, of course, which fall under stipulations of special extradition treaties if any. There is therefore, no universal rule of customary international law in existence which impose the duty of extradition.\textsuperscript{14}

There exist no duty to extradite in the absence of treaty. It is sometimes said that asylum ends where extradition begins; that is a state has a right to grant asylum to fugitive criminals unless it has bound itself by

\textsuperscript{13} Fenwick; op. cit., p.388-389

\textsuperscript{14} Oppenhiem, op. cit., p.696.
treaty to extradite them. The right to asylum means the right of a state to grant asylum; an individual has no right to demand asylum.\textsuperscript{15}

The International Court of Justice in the asylum case explained the connection in the following words: "In the case of extradition, the refugee is within the territory of the state of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the state where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that state'.\textsuperscript{16}

General international law contains no provision for the extradition of fugitive offenders. In order to provide for reciprocal rights to claim the extradition of fugitives from justice states have entered into a multitude of bilateral treaties to secure such rights. It is well established that in English law and the law of United States, there is no duty to surrender in the absence of a treaty with the requesting state but also that the executive in both the countries have no authority to extradite in the absence of such a treaty. \textsuperscript{17}

Supreme court of United States in a leading case "FACTOR V. LAUBENHEIMER" 1933, held: "International law


\textsuperscript{16} O' Connel D.P. International law, Volume II, Oceana publication, 1965, pp-792.

\textsuperscript{17} Greige W.D.: International law, Buttersworth, 1970, p-322.
recognises no right to extradition apart from the treaty while a government may, if agreeable to its own constitution and laws voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under moral duty to do so, the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exists only when, created by a treaty.\textsuperscript{18}

Thus the practice of states have overwhelmingly reflected that no obligation to extradite existed apart from that imposed by treaty. This position has been steadfastly maintained. Same attitude has been taken by the British Courts. Before 1815 the British practice was that the royal prerogative extended to the power of surrender of an aliens to foreign states and their existed judicial authority to the same effect. In 1815 however the law officers advised that without statutory warrant no person might be surrendered to a foreign state, since then British practice has fairly and consistently practiced that no power to extradite existed apart from statute. Further, the Extradition act of 1870 left no doubt as to its intention to cover the whole field of extradition. The act of 1870 also made the existence of a extradition treaty a condition precedent for its application with regard to any, state.\textsuperscript{19} The British attitude was made

\textsuperscript{18} Briggs W: The laws of Nations, Cases documents and notes, Appleton Century Croft, 1938 pp-581.

\textsuperscript{19} Shearer, I.A: Extradition in International Law, Manchester University Press, 1971, pp 23-25.
clear in correspondence concerning the case of THE CREOLE 1842, where the Slave Cargo of United States vessel rose against the master, murdered the passenger and sought refuge in the Bahamas. The law officer pronounced their opinion as follows:

'It is the practice of some states to deliver up persons charged with crimes who have taken refuge, are been found with in their dominions, on demand of the government of which the alleged criminals are subject but such practice does not universally, or even generally prevail, nor is their any rule of Law of Nation's rendering it imperative on an independent state to give up persons residing or taking refuge with in its territory. The mutual surrender of criminals is indeed sometimes stipulated for by the treaty, but as there is not at present any subsisting treaty to that effect with the United States, we think that Her Majesty's Government is not bound on the demand of the government of the United States to deliver up the person in question, or any of them, to that government to be tried with in the United States'.

The practice of civil law countries has demonstrated a greater willingness to grant extradition in the absence of treaties but in few instances that extradition in such circumstances was based on comity and as an act of grace rather than as a treaty obligation. The circular of a French Minister of Justice of 30th July 1772 stated that, 'on the basis of reciprocity' extradition might take place in the

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20. Ibid, p-25
absence of a treaty. Thus it was made clear that no duty was hereby recognised only such cases could be regulated in individual circumstances by the respective Governments. Some parts of South America, has a legal duty to extradite in the absence of treaty. Supreme Court of Venenzula in 1953 surrendered an American National to Panama in the absence of extradition treaty with that country. In granting the request the court expressly acted on the notion that surrender was in conformity with the public law of nations where friendly states recognise a reciprocal obligation to surrender offenders who have taken refuge in their respective countries. Article 646 of the Argentinian Court of criminal procedure provides for extradition in the absence of treaties in cases where extradition is proper according to the principle of reciprocity or the uniform practice of states. But special treaties of extradition between states did not exist in the eighteenth century. There was hardly a necessity of such general treaties, since traffic was not so developed as now a days and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of neighbouring state. However with the appearance of Railways and transatlantic steamships transit began to develop immensely consequently criminals used the opportunity to flee to distant foreign countries. It was then and in consequence of this, that the conviction was

21. Ibid, p-26
22. Ibid, p-26
forced upon civilized states that it was in the common interest to surrender ordinary criminals regularly to each other. Special treaties to extradition became therefore a necessity and there is a widespread tendency towards the conclusion of general extradition treaties.\textsuperscript{24}

The general principle became established that without some formal authority either by treaty or by statute fugitive criminals would not be surrendered. For this reason extradition was called by some writers a matter of imperfect obligation. In the absence of treaty or statute the grant of extradition depended purely on reciprocity or courtesy.

Most states have preferred for conclusion of bilateral treaties or conventions. All developed, and most of the developing countries are parties to at least some bilateral treaties. For those states whose laws or established practice prevent them from extraditing them in the absence of a formal international agreement extradition treaties are the sole means by which they co-operate with other states in surrendering fugitive criminals to jurisdictions competent to try them. The number of effectiveness of such treaties is therefore of vital importance.\textsuperscript{25}

Attempts have been made to have a multilateral convention on International Criminal Law subjects to encompass extradition within their scope. Thus international convention for the suppression of counterfeiting currency 1929, provided

\textsuperscript{24} Ibid, pp 696-697

\textsuperscript{25} Bassiouni.M.C.: op cit, p 13
that the offence created by the convention shall be regarded as extraditable offence in any extradition treaty already in force, as which might later be concluded, between any of the contracting parties. Similar provisions appear in some of the narcotics agreement such as of 1936 convention for the suppression of illicit traffic in dangerous drugs. The Hague convention of 1970 on offences on Board aircraft establish a duty to prosecute or extradite. but Bilateral treaties continues to form the main basis of International practice to provide an effective and comprehensive system.

During the life time of League of Nations 112 bilateral extradition treaties were registered and published in the League of Nations treaty series. The first 550 volumes of united nations treaty series covered the period from 1945 to 1964, contains the test of fifty extradition treaties. The first extradition treaty of the United States was incorporated in article 27 of the Jay treaty of 1794 with Great Britain. These treaties multiplied rapidly in the nineteenth century until the world came to be covered by a network of such agreements.

The present system of bilateral agreements is far from being the effective. According to Bassiouni there are four factors.

(a) There tends to exist a certain resistance or reluctance in the part of states to enter into new bilateral

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26 Ibid.p-13-14.

27 Shearer.I.A., op.cit, 1971, p-35
treaties or make supplementary treaties to existing one states tend to give lower priority to the negotiation of extradition treaties which is readily understandable since extradition is not usually a pressing issue in International Relation. All too often, states unduly defer consideration of their extradition relation until a particular crisis or urgency shocks them out of their inertia. This may be due in small measure to the often complicated and arduous process of negotiating and ratifying a treaty and where needed to pass implementing legislation.

(b) It is the practice of a few states to denounce all their extradition treaties in anticipation of a fundamental revision of their municipal extradition laws. This was done by Brazil in 1913 and by Sweden in 1950 which led to serious breaks in the continuity of their relations with other states especially those constitutionally unable to extradite in the absence of a treaty. This created a gap in relation between Brazil and United States for fifty years making Brazil a heaven for fugitives from United States till 1964 when a extradition treaty was sign between the two states.28 The situation with Sweden did not give rise to such disruptive consequences.29 Even though twelve years passed before Sweden and Great Britain


29 Ibid. p 180
concluded a new treaty to replace that denounced in 1951 and the one with United States was signed in 1964.

The affect of war on treaties generally had a severe impact on extradition treaties. It seems that the only generalization which may safely be made under the present state of International law is that the effect of war on treaties must be assessed in the light of nature of a particular treaty obligation in question. Extradition treaties do not lie at any extreme position of compatibility with a state of War such as treaties of alliance at one end of the spectrum and treaties respecting treatment of prisoners of War at the other. The effect of War on a extradition treaty was directly put in question in the United states in 'Argentino V. Horn'. In this case the relator argued that despite the purported 'revival' by the United States of the extradition treaty with Italy after world War II, the treaty had been abrogated by the outbreak of war and could only be replaced by an altogether new treaty. The court avoided the theoretical question by basing its decision on a consideration of the background of the actual conduct of the two nations involved acting through the political branches of their governments. The provision of the peace treaties following World War II did not advert to the question whether any classes of treaty irrecoverable disappeared as a result of War. The provision of these treaties merely invited the
signatories to notify the former belligerents which treaties it desire to keep in force, or revive and declare that treaties not so notified shall be regarded as abrogated. Extradition treaties have figured prominently among the treaties which were revived under the provision of the peace treaties with Bulgaria, Finland, Hungary Italy Japan and Romania. The cessation of diplomatic relations has been interpreted by some states as suspending the process. This had also been the position of the United States regarding Cuba from 1962 to 1973 even though this view is arguable so long as a treaty is in force and another state represents the interest of the requesting state in the requested stated and can act in an official capacity.³⁰

Legal doubts surrounds the effect of state succession on extradition treaties, especially in the most common present day forms of succession namely the accession to independence of former colonies, protectorates and trust territories. Some successor states have clarified their attitude towards pre-existing treaties by entering into inheritance agreements with predecessor states or by making unilateral declaration of continuity. Other successor states have taken no formal steps with regard to treaties in general the fate of extradition treaties has thus been left in doubt adopting negative

³⁰ Upholding the view of the department of state, that the break of diplomatic relations precluded making extradition request. On Feb. 15,1973 a Memorandum of understanding was signed between the United States and Cuba on the extradition of hijackers of aircrafts and vessels. The globe. volume 10-15. March, fall, 1973. p 121.
attitude towards succession to extradition treaties. There is no evidence for example that Indonesia has ever granted extradition on the basis of Netherland's treaties. Some states which have taken no general step in relations to treaties concluded by the former sovereign state have in practice acknowledged continuity of specific pre-independence treaties. United States, for example have consistently relied on the doctrinu of state sucession in its relation with newly independent states seeking specific inheritance agreement and even implied acceptance of the applicability to from pre-independence agreement. Most states however adopt a Wait and See policy preparing to deal with each problem of state succession as it arises.

There is, however, evidence of increasing Judicial recognition of sucession by new states to extradition treaties. Over all picture is uneven and uncertain. Flight by criminals to newly independent states could be encouraged by the belief that the statutes of a formerly applicable treaty is obscure and might not be clarified in time for action to be taken against them. In any event the delay in settling the question would be enough of an inducement to many, a fugitive as it would give him to prepare for yet another flight elsewhere if matters ultimately turned to his detriment.\(^{31}\)

In addition to bilateral treaties some states are parties to schemes of extradition between a group of nations having geographical or political affinity. Schemes may take

\(^{31}\) Bassiouni. M.C.; op sit, pp - 15-18
the form of a multilateral convention, such as the Arab league extradition agreement and the European extradition convention or the form of reciprocating national legislation upon an agreed pattern, such as is secured by schemes of extradition among the member states of commonwealth and the Nordic treaty state. The advantage of such schemes are firstly, that they atleast reduce, if not entirely eliminate, the divergent stipulations that are so perplex national authority when dealing with extradition matter on a bilateral matters, and secondly they are less susceptible to break down by a process of attiration that is the case with the large number of individual bilateral agreement. A less immediate but important long term advantage of such arrangements is that they assist in the creation of a common law of extradition and could conceivably one day result, in that so far elusive attainment of a world wide extradition convention can be attained.  

Under the bilateral treaty system the request for extradition is usually made through diplomatic channels although some convention allow more informal demands. The procedure for determining whether a request for extradition shall be granted varies. In many states evidence establishing the identity of the accused, the nature of offence charged and the accusation at the place where the offence is alleged to have been committed is sufficient. In Great Britan and United States on the other hand, extradition is regarded as essentially similar to committrial for trail, and it is

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necessary to produce evidence which would justify bringing the fugitive to trial at place of asylum if he were charged with a similar crime committed in that country, while competence evidence to establish reasonable grounds is not necessarily evidence competent to convict. 33

Some states were, however, unwilling to depend entirely upon the discretion of their governments as regards the conclusion of extradition treaties. Many states have enacted special laws which enumerate those crimes for which extradition shall be granted and ask in return, and which at the same time regulate the procedure in extradition cases. In case of Great Britain the powerlessness of the crown at common law to arrest a fugitive criminal and surrender him to another state for trial made legislation essential. They have therefore enacted special municipal laws which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These municipal laws furnish the basis for the conclusion of extradition treaties. The first in the field with such extradition law was Belgium in 1833, which remained, however for far more than a generation quiet exceptional. The U.K. introduced its first extradition at in 1870, which was subsequently amended, it has furnish the basis for extradition treaties between U.K. and large number of states. It has now been replaced by the extradition at of 1989, which consolidate

The act 1989 unlike that of 1970, applies both two foreign and commonwealth states. However, it treats Common-wealth countries which are for the arrangements made under fugitive act 1967, which replaced the fugitive offender act 1881. Though the attainment of independence by state now members of the common wealth created some difficulty in the application of the 1881 act to such state. The principle underlying these arrangements is that the return of the fugitive offenders between commonwealth countries follows not from formal treaty arrangement but from legislation in each country following a common pattern. States which possess no extradition laws and whose written constitution does not mention the matter leave it to their Governments to conclude extradition treaties according to their discretion. In these countries the government are usually competent to extradite an individual, even if no extradition treaty exists.

There is trend of opinion that even in the absence of extradition treaty states should voluntarily surrenders fugitive criminal to each other in the larger interest of International Community for the suppression of crime. This doctrine has however, never become established as part of law of nations.

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36 Moore, digest of International Law, Volume IV, p-239, 1944.
states contains provisions for voluntary surrender even in the absence of treaties such a provision exist in Canada which contemplates in extradition, in certain circumstances even where no treaties exists. There are also extradition laws in force in France and Germany which were enacted for the surrender of fugitive offenders in the absence of treaty arrangements. There does not appear to be any agreement in principle among the various nat on on this question, while certain states such as India and Japan are of the view that there is no objection to the voluntarily surrender of fugitives.\(^\text{37}\) The position in International law in the state practice appears to be that in the absence of treaty no state is obliged to hand over fugitive from justice to other state even in the absence of treaty. It may be stated that there could be no objection in principle to a country voluntarily surrendering a person since no state is obliged to give refuge to a criminal in its territory.\(^\text{38}\)

J.B. Moore further elaborates the question, whether it is the duty of a nation to defines up fugitive from justice in the absence of an express conventional obligation, has generally been aswered in negative, though publicist of great eminence have maintained that such a duty exists. In case of \textit{Wash burn}, 1819, chancellor kent declared that it was "the law and usage of nations, rest'ng on the plainest principle of

\(^\text{37}\) \textit{SEN E: A diplomat\'s hand book of International Law and practice, Martinus Nijhoff, 1979, pp-360-361}

\(^\text{38}\) \textit{Ibid, p-361}
justice and public utility, to deliver up of offenders charged
with felony and other high crimes, and fleeing from the
country in which the crime was committed, into a foreign and
friendly jurisdiction".39

Assuming that a nation is not obliged in the absence of
treaty, to deliver up fugitives from justice or demand, it by
no means follow that governments are free from all obligation
in such cases. A nation which has refused to surrender
fugitive offender from justice and decline to enter into
treaties on the subject, would become object of general
aversion, and would be recipient of International
Complaint.40 Extradition in the absence of treaties which was
supported also in 1980 by a resolution of institut:
International law has long been approved by civil law
countries.

French judicial decision as early as 1827 have proved it.
French writer Billot states that it is an established
principle that extradition may be authorized in the absence of
a treaty and in this view he has been joined by other writers.
French extradition law of 1927 expressly applies in the
absence of a treaty to regulate such extradition. Since in
France treaty duly approved and promulgated, operate without
the need of legislative implementation.41

40. Ibid, p-276
41. Shearer I. A; op cit, pp 30 31
"Since extradition is the delivery of an accused or convicted individual to the state on whose territory he is alleged to have committed, or to have been convicted of a crime, by the state on whose territory he happens for the time to be, the object of extradition can be any individual whether he is the subject of the prosecuting state or of the state which is required to extradite him or of a third state. Many states, however, such as France and Germany have adopted the principle of never extraditing their own subjects to a foreign state, but themselves punishing their own subjects for grave crimes committed abroad. For instance the Article 112 of the German Constitution and the constitution of Yugoslavia of September 1931 Article 2: provided expressly that the extradition of nationals is not permitted.  

The United States practice that unless exempted by the treaty from surrendering its own nationals does so as a matter of obligation and in pursuance of its territoriality conception of jurisdiction. Practice of United Kingdom with regard to extradition of nationals is that it always surrender has own nationals. The Royal Commission on extradition in 1878 was in favour of this practice. It has sometime been asserted that Great Britain attaches a reciprocity qualification to surrender of nationals and that this implies, that surrender of British subjects will be exceptional rather than the rule, because most continental states adhere to the policy of non-surrender of nationals. The theoretical issue between the  

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42 Oppenhiem, op. cit, pp-698-699.
Anglo-American and the continental policies have frequently been misinterpreted. It does not involve the territorial and non-territorial bases of jurisdicaliocation so much as the emphasis given to the moral claim of national to be judged by his country men. This claim is indeed worthy owing to the immaturity of the relevant legal system, there is doubt about a person's chances of being judged by his peers abroad, but this is to be argued from the particular and the exceptional to general, and in any event it has no relevance whatever to the case of extradition after trial and conviction. It's particular objectionability is that it affords a screen behind which the fugitive may shelter, for it will be unusual for his home state to undertake the prosecution. The Institute of International law in 1880 proposed in the light of these considerations that nationals should be surrendered as between countries whose criminal systems are comparable and enjoy mutual confidence.43

The policy of non-extradition of nationals is as old as the notion of extradition itself. It appeared at first in the arrangement made between France and Netherland in 1736 where it was expressed as a rule that inhabitants should not be withdrawn from the jurisdiction of their own courts. However as the Harvard Draft points out there were instances in the eighteen century, where French National were extradited. The general tendency in the continent and latin America is to

follow the French practice therefore Great Britan was compelled on the basis of reciprocity to include references to non extradition of nationals in many treaties on the subject. The usual form of the clause is that neither party shall oblige to extradite its nationals thus leaving the matter to the discretion of the authorities.\footnote{Moore digest of International law, Volume IV, 1946, pp 579-622}

It has been already mentioned that Great Britan make no distinction between their own subjects and other persons who are alleged to have committed extraditable crime abroad. In 1879 Great Britain surrendered Alfred Thomas Wilson to Austria where he was convicted and hanged. This case is all the more remarkable as the criminal law of England extends over murder and manslaughter committed abroad by British Subjects. Although Great Britan is ready to extradite one of her own subjects for crimes committed abroad, she is in some cases prevented from doing so because the extradition treaties concern comprise a clause stipulating that nationals should not be extradited. Thus extradition of Alfred Thomas wilson who had committed a theft in zurich in 1877 whose surrendered was claimed by Switzerland had to be refused, because the Anglo-Swiss treaty of 1874 comprised such a clause.\footnote{Ibid p 759. Also see. A.A.L.C.C. Report of the fourth session. On extradition of fugitive offenders, Tokyo, 1961 pp 17-19.}

To avoid such unsatisfactory result subsequent extradition treaties between Great Britain and foreign states usually compromise a clause according to which no party is
compelled to extradite nationals. In 1906, the extradition of a British subject had to be refused to France because Article 2 of Anglo French extradition treaty of 1876 precluded the surrender of nationals. However by a convention of 1908, Article 2 of the 1876 treaty has been amended to make optional the refusal to extradite nationals. In 1884 Great Britain surrendered Nillis to Germany, who by sending from Southampton forged bills of exchange to a merchant in Germany as payment for goods ordered. It was considered that he committed forgery, and to have obtained goods by false pretences in Germany. It has been held that no extradition can be granted, unless it is proved that the offence in question was actually committed in the territory of the requesting state.

The policy of United States on this issue is similar to that of United Kingdom. As the criminal law of most American states is based upon the territorial principle, there are few charges that can be brought in American courts against a United States Citizen, in relation to an incident occurring abroad. However, despite its reluctance to exempt nationals from the normal process of extradition, the United States Government has been obliged in many of its treaties to such an exemption. As a consequence of these treaties, a United States citizens committing Crimes abroad may succeed in obtaining a degree of immunity by making good his escape to the United States.


Clarke, op. cit., p 177 262.
In the case of VALENTINE V.U.S., EX. REL. NEIDECKER, 1936, the French authorities sought the extradition of two US citizens to stand trial for offences committed in France. Under article V of the Franco-American treaty of 1909 neither state was bound to "deliver up its own citizen" under the terms of the agreement; it was argued, that while the United States was not bound to surrender its national, it has a discretionary power to do so under its provision. This contention was rejected by the Supreme Court. In a number of treaties with other states the discretion has been expressly conferred, for e.g., under the treaty of 1886 with Japan and of 1899 with Mexico. Thus the opening decade of twentieth century the scope of the treaties widened and became general in nature, covering stipulated and applicable to any offender. However numerous as they may have become Extradition treaties continue to be bilateral in character and there is lack of uniformity in their provisions and in the their interpretations. The surrender of fugitive criminal in the absence of treaty provisions still take place on occasions, but in such cases the act is one not of legal obligation but of International comity.

There is uniformity in state practice to the effect that the requesting state may obtain the surrender of its own nationals or nationals of a third state, but many nationals usually refuse the extradition of their own nationals who have taken refuge in their territory, although as between states

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who observe absolute reciprocity of treatment in this regard request for surrender are some times acceded to. This does not mean that the fugitive from justice escapes prosecution by the country of his nationality. 49

Extradition is practiced among nations mainly for two reasons. Firstly, to warn criminals that they cannot escape punishment by fleeing to a foreign territory. The congress of comparative law held at Hague in 1932 resolved that states should treat extradition as an obligation resulting from the international solidarity in the fight against crime. It is a great step towards co-operation in the suppression of crime. Therefore it works as a deterrent.

Secondly, it is in the interest of the territorial state that a criminal who has fled from another territory after having committed crime, and had taken refuge with in its territory, should not be left free because he may again commit a crime and run away to some other state. It is also based on reciprocity, in as much as the territorial state which is asked to surrender the fugitive today may have to request an extradition from the requesting state at some future date. 50

Before an application for extradition is made through the diplomatic channel two conditions as a rule are required to be satisfied.

(a) There must be extraditable crime

49 Starke J.G.: op. cit p-354.

50 Harvard Research Draft on Extradition, American Journal of International Law, (Supplement) 1935, pp-41
(b) There must be extraditable person.

International law allows state to grant extradition for any crime it thinks fit. Extradition is however, a procedure usually appropriate only for the more serious crime and accordingly the internal extradition law of most state limit the number of extraditable offence either to certain specified crimes or to crimes subject to a specify level of punishment.  

As the extradition is usually confined to serious crimes it must also be crime under the law of both the states concerned. This principle of double crimmality can be met in one of the two ways firstly, the treaty may apply to all crimes which are punishable in both countries by several months or years imprisonments. Alternatively, the treaty may list the extraditable offences by name. This second alternative, which is used in British extradition treaties, is clumsy, the list becomes out of date as new types of crimes emerge, for e.g. example narcotic offences and hijacking of the aircraft. While in the United Kingdom the act of 1870 provided a list of extraditable offences, which was varied from time to time, the criminal justice act 1988 introdused instead a level a punishment standard of atleast 12 months imprisonment. This new provision has been repeated in S2 (1) of thr extradition act of 1989.

Extradition treaties often provide that crime must have been committed on the territory of the state requesting

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extradition. Commission of part of the crime on the requesting state's territory is usually interpreted to be sufficient. 52

Two school of thoughts exists in regard to the characterization of extraditable offences. The generally adopted practice is to specify by name the offences for which extradition will be granted. This method is termed as enumerative method. It became the standard international practice in the second half of nineteenth century, which was productive of a great number of extradition treaties for example, the first agreement between Great Britan and United States for extradition was article 27 of the Jay treaty 1794, which listed the murder and forgery and utterences of forged papers. This list was further extended by supplementary treaties in 1889, 1900, 1905. All succeeding British treaties have employed the enumerative method of specifying extraditable offences. French practice also came to specify extraditable offence during the nineteenth century. The circular of Minister of Justice in 1872 was forced to concede that in respect of offences not listed in the treaties extradition could be requested only as a matter of grace and subject to guarantee of reciprocity. 53

The two main defects of the enumerative system are thus illustrated. Omission in the list of offences can be filled only by the time consuming and formalistic means of


supplementry treaties. In the absence of such a revision, extradition rests on uncertain prospects of securing an assurance of reciprocity and an adhoc arrangement. It has already been noted that in the case of some countries including the United States and Great Britan municipal laws do not permit extradition to take place on an adhoc basis.54

These defects promoted the development in treaty practice of Eliminative method. In such treaties extraditable offence are defined simply by references to their punishability according to the laws of the requesting and the requested state by the minimum standard of severity. The first treaty to adopt this formula of standard of severity was set at two years imprisonment or more for accused person and in case of convicted person for one year or more. By these means a standard of severity was set up which would ensure that serious and not trifling crimes were made extraditable and at the same time the inconvenience of different description of offences in the requesting and the requested state, the chances of omission could be avoided.55

The eliminative method has been adopted in 80 out of total of 163 treaties, printed in the League of nations treaty. The modern trend adopted the eliminative method which defines extraditable offences by reference to the maximum or minimum penalty which may be imposed. The modern trade adopted the eliminative method which defines extraditable offences by

54 Ibid - p.134.
55 Ibid pp.134-135
reference to maximum or minimum penalty. Modern bilateral treaties such as the extradition treaties of 12th June 1942 between Germany and Italy; Treaty of 20th November 1951 between France and Federal Republic of Germany and the recent treaty between Iraq and Turkey have adopted the eliminative method. Recent multilateral convention such as the extradition agreement of 14th September 1952 between members of League of Arab States, the extradition convention 5th May 1954 drawn up by the League committee of the council of Europe and Harvard Research draft on extradition have all adopted the eliminative method.\(^{56}\) The argument in favour of eliminative method is that there are number of offences which may not exist at the time of conclusion of the treaty but may be brought in with in the extraditable offences without necessitating a modification in the treaty. Further it is difficult to define with precision all the offences which the state would regard as extraditable at the time when it is entered into. Nevertheless, some states, for example United Kingdom prefer the enumerative method and adopt it both in their treaties and in the municipal legislation regarding extradition.

It is entirely a matter for each country to decide as to which method it would prefer, and extradition request may be made or granted only for those offences, which are contemplated in the relevant treaty or convention. It is also

\(^{56}\) Sen. B. op. cit., p 363.
to be borne in mind that extradition may be made only if the extraditable crime has been committed in the territories of the requesting state, and not otherwise. 57

The ordinary practice as to the extradition crimes is to list these crimes in each bilateral extradition treaty. Generally states extradite fugitives only for serious crimes. In recent practice there has been a general disposition of states to treat war crimes as extradition crimes. However there are number of decisions of municipal courts which treat war crimes as political offence for purpose of extradition for instance in the case of EF KANADZOLE V ARTUKOVIC 1957, the extradition was refused. There is also obvious advantage in thus limiting the list of extradition crimes since the procedure is so cumbersome and expensive certain states for example France extradite only for offences which are subject to a definite minimum penalty, both in the requesting and the state requested to grant extradition.58

Unless a state is restricted by an extradition law it can grant extradition for any crime it thinks fit. Some states adopt the policy of extraditing person accused of capital crimes on condition that the death penalty is not inflicted.59 In a case on June 17, 1994 O.J.Simpson was charged for with murdering Nicole Brown Simpson and Loland

57 Ibid, p-364
58 Starke J.G.; op-cit.p-354
Lyle Goldman in Violation of Californian penal code 187(a). These criminal offences made him eligible for death penalty under Californian penal code 190.2(a)  

A state can refuse extradition for any crime unless bound by a treaty. Such states frame their extradition laws, specify in their treaties, all those crimes for which they are willing to grant extradition for e.g., the convention for the suppression of counterfeiting currency of April 20, 1929, provides that the offence dealt with by the convention shall be deemed to be included in the various extradition treaties by the contracting parties.  

Since extradition is effected as the result of provisions of treaties entered into by the nations two by two, it is impossible to formulate any general rule of International law upon the subject. It is however possible to bring together the provisions common to the treaties of the leading states and to point out the more important condition attached to the practice of extradition. A number of rules recur which are common to most of the treaties. 

Every single extradition is subject to the rules of the applicable treaty or statute. In the absence of a universal convention or customary international law there exists as many extradition laws as there are treaties and national statutes. a number of rules, however recur in all these norms,  


differences being rather a matter of wording than of principle.

(a) **Principle of double criminality:** The basic rule adopted by the enumerative and the eluminative treaties alike is the rule of double criminality. This rule requires that an act shall not be an extraditable unless it constitutes a crime according to the laws of both the requesting and the requested state, thus no person shall be extradited whose deed is not a crime according to the criminal law of the state which is asked to extradite. Double criminality rule serves the most important purpose of ensuring that the person's liberty is not restricted as a consequence of offences not recognised as criminal by the requested state. The social conscience of a state is also not embarrassed by an obligation to extradite a person who would not, according to its own standards be guilty of acts deserving punishment.  

The extradition of a subject is only available when the offence is one under both the laws. It needs to have a same name, and needs to have a same element to make it criminal but it must be criminal act, in both the legal system. Theoretically this satisfies the double purpose of extradition which is to help the requesting state to enforce its criminal law and to protect the requisitioned state from fugitive criminals. A particular puzzle arises when one seeks to apply this to case c: a federal country where the law relating to crimes varies from state to state of the union. Which law is the law of requisitioned state, federal or local is a point of

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Shearer. I.A. : op.cit, pp-137-141.
In the recent case of FACTOR V LAUBENHEIMER and HAGGARD, 1889, Factor was charged in the United Kingdom with receiving goods knowing them to have been fraudulently obtained. The British Government requisitioned the United States for his extradition under the treaty of 1889, which referred to this offence. The warrant that issued in Illinios where Factor has taken refuge, but the laws of several states recognised this as a crime like the law of Illinios did not. The court ordered extradition on the thesis that the rule of double criminality is not one of the law and hence in effect applied to the law of the requisitioning state.

The decision in the factor case has broken new grounds with reference to the interpretation of the extradition treaties between the United States and Great Britain. Factor's extradition was requested by Great Britain on charge of receiving certain sum of money aggregating £458,500 known to have fraudulently obtained. On the complaint of a British Counsel Factor was taken into custody in Illinois and a United States Commissioner in Illinois issued a warrant for his commitment pending surrender. On return to writ of Habeous corpus the District court for the Northern District of Illinois ordered his discharge from custody, but this order was reversed by the circuit court of the District.

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63 O'Connel D.F., op.cit, pp-795-796.

Court and circuit court of appeal seems to have regarded extradition as possible only if the offence charged was a crime both, by a law of Illinois, and by the law of land. The District Court held that receiving money known to have been fraudulently obtained was not a crime by the law of Illinois...... On certiorari, the Supreme court held that the offence charged was an extraditable crime even if it is not punishable by the law of Illinois.

The general requirement of double criminality has now commanded an almost universal acceptance and current treaties on extradition, very frequently dispensing with the list of offences, restrict surrender to those cases where the act charged is punishable by the law of both the requesting and the requested state. This does not mean that there must be an exact identity of offences named in the two systems of law; it means merely that the act charged must fall within the prescription of the two systems of criminal law.

The principle of double criminality may therefore be said to be an underlying principle with reference to which treaties of extradition ought to be interpreted, and with reference to which the performance of treaty obligations ought to be judged.66

In a similar case in December 1932 the Great Court of Appeal refused the extradition of financier SAMUEL INSUL an

66 Ibid, p-370
alleged fugitive from justice from the state of illinois on
the ground that, the offence with which he was charged did not
constitute a crime under Greek Law. 67 The Greek Court twice
held that the alleged deliberate intention on the part of
Insull to evade the United States bankruptcy act in the
concealment or transfer of assets had not been approved, and
according to the court, held to release the prisoner. In
consequence, the United States immediately gave notice to
Greece, that the recently concluded treaty to extradition
would be terminated in accordance with its provision. As it
turned out the extradition of Insull was later affected from
Turkey when the ship 'Moatis' which he chartered put in at the
port of Istambul to its way to somewhere. An item of
additional interest in this case was the claim of Insull
before the Greek court that he had taken refuge in Greece
before the treaty under which the treaty of United States
demanded his extradition, has come into effect, due to delay
in exchange of ratification. On this point the Greek Court
held, that the accused could not invoke the principle of
nonreactivity as a bar to his extradition.68

The rule of double criminality has become a part of the
law of extradition. It is now a well established customary
rule of International law that the crime of the fugitive
should not be indicated under the law of the requesting state

67 "The extradition case of samuel Insull in relation to Greece", American
Journal of International Law, Volume 28, 1934, p-307

68 Fenwick charles: International Law, 3rd. edition, appleton century, 1971,
p-390
but also under the laws of the requested state but also under the laws of state of asylum if a person is to be extradited.

(b) **Principle of speciality:** The doctrine of speciality is yet another established rule of International law relating to extradition. Under the speciality rule incorporated in almost every treaty and statute, considered as a rule of general International law, fugitive may not be detained, tried or in any way punished in the requesting state for any offence committed prior to his surrender other than the one for which extradition was granted unless he does not leave the territory of his requesting state with in the certain time limit, usually 30 to 45 days after being free to do so, or voluntarily returns or is lawfully reextradited to it by a third state, or unless the state which surrenders his consents. Prior consent is not required if the description of the offence for which extradition was granted is altered in the course of the proceedings, provided that the offence in its new description is based on the same facts and itself constitutes a returnable offence. Under some treaties a lesser returnable offence, for which no higher maximum penalty is fixed. The speciality rule, though generally not conceived of as a rule conferring individual rights nevertheless, protects the fugitive from having to face charges of which he has no notice prior to his transfer, it also reinforces the double crimnality rule; and rules prohibiting extradition for certain categories of offences for e.g. fiscal offences political, or
military offences and it also protects from abuse of legal processes of the requested state which is called upon in extradition to renounce its jurisdiction over and protection of the fugitive. Particularly in cases where it appears that the fugitive after return may be prosecuted or prejudiced on political grounds, it has become the constant practice of states to require of express assurances from the requesting state that it will respect the speciality rule.69

According to the principle of speciality the state to which a person has been extradited, may not without the consent of the requisitioned state try a person extradited for the offence for which he was extradited. Many extradition treaties embody this rule and the question arises whether it is one of International law or not? The Reichsgericht in 1921 held that when the relevant extradition treaty is silent on point, an accused could be prosecuted in Germany only for the offence for which he was extradited. 70 The United State's supreme court while not placing the rule on high plane of International law did in fact arrive at alike conclusion in the case of United States. V. RAUSHER. The accused had been extradited under the Anglo American treaty 1842 upon a charge of murder, but had been indicted for, and convicted of inflicting cruel and unusual punishment. Supreme court denied juridication of the trial court even though the treaty did not

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65 Encyclopaedia of Public International Law, Volume 2, Elsvier, 1995, p-330

70 "Germany and Czeckoslovakia Extradition Case", Annual digest of International law, 1919-21, case No.182. pp 131 321.
stipulate that there should be no trial. It said:

The weight of authority the principle is in favour of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offences with which he is charged in the proceeding for his extradition, until a reasonable time and opportunity have been given him, after his release on trial upon such charge, to return to the country from whose asylum he had been forcibly taken under to those proceedings.\(^7\)

The decision rest on municipal law grounds, much more than upon International law. The limitation with respect to trial was found in the manifested scope and subject of the treaty itself, which read with the relevant statutes, which contemplated trial only for the offence for which extradition was granted. It was sufficient explanation of the limitation, Justice Gray found that the will of the political department had been manifested in favour of the principle that a person should be tried only for the specific offences and should be allowed time to depart before he could be arrested and tried for some other offences.\(^7\)

Article 23(1) of Harvard Research draft states: A state to which person has been extradited shall not, without the consent of the state which extradited such person:


\(^7\) Ibid, p.805
(a) Prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited.

(b) Surrender such person to another state for prosecution or punishment.

(c) Prosecute such person before a court specially constituted for the trial or to which special powers are granted for the trial. According to United Kingdom practice principle of speciality is laid down in S.3 (2) of 1870 act. It provides that a fugitive criminal shall not be surrendered to a foreign state unless a provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had the opportunity of returning to Her majesty's dominion, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the fact on which surrender is granted. In cases where the extradition of a fugitive is obtained by the British Government from a foreign state S.19 applies a similar rule: such person shall not, until he has been restored or had the opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominion other than such of the said crimes as may be

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Although there is similarity between the two provisions, nevertheless there is significant difference in wording between S.19 and S.3(2). Under S.19 provision there is no need for an English court to allow a surrender fugitive to return to the foreign state from which he was extradited if the crime for which he is tried may be proved by the facts on which the surrender was grounded. In a case R.V. CORRIGAM (1931) the appellant had been extradited from France on charge of obtaining by false pretences. He was convicted by an English court on a charge of fraudulent conversion upon the same fact that has been the basis of the original claim for extradition. The court of criminal appeal held that the English court has jurisdiction over the appellant is within the terms of the S.19 provision.

On the other hand S.3(2) provision lays down that the law of the requesting state or the arrangement made with that state must guarantee that the surrendered fugitive should not be tried for any offence other than the extradition crime proved by the facts on which the surrender is grounded.

According to United States practice the principle of speciality is mentioned under 18 U.S.C. section 3186 which states that, Secretary of state can only surrender a fugitive to stand trial for the offence or offences with which he is

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75 Ibid, pp-323-333.
charged by the requesting state. There is no express statutory provision dealing with a person surrendered by a foreign state for trial in the United States. The position is therefore governed by the terms of the relevant treaty. In United States v. Rauscher the fugitive had been extradited from Britain to United States to be tried for a murder committed on board an American vessel on the high sea. Presumably because there was no evidence to establish the murder charge. Rauscher was indicted for unlawfully assaulting and inflicting cruel and unusual punishment on the victim. The supreme court held that courts were bound to give effect to the terms of the treaty with Britain which spoke in terms of evidence of criminality to relation to a specific crime or crimes. It was not possible therefore to proceed with any charge against the accused other than that for which his surrender has been requested. And it made no difference if the offence charged arose out of the same evidence as that upon which surrender had been allowed. 77

So insistent have nations been at times with respect to the observance of the principle of trial for specified offences recognised as such by both countries as to give the impression of greater concern for the protection of fugitive criminal than for the local community whose law has been violated. In 1910 one Nalbidian was indicted for murder in Massachusetts and fled to his native state Bulgaria. Bulgaria co-operated by surrendering him even in the absence of treaty

of extradition. When however the agents of state Department asked permission of Romania for the transit of the prisoner through that country the request was refused on the ground that, even though there had been a treaty of extradition between the United States and Romania, the penalty for murder in the United States was death and Romania would have been obliged to require that the United States should not exact the death penalty.\textsuperscript{78}

Thus it can be concluded that the fugitive shall not be liable to be tried for any offence other than mentioned in the request for his extradition, until he has been given a chance to leave the country to which he was extradited.

(3) **Principle of prima facie evidence of guilt:** There must be reasonable prima facie evidence of the guilt of the accused. The requested state shall satisfy itself that the evidence submitted justifies prima facie judicial proceedings against the accused but it is not within the province of the court such a state to try the case on merits. International law also leaves to the state the right to grant asylum to foreign individuals by virtue of their territorial supremacy whose cases do not fall under stipulation of extradition treaties.\textsuperscript{79}

No person is to extradited whose deed is not a crime according to the criminal law of the state which is asked to

\textsuperscript{78} Stowell and Munro, International Law cases, Volume 1, pp 404-408

extradite as well as of the state which demands extradition. However it is not within the province of the courts of the requested state to try the case on its merits, but merely to ascertain whether the evidence submitted justifies prima facie judicial proceedings against the accused. In the notorious case of Samuel Insull, the Chicago banker, whose extradition from Greece was requested by the United States for the offence of embezzlement and larceny. The Greek court twice held that the alleged deliberate intention on the part of Insull to evade the United States Bankruptcy act in the concealment or transfer of assets had not been proved accordingly. The court said the prisoner be released.

In general the crime must be one with respect to which there is general agreement among civilized nations, the kind of amount of evidence to be adduced as proof and the punishment assigned to the offence. Request for the extradition of fugitive criminals are presented through the diplomatic representatives residents in the foreign state. Upon receiving the request the government institutes, a judicial investigation to determine whether there is sufficient evidence, in accordance with local law to warrant apprehension of the fugitive.

Court in common law countries require broadly speaking, that a requesting state make out a prima facie case of guilt.

80 Oppenhier op. cit. pp-701-702.
against an alleged fugitive offender justifying his committal for trial under their own legal system before they will grant extradition for the purpose of prosecution. No such evidence is required in respect of convicted fugitive, persons convicted in abstentia however, count as accused persons for the purposes of extradition.

In contrast most civil law countries or continental countries reject this requirement as such provision are unknown in treaties. The verification of the extradition request is a more or less formal one. Supporting documents must enclosed a copy of the warrant of arrest or judgement, the legal characterization of offence, information regarding the identity of the offender and at most a summary of the relevant facts. Prima facie evidence is here considered as an unnecessary requirement that will often Jeopardize the performance of Justice civil law countries do however request additional evidence including evidence of guilt if from the circumstances of the case, there is reasonable doubt as to whether the requested person has in fact committed the offence, or where there is reasonable suspicion that the returnable offence charged to the fugitive is not genuine.\(^2\)

While there is almost unanimity that a prima facie case must be established against the fugitive before the order for his surrender is passed, the quantum of evidence required for the purpose and the extent of powers of inquiring magistrate

are often the subject matter of controversy. Two school of thoughts operate in this area. One school expects the magistrate has to be satisfied that the prima facie evidence exists against the accused and the evidence laid before him is enough to cause conviction of the fugitive. In the absence of such evidence the magisterate must discharge the fugitive.\textsuperscript{83}

In case of C.G. MENON V. State of Madras 1953. The Madras high court held: "To surrender a fugitive offender without a prima facie case being made out is opposed to principle of natural justice"\textsuperscript{84}

The other school claims that extradition proceedings are not criminal proceedings, nor is the magistrate an adjudicator. magisterial inquiry is just a hearing "to determine whether adequate grounds exist to warrant returning the fugitive to the custody of the requesting state"\textsuperscript{85} Thus, there must be prima facie evidence of the guilt of the fugitive criminal before he is surrendered to the state demanding his extradition. If there is no such evidence the fugitive can not be extradited.\textsuperscript{86} "In the TARASOV extradition case, where on the receipt of the requisition from the Soviet Embassy in India in January 1963 the extradition of Vs. Tarasov a soviet

\textsuperscript{83} Hingorani. R.C., Modern International law, IBH publishing, India, 1978, p 167.

\textsuperscript{84} C.G. Menon V. State of Madras A.I.K. 1953. Madras 763. Also see extradition proceedings of Samuel Insull in American Journal of International law 1934, p 362.


\textsuperscript{86} Chavan R.S., an approach to International law, 2nd edition, 1983, sterling publication N.Delhi, pp 166.
citizen who was alleged to have committed a threat on the Soviet ship ........, in the case of Tarasov on the basis of evidence produced, the magistrate came to the conclusion that no prima facie case was established against the offender ........, the degree of proof should be higher than in the ordinary prosecution and that the evidence must be incontrovertible raising probable and strong presumption of the offence against the accused........, the magistrate held travasov therefore be discharged". 87

As a general rule, followi-j offences are not subject to extradition proceedings: military offences, for example desertion, trifling offences, religious offences and political crimes. The definition of political offences has given rise to difficulties in interpretation, which different countries have tried to solve in different ways. For e.g. the case of R.V. Governor of pentonville prison, exp. cheng, (1973) A.C. 931; R.V. Governor of wilson Green prison, exp. Little Joh, (1975) 3 E.R. 208; R.V. Governor of pentonville, exp. Budlong, (1980) 1 All E.R. 701; 712-14. In recent years there has been a tendency to exclude acts of terrorism from the catagory of political offences. To give strength to this approach the European convention on the suppression of terrorism act 1978 gives effect to the convention in English law.

Extradition is granted only if asked for, and only after the formalities have taken place which are stipulated in the

87 Ibid, p-166
treaties of extradition and the extradition laws if any. It is effected through handing over of the criminal by the police of the extraditing state to the police of the prosecuting state. According to most extradition treaties it is a condition of extradition that the surrendered individual shall be tried and punished for those treaties exclusively for which extradition has been asked and granted, or for those at least which the extradition treaty concerned enumerates. If an extraditable individual is tried and punished for another crime, the extraditing state has a right to complain.\textsuperscript{68}

(4) \textbf{Condition of reciprocity:} The extradition of fugitive as a matter of comity, in the absence of treaty or outside the provisions of an existing treaty is practiced in many countries. Usually it is conditioned on reciprocity. Traditionally the principle of reciprocity underlines the whole structure of extradition. Where general extradition relation are established by virtue of a treaty, reciprocity to a large extend is guaranteed, although even here optional grounds for denying extradition may result in the inequality of reciprocal obligation extradition in the absence of treaty is the field where the principle of reciprocity is mainly applied here surrender takes place usually only after assurances of reciprocity have been expressly given by the requested state. The precondion of strict reciprocity however is increasingly considered as being

\textsuperscript{68} Oppenheimer, op. cit, p 702.
determinental to the interest of the justice. Some recent extradition treaties and statutes, therefore, either do not mentioned reciprocity at all; or allow considerable exception, or express the principle in optional term, thus conceiving reciprocity as a political maximum rather than a legal precondition. ⁸⁹

Regarding the practice of United States and United Kingdom, the opinion prevails that there is no authority to extradite apart from treaty or statute. In the case, ARGULLES was surrendered to Cuba in 1864, United States granted the request but the authority of the executive to extradite in such circumstances is at least doubtful. Since United States do not grant extradition in the absence of treaty it refrains from requesting extradition either in the absence of treaty or in cases not covered by a treaty in force. It has occasionally in exceptional circumstances sought the surrender of the fugitive as an act of courtesy while explaining that it is not in a position to reciprocate, and has on numerous occasion accepted the surrender of fugitive criminals which the state of asylum was willing to return. It has also prosecuted and punished fugitives recovered in an irregular way on the principle that the fugitive is no way position to object to such irregularities. ⁹⁰

The extradition legislation of a number of states


requires guarantee of reciprocity as a condition of precedent to its operation in the absence of a formal treaty. The German extradition law of 1929, which like the French law was designed to operate with respect to countries with which no treaty obligation exist, specifically provides, that extradition is not permissible if reciprocity is not guaranteed. Law of 23rd December 1929; Article 4 (1) Harvard Research Draft 1935 also refers to the same point. Similar provision are contained in the laws of Argentina, Austria, Belgium, Iraq, Japan, Luxembourg, Peru, Spain, Switzerland and Thailand.91

Extradition of fugitive offenders:—closely connected with the question of territorial asylum is the matter of extradition of fugitive offender. It is generally recognised under international law that a state in whose territory a crime has been committed is entitled to try and punish the offender irrespective of whether he is a citizen of the country or an alien. States possess this right by virtue of their territorial sovereignty and several states possess this right by virtue of their territorial supremacy, and several states also exercise criminal jurisdiction over their nationals even in respect of crimes committed abroad. The question of extradition of a fugitive offender arises when a person after committing a crime in a particular country leaves its territory and take refuge in another state. It the state in whose territory the crime has been committed is anxious to

91 Shearer. I.A. op.cit. pp-31-32
try and punish the offender, it would naturally have to request the other state to hand over to it, the person accused of the crime. Such a request would normally be conveyed through its diplomatic agent to the government of other state. When no diplomatic relation exists, it is however open for the government to approach the government of the other state directly or through other agencies, if such a request is received the government of the state which has been requested for surrender of the criminal would naturally have to consider the question, as to whether the person concerned should be extradited, and in coming to a decision in this regard, it must follow certain well known rules under International law. \(^\text{92}\)

The Jurisdiction of a state over all persons within its territorial boundaries and its rights in consequence to punish them for violation of its laws is frequently defeated for the time being by the escape of an offender into the jurisdiction of neighbouring state. So strictly is the independence and sovereignty of states interpreted that not even the repression of the most outrageous crimes will warrant the exercise by one state of the slightest act of jurisdictional authority within the territory of another state. \(^\text{93}\)

'In the famous case of FRANCE V. GREAT BRITAIN concerning Savarkar, this Indian British Subject who was prosecuted for high treason and abetment of murder and was being conveyed in


P.O boat Morea to India for the purpose of standing his trial there, escaped to the shore on October 25, 1910 while the vessel was in the Harbour of Merseilles. He was however seized by a French policeman who erroneously and without further formalities reconducted him to the boat Morea with the assistance of individuals from the vessel who had raised a hue and cry. Since Savarkar was prima facie a political criminal, France demanded that Great Britain should give him up in a formal way but Great Britain refused to comply with this demand, and the parties therefore agreed to have the conflict decided by the court of Arbitration at the Hague. The award while admitting that an irregularity had been committed by the reconduction of Savarkar to the British Vessel, decided in favour of Great Britain asserting that there was no rule of International law imposing in circumstances such as those which have been set out above, any obligation on the power which has a prisoner in its custody to restore him on account of mistake committed by a foreign agent who delivered him up to that power. It should be mentioned that the French Government had been previously informed of the fact that Savarkar would be a prisoner on board the Morea while she was calling at Merseilles and had agreed to this.94

Thus it can be said that under these circumstances a mutual interest in the maintenance of law and order and the

94 Oppenhiem, op.cit., p 703. Also see the American Journal of International Law, Volume 5, 1911, p 308 412.
administration of justice has led nations to co-operate with one another by surrendering fugitive criminals to the state in which the crime was committed. This surrender in compliance with a formal demand and in accordance with conditions attached assumes the status of treaty agreement.

Section 26 of the British Extradition Act defines a fugitive criminal as any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of her Majesty's dominions. This definition is similar to that in section 2 of the fugitive offenders act 1881, which deals with rendition of criminal within the commonwealth.

Act 1881 applies:

'Not merely to person who has left one part of his Majesty's dominion for the express purpose of avoiding trial but to any person who is accused of having committed an offence in one part and is found in another part of his Majesty's dominion.

In the case of R.V. GODFREY 1923 a person was held to be fugitive in England for the purpose of extradition to Switzerland, although he had not been in Switzerland at time of commission of the offence which had been perpetrated through an agency.\(^5\)

The question of fugitive character of the offender is linked with the question of place of commission of the act. A criminal act may be committed. Simultaneously in one or more

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states and the problem of territorial competence may be acute, as in Godfrey case 1923 the two states in question are the requisitioning. Some civil law jurisdiction reserve primary competence to prosecute in these cases to the requisitioned state. An associated problem is whether extradition may be granted when the offence, though a violation of the law of the requisitioning state is not actually committed on its territory. By the doctrine of constructive presence of the accused at the place of the act's effect he may be held extraditable. Most treaties do not contain provision's covering the commission of offence outside the requisitioning state and hence the acts must be connected territorially by means of their effects.\textsuperscript{96}

DOUBLE JEOPARDY - The general practice of states is to refuse extradition if the person sought to be extradited has already been tried and discharged or punished or still under trial in the requested state for the offence for which extradition is demanded. Laws of most of the countires contain provision providing against double, Jeopardy for the same act. Article 3 (b) of the monitevides connexion of 1933 and Article 2(5) of the central American convention of 1934 provide protection against double Jeopardy. However Article 9 of the Harvard Research draft 1935 makes the protection against double Jeopardy only permissive and not mandatory.\textsuperscript{97}

\textsuperscript{96} Ibid, p.797.

\textsuperscript{97} Harvard Research draft on extradition volume-29, American Journal of International law,1935,p-377.
The general practice of states require some kind of proof of the offence having been committed in the territory of the requesting state and also proof of the fact that it is the person sought who had committed the crime. The practice of states with regard to evidence of the guilt of the person claimed, which is required to support the extradition varies from state to state. This is due to the differences of emphasis which is placed, on the one hand upon the importance of International co-operation in the matter of suppression of crime and, on the other, upon the protection of the individual against oppression. ²⁸

Extradition Procedure:

Extradition proceedings are initiated only upon formal request, usually communicated through diplomatic channels and supported by those documents specified by the applicable extradition treaty or, in the absence thereof, by the extradition act of the requested State. Most extradition treaties and statutes provide for the possibility of requesting for a limited period pending receipt of a formal request the provisional arrest of an alleged fugitive offender, either by means of rapid communication or on the basis of an international warrant of arrest issued by Interpol.

The extradition procedure itself is not usually the subject-matter of extradition treaties but is left entirely to

the requested State, including the questions if, to what extent and at which stage of the proceedings judicial protection is available to the fugitive.

While in common law countries the lawfulness of rendition may be reviewed in habeas corpus proceedings, civil law countries make surrender dependent upon a prior criminal court's ruling on its admissibility; if extradition is declared inadmissible, this decision is usually final, otherwise surrender is left to the executive's discretion. As a rule, the requesting State has no standing in any of these judicial proceedings.

Most extradition acts governing extradition procedure provide for return by consent for instance simplified extradition, informal surrender in cases where the fugitive, duly instructed, waives formal proceedings either in writing or before a court or commissioned judge. If so doing, the fugitive in some countries also loses the protection under the speciality rule, in others the speciality rule may be waived separately. A validly declared waiver is usually irrevocable.

Expenses resulting from return proceedings in the requested State are met by that State; some treaties provide that exceptional expenses (e.g. for air transport) are to be borne by the requesting State.

Notwithstanding the fact that resolutions of international conferences and associations encourage States to grant extradition also in the absence of an extradition treaty and that new forms of legal assistance in criminal matters
like the transfer of criminal proceedings and the execution of foreign judgements may diminish the importance of extradition, extradition treaties will remain of primary importance as the only source of a State's duty to extradite.

The fact that States continue to conclude new extradition treaties and to replace older treaties by new ones clearly underlines their necessity. Uniform extradition systems in a given geographical area do have their advantages, but one may doubt whether multilateral conventions, reflecting only the minimum standard of joint convictions, abstaining often from providing the necessary details and being subject to reservations, are the best solution to the problem. Bilateral extradition treaties have proved more flexible in this respect and should be given preference.