Chapter IV

LAW OF EXTRADITION: AN INTERNATIONAL PERSPECTIVE

[I] THE INSTITUTION OF EXTRADITION

Under international law, a state, by virtue of its sovereignty, exercises its authority over persons and things on the basis of four generally accepted principles, namely territoriality, nationality, the protective principle and universality. The territoriality principle recognizes the exercise of authority within the territorial jurisdiction of a state. Territory is indeed the physical basis of a state and, subject to any special rules of international law such as those relating to human rights and other international obligations undertaken by it; a state’s jurisdiction is exclusive and absolute. The principle of nationality recognizes the exercise of authority by a state in respect of its organic linkage with its nationals and other permanent residents, and usually this linkage is described as that of nationality. The third principle, namely the protective principle, justifies exercise of authority by a state in order to protect vital aspects of its political and economic system. Finally, pursuant to the universality principle, a state exercises authority to enforce international criminal law— which is still in a very rudimentary phase of development— against persons who are alleged offenders of that law. The offences under this law, so far, include piracy, genocide, and war crimes.

[II] DEVELOPMENT OF LAW OF EXTRADITION IN INTERNATIONAL LAW

The law of extradition is not a new phenomenon. The law of extradition has developed only during the 19th and 20th Centuries. It was the view of Grotious that every State must either punish or surrender to the prosecuting State those individuals who have committed any crime abroad. Before the 18th century, there was no extradition of ordinary criminals although many States frequently surrendered
political fugitives, heretics and immigrants.\(^1\) During the 18\(^{th}\) century, many treaties provided for the extradition of ordinary criminals, political fugitives, conspirators military deserters etc. Vattel stated in 1758 that murderers, incendiaries and thieves were regularly being surrendered by the neighboring States to one another. There were no special treaties for extradition purposes as the means of transport and communication were not well advanced. However, things changed after the industrials revolution when the introduction of railways and steamship enabled the criminals to abscond from countries. When such things happened, it was considered necessary to tackle the problem of aggrieved States offenders. No wonder, a large number of special treaties of extradition were entered into among the various States.\(^2\) Many States enacted special laws in which they enumerated those crimes for which extradition could be demanded and granted. The procedure to be followed in the extradition cases was also laid down. Many of the clauses of those laws have been included in the extradition treaties. The British Parliament passed in 1870 an Extradition Act, which was amended in 1873, 1895 1906 and 1933. The Indian Extradition Act of 1903 lays down the procedure for the surrender of fugitive criminals by the Government of India.\(^3\)

On International level Nationals had established many bilateral and multilateral treaties for the extradition of fugitives and these treaties have played a great role in development of extradition law. The treaty of Amines in 1802 was the first effort at multipartite Convention on extradition.\(^4\) Since then, effort have been made in this regard through regional arrangement, for example, the American Continent has witnessed a number of conferences to conclude a Convention among the Latin American States, The Arab League Extradition Agreement was approved by the council of the Arab States in 1952, The European Convention of Extradition was signed on December 13, 1957.

\(^3\) *Ibid.*
Bilateral treaties have greatly contributed to the development of extradition law and these play a very important role in the field of International cooperation for the controls of Crime. Number of countries of today’s world has established many bilateral extradition treaties with the other nations like U.S.A, U.K., Russia, China and India have created number of extradition of criminals.

[III] DEVELOPMENT OF INTERNATIONAL COOPERATION (MULTILATERAL TREATIES AND REGIONAL ARRANGEMENT)

The great majority of Nations have come to look upon extradition as the major means of International Cooperation in the suppression of crime. In addition to bilateral treaties and extradition without treaty based on reciprocity, some States are parties to schemes of extradition between groups of nations having geographical or political affinity. Schemes may take the form of a multilateral Convention, such as the Arab League Extradition Agreement and the European Extradition Convention or such as is secured by schemes of extradition among the member States of the Common wealth and Nordic treaty States.5

(A) The Arab League Extradition Agreement

This agreement was approved by the council of the league of Arab States on September 14th 1952, and was signed by Egypt, Iraq, Jordan, Lebanon & Saudi Arabia and Syria. Only Egypt, Jordan and Saudi Arabia ratified it. There is the enumeration of extraditable offences, the eliminative method being preferred the standard set in an offence punishable under the laws of both requesting and requested States by imprisonment for one year and a heavier penalty. In the case of convicted offenders the offence of whom the fugitive must have carried a sentence of two months imprisonment or more. Restriction on surrender include the non extradition of political offenders, the determination of which is left to the exception by stipulating that assassination of heads of States or their families attempts against the lives of heirs to the throne premeditated murder, or acts of terrorism should not be regarded as political offences. Extradition may not be granted where prosecution would be time

barred by the law requesting State. A State may also refuse extradition of one of its own nationals, if it exercises this right, it must itself, prosecute for the crime committed in the requesting State. The principle of specialty is also including among the restrictions on surrender.6

(B) The Benelux Extradition Convention

On June 27, 1962, Belgium Luxembourg and the Netherlands signed a Convention on extradition and judicial assistance in penal matters. The close economic ties among these three States, which have been partly but not entirely subsumed within the wider European Economic Community, serve to explain why in some respect the Convention is more permissive than other multilateral arrangement.7 The substantive provisions of the Convention follow those of the European Convention but in a number of respects reflect the closer relationship between the parties. Thus the measure of the severity of punishment sufficient to render an offence extraditable is six months imprisonment for accused fugitive and three months for convicted fugitives as against twelve months and four months respectively. Under the European Convention although political offenders are not subject to extradition, military desertion is met to be deemed political. Requests for extradition proceed not by way of the diplomatic channel but directly from the minister of justice of the one party of the minister of justice of the other. In one respect, by contrast the Benelux Convention of a requested State’s own national is forbidden whereas under the latter it is discretionary.8

(C) The Commonwealth Scheme

Although the scheme relating to the rendition of fugitive offenders within was drawn up at a meeting of common wealth law ministers held in London in April, May 1966. It did not represent a sudden and belated recognition of the possibilities of common wealth cooperation in this field. The genesis of the present scheme lies as far back as 1843 when the first statute providing for the surrender of fugitive criminals between British possessions was passed by the Imperatival Parliament. This measure

6 Ibid. at p. 328.
7 Ibid.
8 Ibid.
was replaced by the Fugitive Offenders Act in 1881. Although some important changes were made in the 1966 scheme, reflecting the evolution of the British Empire into the Commonwealth of Nations the scheme retains many of the features of the Act of 1881. At the meeting in 1966 the proposal of a multilateral treaty was rejected in favour of an agreed scheme which would form the basis of reciprocating legislation enacted in each member State of the Commonwealth Australia was the first member to pass implementing legislation, at the time of writing other members are preparing similar legislation. In the meantime however, delay in implementing the Scheme will not result in a hiatus in extradition relations, the Imperial Act, 1881 continues in force in many common wealth countries as part of received statute law in other States local enactments similar in content and applicable in the absence of treaties to other Commonwealth countries continue in force.

(D) The European Extradition Convention

The preamble of this Convention signed on December 13th, 1957 recites that its object is the acceptance of uniform rules with regard to extradition as a part of the more general aim of achieving greater unity between member States of the Council of Europe. The convention secured the signatures of eleven States but not all proceeded to ratification. The Convention entered into force on April 18, 1960, after the deposit of ratification by Norway, Sweden and Turkey. Since coming into force the Convention has also been ratified by Denmark, Greece, Ireland, Italy and Switzerland. The Substantive provision of the European Convention follow generally orthodox pattern but contain a number of modifications rendering their application more liberal and more humanitarian than those of prior bilateral agreements. This applies especially to the liberal provision relating to political offenses, which was adopted in the Commonwealth Scheme of 1966 and which has exerted influence on later bilateral treaties also. Military offences are similarly excluded and fiscal offences are to be extradition only if the contracting parties

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9 Ibid. at p. 330.
10 Ibid.
11 Ibid. at p. 331.
should subsequently agree that any particular fiscal offense or category of offences should be embraced by the Convention.\textsuperscript{12}

The extradition by a requested State of its own national is discretionary whereas previously under bilateral treaties within Europe it had been forbidden. It seems unlikely that in practice the contracting parties will exercise the power to extradite their own nationals. If the offence for which extradition is requested carries the death penalty by the law of the requesting State but not by that of the requested State the latter may refuse extradition unless an assurance is given that the death penalty will not be carried out. Account of modern developments is taken also in permitting request for provisional arrest to be channeled through the International Criminals Police Organization.\textsuperscript{13} The Convention is at present limited to the continent of Europe but already its effects have been felt as a model for bilateral treaties concluded elsewhere. The Convention may be opened to accession by nonmembers of the Council of Europe, if the unanimous consent of those States which have already ratified the Convention is obtained. Although reservation is permissible under the Convention and a number have in fact been lodged, the essential aim of uniformity has been largely achieved.\textsuperscript{14}

\textbf{(E) The Nordic States Scheme}

The Nordic Treaty of 1962 in which Denmark, Finland, Iceland, Norway and Sweden agreed on board principles of cooperation including the attainment of “the highest possible degree of judicial equality”, of all Scandinavian citizen in their territories was in fact preceded by an agreement on extradition. Effect was given to the scheme of extradition by the enactment of similar legislation by each Member State.\textsuperscript{15}

\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid. at p. 332.
(F) The O. C. A. M. Convention

Twelve of the fourteen former French territories in equatorial and West Africa formed the union African at Malgache in 1961 and signed a Convention of judicial cooperation at Tananarive on September 12, 1961. The union was subsequently renamed the Organisation Communal African at Malgache (O. C. A. M.) and was enlarged by the accession to Togo. The Convention contains provision for “simplified extradition”, similar in basic pattern to the bilateral treaties conclude by each of the signatories with France after independence. The main features of the system are direct dealing between procurers generaex without the intervention of diplomatic procedures, a permissive faculty to refuse extradition for political and military offence (except in the latter case as might be provided in treaties of defense), extradition for offences relating of customs, exchange and taxes (as may be provided by exchanges of notes between the parties) and the absolute prohibition of the extradition by a State of its Own nationals. Although the treaty provides for the extradition of both accused and convicted offenders, an alternative method of enforcing foreign panel sentence is open in the case of fugitives sentenced to imprisonment. At the request of a party, but subject to the express consent of the prisoner, a convicted person may be returned to his home State to serve his sentence is such cases decision to release on parole lies with the home State but pardon and amnesty may be applied only by the sentencing State. Pecuniary penalties may also be enforced in one State at the request of another.

(G) The Bilateral Treaties of The Socialist States of Eastern Europe

The system of extradition among the communist State of Eastern Europe and the Soviet Union conforms to a uniform pattern. Uniformity has been achieved, in contrast to the method of uniform legislation adopted by the common wealth, by a network of virtually identical bilateral treaties which have been concluded by the individual members of the socialist bloc. The treaties in which the extradition provisions are contained deal with other matter as well, extradition from but one

16 Ibid. at p. 333.
17 Ibid.
chapter of a treaty which makes comprehensive provision for legal assistance in civil family and criminals cases.  

(H) The Inter American Convention on Extradition

This Convention applies to all the Member State of the Organization of American States. Article 1 of the Convention enjoins all member State to surrender to other parties that may so request the extradition of personal accused or convicted of an offence that give rise to the request was committed within the territorial jurisdiction of the requesting State provide that the requesting State has jurisdiction to try and pronounce judgment on it. The requested State may deny the extradition of a fugitive if it is complaint according to its own legislation to prosecute the fugitive aid the requesting State must be informed of the result of the Prosecution.

(I) The Extradition Treaty between Benin, Ghana, Nigeria and Togo

This very important treaty which constitutes a landmark in the efforts of African States to harmonize their attitudes on the question of extradition was a adopted in Lagos Nigeria, on the 10th of December, 1984 by the heads of States of four west African countries namely the people’s republic of Benin of Ghana the federal republic of Nigeria and the republic of Togo. The treaty covers the various aspects and issues that normally lead to controversy with respect to the extradition of fugitives some of the provision may be noted. The treaty applies to the four contracting parties only although there is no reason why other State within the West African, sub region or indeed within the African continent should not accede to it if they so desire. Article of treaty requires the contracting parties to surrender to another State party to the treaty person accused or convicted of any of the crimes recognized as an extradition crime under the treaty. However extradition shall not be granted unless the offence that gave rise to the request for surrender has been committed within territorial jurisdiction of the requesting State. The provisions here appear to

18 Ibid. at p. 334.
conform to the generally accepted international practice with respect to the jurisdiction of States in cases of extradition. 21

(J) S. A. A. R. C. Accord on Extradition

On 16th June, 1987, the Foreign Secretaries of South Asian Regional Countries entered into an agreement on extradition. The draft of the Agreement and recommendations were presented before the standing committee of foreign affairs minister. The agreement provided for the extradition of persons accused of territory acts but not including acts of political nature. Later on a three-day summit of S. A. A. R. C., the conference adopted a Convention on terrorism on 4th November, 1987. The Convention was to be ratified within six months. The Convention provides for the extradition of person accused of terrorist acts However Article (11) of the Convention provides, that if the State concerned thinks that it is not proper and expedient to extradite accused, there shall be no obligation to extradite. Similarly, there shall be no obligation to extradite if the matter is very ordinary and the request for extradition has not been made in good faith and is not in the interest of justice. 22

[III] INTERNATIONAL CONVENTIONS RELATING TO EXTRADITION

These Convention have been adopted the principle of “Aut Dedere aut Punire”.

(A) The Genocide Convention 1948

Article VI of the Convention provides that parties to the treaty pledge themselves in genocide cases to grant extradition in accordance with their laws and treaties. Article VI requires that extradition be carried out when an extradition treaty is in force between two States party to the Convention and Art. V of the Convention

21 Ibid.
would obligate the States to pass legislation providing for extradition to the State on whose soil the offences had been committed.\textsuperscript{23}

\textbf{(B) The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963}

Article 16 of this Convention deals that, offences committed on aircraft registered in a contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in place in which they have occurred but also in the territory of the State of registration of the aircraft.\textsuperscript{24}

\textbf{(C) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970}

The Hague Convention lays down a strong obligation on the part of the State in the territory of which a fugitive offender is found in respect of the extradition of the said person. The relevant provisions are as under:

\textbf{Art. (7)}

The contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offences was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.\textsuperscript{25}

\textbf{Art. (8)}

i. The offences shall be deemed to be included as extradition offences in any extradition treaty existing between contracting State. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

ii. If a contracting State which makes extradition conditional on the existence of a treaty receiver a request for extradition from another contracting State with

\textsuperscript{25} \textit{Ibid.} at 792.
which it has no extradition treaty, it may at its opinion consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

iii. Contracting State which does not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

iv. The offence shall be treated for the purpose of extradition between contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, para 1.26

(D) The Hostages Convention 1979

1. This Convention also contains almost identical provision relating to extradition of fugitive offenders-

2. According to Article (6) of the Convention, Any State party in the territory of which the alleged offender is present shall, in accordance with its laws, take him into custody or take other measures to ensure his presence for such time as in necessary to enable any criminal or extradition proceedings to be instituted.27

3. Article (8) of the Convention also deals that, the State party in the territory of which the alleged is found shall, if it does not extradite him, be obliged to submit the case to its competent authority for the purpose of prosecution.28

Some other Conventions are also adopted the ‘principle of Aut dedere aut punire’ like-

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26 Ibid.
28 Ibid. at p. 187.
(E) Geneva Conventions and their Protocols

The Geneva Conventions and their Additional Protocols are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects. They specifically protect people who are not taking part in the hostilities and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. The Conventions and their Protocols call for measures to be taken to prevent or put an end to all breaches. They contain stringent rules to deal with what are known as "grave breaches". Those responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold.

(F) Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilization

Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts; Requires parties to the Convention to make offences punishable by “severe penalties”; and requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution. The Convention’s central provision requires that a person alleged to have committed certain serious attacks against diplomats and other “internationally protected persons” should either be extradited or have his or her case submitted to the authorities for the purposes of prosecution (Art. 7). States must establish jurisdiction over the crimes set forth in Art. 2 of the Convention (which will in any event be crimes under the ordinary criminal law) in certain circumstances (Art. 3). It provides for cooperation between states in the prevention of the crimes, and for the communication of information (Arts. 4 and 5). States must ensure that alleged offenders in their territory are available for prosecution or extradition (Art. 6). The Convention makes provision to facilitate extradition, but does not remove the political offence exception where this exists.

under domestic law (Art. 8). It makes provision for mutual assistance (Art. 10). It contains a carefully circumscribed provision on asylum.

(G) **Single Convention on Narcotic Drugs**

The adoption of this Convention is regarded as a milestone in the history of international drug control. The Single Convention codified all existing multilateral treaties on drug control and extended the existing control systems to include the cultivation of plants that were grown as the raw material of narcotic drugs. The principal objectives of the Convention are to limit the possession, use, trade in, distribution, import, export, manufacture and production of drugs exclusively to medical and scientific purposes and to address drug trafficking through international cooperation to deter and discourage drug traffickers.° The Convention also established the International Narcotics Control Board, merging the Permanent Central Board and the Drug Supervisory Board.

(H) **Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment**

The Commission on Human Rights began its work on this subject at its session in February-March 1978. A working group was set up to deal with this item, and the main basis for the discussions in the working group was a draft convention presented by Sweden. During each of the subsequent years until 1984 a similar working group was set up to continue the work on the draft convention.° There were a number of issues on which it was initially difficult to reach agreement. In particular, the following issues gave rise to long discussions.

(I) **Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation**

Convention, declares any person commits an offense if that person unlawfully and intentionally commits, attempts to commit, threatens to commit, or abets the

° Single Convention on Narcotic Drugs, 1961
°°° GA Res. 39/46, Annexure, 39 UN GAOR Supp. (No.51), at 197; UN Doc. A/39/51 (1984); 1465 UNTS 85
seizure or exercise of control over a ship by force or threat of force or any form of
intimidation; or commits any of the following acts if it endangers or is likely to
endanger the safe navigation of that ship: an act of violence against a person on
board; destroying a ship or damaging a ship or its cargo; placing or causing to be
placed on a ship a device or substance likely to destroy the ship or cause damage to
the ship or its cargo; destroying or seriously damaging maritime navigational
facilities or seriously interfering with their operation; or communicating information
he knows to be false. It is also an offense to injure or kill any person in connection
with the commission or attempted commission of any of the previous offenses.

(J) Convention against Recruitment, Use, Training of Mercenaries

The Convention represents an endeavour by the international community to
outlaw in all its manifestations and consists of 21 articles. The definition of a
mercenary is based on Art. 47 of Protocol Additional to the Geneva Conventions of
12 August 1949, and relating to the Protection of Victims of International Armed
Conflicts (Protocol I), but goes further than Art 47 of Protocol I by being applicable
in “armed conflict” (Art. 1, paragraph 1) and in “any other situation” (Art. 1,
paragraph 2). According to Art. 5 of the Convention, state parties are not to recruit,
use, finance or train mercenaries and each state party shall establish jurisdiction over
any of the offences set forth in the Convention.

(K) Convention on Psychotropic Substances

The Convention on psychoactive drugs such as Amphetamines, Barbiturates,
Benzodiazepines, and Psychedelics was signed at Vienna on 21 February 1971. The
Single Convention on Narcotic Drugs of 1961 could not ban the many newly
discovered Psychotropic substances since its scope was limited to drugs with
cannabis, coca, and opium like effects. During the 1960s such drugs became widely
available, and government authorities opposed this for numerous reasons, arguing that
along with negative health effects, drug use led to lowered moral standards. The
Convention, which contains import and export restrictions and other rules aimed at
limiting drug use to scientific and medical purposes, came into force on 16 August,
1976. Today, 175 nations are parties to the treaty. Many laws have been passed to implement the Convention, including the U.S. Psychotropic Substances Act, the UK Misuse of Drugs Act 1971, and the Canadian Controlled Drugs and Substances Act. Adolf Lande, under the direction of the UN Office of Legal Affairs, prepared the commentary on the convention on Psychotropic Substances.

[IV] CONDITIONS FOR EXTRADITION

(A) Extraditable Persons

There is uniformity of 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 State usually refuse the extradition of their own nationals who have taken refuge in their territory, although as between States who observe absolute reciprocity of treatment in this regard, requests for surrender are sometimes acceded to. This doesn’t necessarily mean that the fugitive from Justice escapes prosecution by the country of his nationality.\(^\text{33}\)

Article (3) of the Inter American Convention of Extradition (1981) provide that, the nationality of such person may not be invoked as a ground for denying extradition exception the law of the requested State provided otherwise.\(^\text{34}\) In cases where extradition is applicable and the requested State fails to deliver the person sought, the requested State must if its laws or other treaties permit prosecute the fugitive for the offence which he is charged just as if it had been committed within its territorial jurisdiction, and the requesting State must be informed of the results of judgment.\(^\text{35}\) It should be noted that the requested State could prosecute under this provision only when or if its laws or other treaties so permit.

\(^{34}\) *Supra* note 20 at p. 457.
\(^{35}\) *Ibid.*
(B) **Extradition Treaty or Reciprocity**

Existence of an extradition treaty between the territorial State and the requesting State is most important condition for extradition. In this condition States are bound to deliver the criminal to requesting State on basis of customary international law that treaty have bound effect on its parties States.\(^{36}\)

Some States, such as the U.S., Belgium and the Netherlands, require a treaty as on absolute pre-condition.

The strict requirement of an extradition treaty may be regarded as the most obvious obstacle to international cooperation in the suppression of crimes. Since extradition treaties are politically sensitive and require careful and lengthy negotiation, States have few extradition treaties and the criminals can usually find a safe haven—that is a State which requires a treaty for extradition and has no such treaty with the State within whose jurisdiction the crime was committed. It is therefore, desirable that States conclude extradition treaties to suppress the crime.\(^{37}\)

In order to provide assistance to States interested in negotiation and concluding bilateral extradition agreements, the General Assembly on December 14, 1990 adopted a Model Treaty on Extradition by adopting a resolution. The resolution invited member States to take into account the Model Treaty on Extradition at the time of concluding extradition treaties or when they will revise the time existing extradition treaty relation.\(^{38}\)

It is to be noted that in the absence of any treaty arrangements, a person may be extradite in exceptional cases on the basis of reciprocity.\(^{39}\) Germany and

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\(^{38}\) *IIIL* 1990 (30) 184-194.

Switzerland extradite a person apart from a formal treaty so long as their Governments and the requesting State have exchanged declarations of reciprocity.  

(C) Extradition Crimes

It is an undisputed principle of the law of extradition that only a serious offence may be ground for extradition. The reason for this restriction is purely technical; the procedure of extradition is always lengthy, cumbersome, and costly. The interests of the two States involved and of the fugitive coincide in excluding extradition for petty offences.

This principle is effectuated by either of the following techniques-

i. Extradition treaties might enumerated crimes for which extradition is granted or.

ii. They place certain minimum limits of punishment to allow extradition.

There is a marked trend to prefer the second system of elimination to the older system of enumeration. The usual limit set by modern treaties is a minimum period of one year of deprivation of liberty. However, under “accessory extradition”, the requesting State may grant extradition for an offence which does not fulfill the condition with regard to the minimum limit on punishment, provided the fugitive is prosecuted for another offence which fulfills this condition.

Ordinarily extradition is asked for only in serious cases. According to the French Law, extradition is provided only in those cases where there is a definite minimum penalty. The extradition Act of Great Britain also contains list of the extradition crimes. Model Treaty on Extradition of 1990, deals that the offences which are punishable under the laws of both parties by imprisonment or other

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40 Supra note 33.
41 Ibid.
42 Ibid.
deprivation of liberty for a maximum period of at least [one/two] year(s) or by a more severe penalty.43

In short, some of those offences which are extraditable in various Acts and treaties are - murder, forgery, robbery with violence, rape abduction, piracy under the law of nations, smuggling of narcotic, kidnapping, revolt or conspiracy against the authority of the master on board of a ship on the high sea, sinking or destroying a vessel at sea.44 In Some new bilateral treaties between States are also declaring the offences, which are relating to fiscal and tax evasion.45

In some cases extradition is available in those cases which are punishable with imprisonment less than one year.46

But as a general rule, the following offences are not subject to extradition proceedings-

- Political Crime
- Military Offences
- Religious Offences

[V]   THE PRINCIPLES OF EXTRADITION

(A)   The Principle of Double Criminality

According to principle, which is almost universally recognized, extradition is to be granted only if the act the fugitive, sought for an extraditable crime is punishable according to the law of the demanding State as well as that of the requested State. In its absence, no extradition can take place.47 It is but natural that it will offend the conscience of the territorial State if it were to extradite the man whom

43 *IJIL* 30 (1990) 186.
45 See Treaty between India and Canada and India and Russia, 40 *IJIL* 898-906 (2000).
47 *Supra* note 37 at p. 313.
its law does not demand the custody of a person if he were not accused of any act or omission, which is not a crime within its territory.\footnote{R.C. Hingorani, Modern International Law, New Delhi/Bombay/Calcutta/Oxford and I.B.H. Pub., 1978, p. 157.}

The doctrine thus satisfies double purpose. It helps the requesting State to enforce its criminals law, and to the territorial State in the sense that the rule protects it from fugitive criminals. In order to ensure that a crime is recognized in both the States, a list of extraditable offences is attached in the extradition laws of some States. But, generally a list of crimes is embodied in the treaties for which extradition is done.\footnote{Supra note 33 at p. 240} In the case of \textit{Factor v. Laubenheimer}\footnote{(1886) 119 U.S. 407. Cited in M.P. Tondon, International Law, Allahabad, Allahabad Law Agency Pub., (13th ed.), 1971, p. 264.} the U. S. Supreme Court gave a liberal interpretation to the extradition treaty with Great Britain, when it held that the offence with which the plaintiff was charged was an extraditable crime even though it was not punishable by law of the State of Illinois where the plaintiff was taken in custody. The Court observed “Once the contracting parties are satisfied that an identified offence is generally recognized as criminal in both countries, there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeeded in finding in the country of refuge, some State, territory or district in which the offence charged is not punishable”. In the \textit{Eisler Extradition Case (1949)}\footnote{Supra note 1 at 310.}, Eisler was an alien communist and he was convicted in U. S. A. for some criminal’s offences, but he managed to run away from that country. He was arrested by a British Police Officer and produced for trial before a magistrate. The latter ordered the release of Eisler on the ground that the technical head of burglary in England. Eisler was accused of making a false Statement in an application for permission to depart from the United States. In December 1932, the Greek Court of appeals refused the extradition of Sandual Insule, who was fugitive from the State of Illinois, on the ground that the offences with which he was charged did not constitute a crime under Greek Law.\footnote{\textit{Ibid.}}
The rule of double criminality has put a State into a difficult situation when it has to request another State for extradition in respect of those offences which do not find place in the list of crimes embodied in a treaty. In order to overcome the above difficulty it is desirable that instead of laying down the names of various crimes specifically in the treaties, some general criterion should be adopted. For example any offence punishable with a definite minimum penalty under the laws of both the States should eligible a person for extradition appears to be more appropriate. The Model Treaty on Extradition has laid down the general criterion under Article (2) by stating that extraditable offences that are punishable under the laws of both parties by imprisonment of other deprivation of liberty for a maximum period of at least (one/two) years or by a more severe penalty. The above criterion would enable the States to extradite the offender even for those offences, which are not laid down in the treaty. France applies the above principle in extraditing a person. The above principal has also laid down in the Extradition Treaty between India and Canada (1987), Indian and Britain (1992) India and U. A. E. (2000), India and Russia (2000).

(B) Rule of Specialty

According to this principle, a fugitive is tried by the requesting State only for that offence for which he has been extradited. In other words, the requesting State is under a duty not to try or punish the fugitive criminal for any other offence than that for which he has been extradited, unless he has been given an opportunity to return to the territorial State. The rule has been made to provide safeguard to the fugitives against fraudulent extradition. The rule of specialty is incorporated generally in the extradition law of a State and in the extradition treaties. The principle of specialty constitutes a mandatory restriction on the requesting State to prosecute the extradite person for no offence other than that for which he was extradited. This is an absolute restriction; he may not even be tried for a lesser offences. An important case on this

53 Supra note 42.  
54 Supra note 34.  
rule is that of *United States v. Rouscher*. Wherein the accused was extradited on the charge of murder, but he was tried and convicted in U. S. A. on a minor charge of causing cruel and unusual punishment on a member of the crew. He made an appeal before the Supreme Court of the United States which quashed the conviction and ordered the release of the prisoner on the ground that unless otherwise provided for by the treaty, the prisoner could only be charged with the offence for which he was extradited unless he was given a reasonable time to return to the country which surrendered him. This principle has also been evoked in *Tarasov’s case* (1963) and in the case of *Daya Singh Lahoria v. U. O. I.* (2001).

In the British Fugitive Offenders Act, 1967, it is so prescribed in section 14; “A person to whom this Act applied shall not be dealt with in the U. K. for or in respect of any offence committed before he was returned to the U. K. other than-

a) The offence in respect of which he was returned,
b) Any lesser offence proved by the facts proved for purposes of securing his return”.

Article (7) of the French Extradition Law, 1927 provides that, extradition is accorded only on the condition that the extradited person shall not be prosecuted, nor punished, except for an offence for which he was extradited.

Sec. (2) of the Indian Extradition Act, 1962 had also provided the rule that a person shall not be convicted for the offence other than he was extradited. But by the amendment of 1993 some restriction has been imposed on the rule of specialty. The doctrine is incorporated in treaties Conventions and national statutes and as such is an admirable example of principles of International Law becoming part of national legal system for the better implementation of International Juridical principles through national Courts. It is an integral ingredient of extradition accords, arrangement, decrees, and of understanding in the community of nations whereby in the absence of any treaty in the interest of International Judicial cooperation the requesting State

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shall not prosecute the person concerned for any offence, other than that for which he is extradited or on the facts on which his extradition is based.

(C) **Rule of Prima facie Evidence**

For the extradition of a criminal there should be a *prima-facie* evidence of the guilt of the accused. Before a person is extradited, the territorial State must satisfy itself that there is a *prime-facie* evidence against the accused for which extradition in demanded.

In *C. G. Menon’s case*\(^{60}\) the Madras H. C. Held that, “the need for offering evidence to show that *prima facie* the offender is guilty of the crime with which he has been charged by the country asking for his extradition has been well recognized”.

The purpose for laying down the rule of *prima facie* evidence is to check the fraudulent extradition. The territorial State has to see that the demand is not motivated by any political reasons.\(^{61}\) The requirement of *prima facie* evidence is laid down in the national legislation of a State. Section (19) of British Extradition act, 1870 & Sec. 7(4) of Indian Extradition Act 1962 provides the requirement of *prima facie* evidence.

(D) **Rule Against Double Jeopardy (Non bis in idem)**

It is a general principle recognized by all members of the international community that a person should not be subjected to repeated trials for the same act. This is commonly known as a rule of natural justice. States normally refuse to extradite the fugitive it he has been once tried or is undergoing trial in the territory of the requested State for the same act for which his surrender has been demanded.\(^{62}\) This kind of protection is supplemented in some bilateral treaties. For example, Article (6) of the Indo –Nepal Treaty of 1953, provides that, “Extradition shall not take place if the person whose extradition is claimed by one of the Government has already been tried and discharged or punished or is still under trial in the territory of

\(^{60}\) *AIR* 1953, Madras, 763

\(^{61}\) *Supra* note 44 at p. 167.

the other Government for the crime for which extradition is demanded.” Similar provision is found in Article (4) of the Anglo German Treaty. In view of the recognition of protection against Jeopardy, national Courts will be entitled to go into the question whether the fugitive has already been tried or is undergoing trial for the same offence, irrespective of the place of such trial.

However, the rule against double Jeopardy is confined to the trial or punishment of the fugitive for the crime attributed to him. It does not apply to extradition proceedings, which do not amount to a trial. Consequently, rejection of request for extradition does not prevent the requesting Government from making another request for the surrender of the same fugitive for the same offence for which the request was turned down earlier. This happened in the case of Stallman who was discharge in extradition proceedings in India but was extradited by a British Court to Germany.

[VI]  RESTRICTIONS ON EXTRADITION

(A)  Restrictions by the Nature of the Offences

Traditionally, extradition is to be granted only if the fugitive is prosecuted for an offence which is not political, military, or fiscal nature. New development is likely to occur in this area.

1.  Non Extradition of Military Offenders

Extradition is usually not granted for “purely military offences”, i.e. violations of military order and discipline which can be committed only by military persons, for “improper military conduct”, and for the offences which are prohibited only by the military penal code. Extradition will be possible if a soldier commits an ordinary

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63 Supra note 44 at 169.
64 Ibid.
65 Ibid.
66 Re Rudolf Stallman v. Emperor, 38 ILR Calcutta, p. 547. See also Re Rudolf Stallman, ILR 39, Calcutta, 164.
crime, even though the offence is also regulated by the military penal code and the offender is to be tried by a Court martial. Extradition treaties generally exclude military offences. Broadly military offences fall into two categories, i.e., those which constitute offences under ordinary criminal law and those which related specifically to military matters. Only the second category qualify as military offences in respect of which of extradition will not apply. Desertion is an example of the second category. Model Treaty on Extradition also lays down under Article para (c) that extradition shall not be granted if the offences under military law, which is not also an offences under ordinary criminals law.

Military offences are granted asylum by the territorial State on legal and extra-legal grounds and also as a security measure. After the First World War, Holland refused to extradite the German Head of the State W. Kaisar. Similarly Brazil refused to surrender to Denmark a person charged with the crime of assisting the enemy in time of war, maintaining that this was a political offence. Extradition Treaty between India and Canada of 1987 also provides under Article 2(a) that extradition shall be refused if the offence, in respect of which it is requested, is considered by requested State to be a purely military offence. But the practice of non-extradition for military offenders has not gained universal acceptance. For example a person committing war crimes is extradited to the requesting State.

2. Non Extradition of Fiscal & Economic Offenders

Offence of a purely fiscal character may broadly mean the offences relating to revenues, taxes, excise and custom etc. The policy reasons for excluding fiscal offences are based on State sovereignty and are similar to those for excluding military offences. Thus, tax offences did not give rise to extradition. Later on, the same principal was adopted concerning the violation of laws regulating economic life. It is obvious that this way of looking at the fiscal offences does not in with our

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68 Supra note 5 at. 317.
69 Supra note 39
70 Supra note 36 at 244.
71 IJIL, Vol. (34), 1994, 188.
72 Supra note 5 at 317.
contemporary world of welfare States and economic interdependence. Therefore modern laws of extradition do not exclude or even prohibit extradition for fiscal or economic offences person. Special treaties regulate such offences.\textsuperscript{73}

3. **Non Extradition of Political Offenders**

It is a very important principle of International law that extradition for political crimes is not allowed. Most States refuse to commit themselves to extradite any person with ‘political crimes’ that is to say crime committed for political purposes or crimes that are politically motivated. The principle of non-extradition of political offenders crystallized in the nineteenth century, a period of internal convulsions, when tolerant liberal States such as Holland, Switzerland, and Great Britain, insisted on their right to shelter political refugees.\textsuperscript{74}

i. **Basis for the Non Extradition of the Political Offenders**

Reasons for non-extradition of political offenders are manifold. Firstly, rebels of today may be the rulers of tomorrow. Secondly, there is fear on the part of the territorial State if it were to extradite these offender, they may not get a fair trial at the hands of their adversaries. It is also an attempt at avoiding interference in the foreign State’s affairs, besides; political offenders are not dangerous and undesirable elements as may be the case with regard to ordinary offenders.\textsuperscript{75} The constitutions of France and Italy and the basic law of Germany guarantee right of asylum to political fugitives.\textsuperscript{76}

ii. **Exceptions on the Political Offence Exception**

On some occasion, fugitives take undue advantages of the principle of non-extradition of political offenders by passing themselves as political offenders. In order to check the abuse, an attempt was made to restrict the principle in certain cases. In

\textsuperscript{73} Art. 5 of European Convention of Extradition, 1957, Art. 4 of Benelux Extradition Convention 1962. Cited in *Supra* note 5. See also Art. 4 of Treaty between India and Russia, (2000) 40 *IJIL* 907.


\textsuperscript{75} R. v. Enhore, *MLR* 1963, 557.

\textsuperscript{76} *Supra* note 48 at p. 158.
1956 Belgium introduced the *attentat clause* in its extradition law. Article VI of the Act provides that an attempt on the life of the head of a foreign Government or of members of his family shall not be considered to be a political offences or an act committed with such an offences, when it in fact constitutes murder, assassination or poisoning.\(^77\) Some other European States followed this practice, but the attentat clause has not been accepted as a general rule of International law because sometimes the head of the State may be titular head. He may not be the most important and powerful man in the State. For example, the Queen of England and President of India may not be as powerful as the Prime Minister.\(^78\)

At present, the political offence exception is no longer accepted in a number of serious crimes, which are as follows-

a) It is expressly excluded by some multilateral treaties. Notably The Genocide Convention provides under Article VII that genocide, conspiracy to commit genocide, direct and indirect public incitement to commit genocide, attempts to commit genocide and complicity in genocide shall not be considered political crimes.\(^79\)

b) Political offence is not recognized as an exception to extradition in the case of customary International Law crimes such as war crimes and crimes against humanity.\(^80\)

c) Multilateral treaties relating to hijacking, torture or hostage taking injury to diplomats and grave breaches of the Geneva Conventions on the Law of War and armed conflict have seriously undermined the exception by requiring States either to prosecute or extradite despite the fact that they will normally be politically motivated.\(^81\)

\(^{77}\) *Supra* note 1, p. 355

\(^{78}\) *Ibid.*

\(^{79}\) *Supra* note 23.

\(^{80}\) *Supra* note 74 at p. 354.

\(^{81}\) *Supra* note 27.
d) State has excluded the political offence exception in the case of some purely localized criminal offences by means of bilateral or multilateral treaties.82

e) It has been held not to protect former Government official’s guilty human’s rights abuses.

In the light of the above exceptions, two important questions arise. Firstly, whether the political offence extradition in its traditional form is of much value today, and secondly, whether the genuine political opinions in the requesting State or denied a fair trial in the requesting State.

At to the first, it may be be noted that though persons who commit a pure political crime, such as treason, are exempted from extradition, the traditional political offence exception is no longer accepted by States. As to the second, if may be noted that an attempt should be made to protect the interests of the political offenders within the context of the rights to fair trial. Although the principle of non extradition of political offenders is widely accepted, there is probably no rule of customary International law which prevents their extradition.83 If a State wishes to impose any restriction on the rule of non-extradition of the political offenders, it may do so in its extradition treaties by which the principle itself is regulated.84

iii. Meanings of Political Offences

Although the notion of non-extradition of the political offenders is generally accepted, one of the most complicated question which arise in this regard is to define the term ‘political offences’. The questions has become more complex because whether or not the offence, which is the subject of a request for extradition is a political crime is decided by the municipal Courts, and this had laid to the emergence of divergence views taken by the judges of the different municipal Courts. In a few cases, judges did not consider it necessary to lay down an exhaustive definition of the term political offence. Hence they did not make any attempt to define the term.

82 Treaty between India and Canada, (1994) 34 IJIL 188.
83 Supra note 36 at pp. 704-710.
International publicists have also made attempts to define it, but their views are also too divergent. It suffices to State that, whereas many writers consider a crime ‘political’ if committed from a political motive, other call political any crime committed for a political purpose, again other recognize such a crime at only ‘political’ as was committed both from a political motive and at the same time for a political purpose and thirdly, some writers confine the term ‘political crime’ to certain offences against the State only.\(^{85}\)  

**Starke** has adopted some criteria for define the political crime, like that\(^{86}\).  

a) The motives of the crime,  
b) The circumstances of its commission,  
c) That it embraces specific offences only e.g., treason or attempted treason,  
d) That the act is directed against the political organization, as such, of the requesting State.  

Extradition treaty concluded between India and U. S. A. on September 14, 1991 provides under article 4 Para (2) that, the following offences shall not be considered to be political offences,  

(a) Murder of or other willful crime against the person of a head of State of Government of one of the contracting States of a member of the head of State or head of Government family,  
(b) Aircraft hijacking offences,  
(c) Acts of aviation sabotage,  
(d) Crime against internationally protected person including diplomats,  
(e) Hostage taking,  
(f) Offences related to illegal drugs,  

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\(^{85}\) *Supra* note 36 at p. 707.  
\(^{86}\) *Supra* note 74 at p. 355.
Any other offence for which both contracting States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution and

A conspiracy or attempt to commit any of the foregoing offences or aiding or abetting a person who commits or attempts to commit such offences.

Also extradition treaty between India and the U. A. E. concluded on July 20, 2000 which provides under article 6 para (1) that following shall not be regarded as political offences,

a) Assault against the President or the Vice-President of either contracting State or any member of the families and the member of the council of ministers of the two countries or any member of our families,

b) Murder culpable homicide not amounting to murder or robbery,

c) Offences relating to terrorism including murder, culpable homicide not amounting to murder, assault causing bodily harms, kidnapping, hostage taking, offences involving serious damage to property or disruption of public facilities and offence relating to firearms or other weapons or explosives or dangerous substances,

d) Any offence within the scope of an international Convention to which both contracting States are parties and which obligate the parties to prosecuted or grant extradition,

e) An attempt or conspiracy to commit or incite or participate in the commission of any of the above offences.

Besides these tests some tests are also followed in the famous English cases Re Meunier and Re Castioni.
Re Castioni Case

In the last decade of the nineteenth century a leading case on this issue decided by the British Court was that of Re Castioni. In this case, Castioni who had returned to Switzerland from abroad joined the revolutionary movement in the Canton of Ticino (Switzerland) and in the course of it he committed the murder of Rossi, a member of the Government. It was pleaded on behalf of Castioni in writ of habeas corpus that his offence was a political offence for which extradition was not available. He claimed protection under section 3 of the extradition Act, 1870.

Lord Denman, J. laid down that in order bring the case within the scope of the Act, and for an offences to be political, it must at least be shown that the act is done in furtherance of the intention of assistance, as a sort of Overt act, in the course of acting in a political matter, a political rising or dispute between two parties in the State as to which is to have Government in its hands. The question really is, whether upon the facts it is clear that the man was acting as one of a number of persons engaged in act of violence of a political character with a political object and as a part of the political movement and rising in which he took part. His extradition was refused on the finding that his motive for the act was political.

The deciding factor for an offence to be considered as political according to the Court was that the act should have been committed in the course of political struggle or disturbance during which two or more parties in the State are contending and each party seeks to impose the Government of its choice on the other. In other words the act should be done against the established regime, by the other party, seeking to establish its own regime.

Re Meunier Case

In the case of Re Meunier, which came before the Court three years Re Castioni the principle laid down in Re castoni was repeated. In Re meunier the petitioner was a French anarchist who was charged with causing explosions at a café

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87 1 QB (1891), p. 149.
and also in certain barracks in French, one of which resulted in death of two individuals. Cave, J. upheld his extradition and held that, “in order to constitute an offence of a Political character there must be two or more parties in the State each seeking to impose the Government of their own choice on the other and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.

In the present case there are not two parties in the State each seeking to impose the Government of their own choice on the other, for the Party with whom the accused is identified namely, the parties of anarchy is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens.\(^89\)

The Principle laid down in Re Castioni and Re Meunier was followed for a fairly long time by another States as well. The federal Court of the United States. In 1894 in Re Etza held that in order to bring an offence within the meaning of the words ‘political character’ it must be incidental to and from part of political disturbance. The Federal Tribunal of Switzerland in Re Pawan, the Supreme Court of Brazil in Re Benegas case also applied the strict principle laid down in the Castioni case. According to these decisions an offence is considered to be political if it is directed against the State or the constitutional order, or be otherwise ‘inextricably involved in conditions disturbing the Constitutional life’ of the country. It should be committed by an organized movement to secure power in the State against the established regime.

**Criticisms of the Re Castioni and Re Meunier cases**

It is to be noted that the above approach in defining the term political offence appears to be too narrow and rigid. May acts of individuals such as terrorist acts of personal vengeance or for gain and acts having an entirely local impact are excluded from the category of political offence. The above approach stresses that the object of the crime should be to overthrow the Government. It is submitted that an offence may be described as political even if the object of its commission is not to overthrow the

\(^89\) Ibid.
Government. For example, if a group of persons persuades the Government to do or not to do any particular act, and in the course of their persuasion they commit certain crimes, their object is not to over throw the Government, yet the crime may be considered as political.

Further, the above view does not take account of the motive of the crime. An Individual may fear of not getting fair trial from the Government of his own State on social, economic, religious or cultural grounds which are inextricably woven with the policies of the Government such persons are not treated as political offenders according to the above approach taken in Castioni and Meunier cases.

**Ex Parte Kolczynski Case**

All these reasons perhaps, prompted to the Court in *Ex Parte Kolczynski and others*[^90] to lay down a wider meaning of the concept of political offence. In the above case Lord Goaddard, C. J. deviated himself from the established principle set in Castioni case. He also felt it necessary on considerations of humanity to give a wider and generous meaning to the term political offence.

Cassels, J. in above case observed that, “the offence for which extradition was requested was committed in circumstances, in which, if surrendered, the accused would, although being tried for those offences, be also punished for an offence of a political character. He therefore, said that the political offence ‘must always be considered according to the circumstances, in existing at the time when they have to be considered’”. After having made the above observations, he added, that it is submitted on behalf of the men that if they should be extradited they may not only be tried for the offences for which their extradition is requested, but they will be punished as for an offences of a political character, and that offence is treason in going over to the capitalistic enemies. They committed an offence of a political character and if they were surrendered there could be no doubt that, while they would

[^90]: All ER (1955), p. 31.
be tried for the particular offence mentioned, they would be punished as for a political crime.\footnote{Ibid.}

From the above decision it appears that the meaning of the term ‘political offence’ has been made wider than that laid down in \textit{Castioni Case}. According to this approach, it is not necessary that the crime should be committed by an organized party to overthrow established Government. Even membership of a political party was not regarded as necessary. The definition laid down by Cassels, J., in the above case reveals that if any ordinary crime is committed in the course of committing any offence against the State, that would be considered political because of its close association with the politics of the State and also because the prosecution for the ordinary crimes on the facts amounts to a prosecution for the political crime as well.

Thus, the Court refused to be tried down to the former view of the two political parties contending for power within a State in order to constitute a political offence.\footnote{Ibid.} It may be noted that all those offences which are committed by an organized party or by an individual with an object of overthrowing the established Government should be considered political. In addition to such crimes, other common crimes may also be coincident political if they are so inextricably involved with the latter in such a way that the two cannot be separated.\footnote{H.O. Agarwal, “Nature of Political Offence”, SCJ, Vol. (I), 1981, p. 21.}

Thus, the principle of non extradition of the political offenders is applied more especially to the so- called relatively political offences in the wide sense, namely, acts which have the character of an ordinary crime appearing in the list of extraditable offences but which, because of the attendant circumstances, in particular, and because of the motive and the purpose is one of a predominately political complexion. If an offender commits any crime because he is not satisfied with the policy or policies of the Government, there is a reason for considering such offenders as political on the ground that the crime would not have been committed otherwise. This also includes religious, social and cultural offences.\footnote{Ibid.} The essential point involved in such crimes
should be that they are committed because of the dissatisfaction of the policies of the Government. It is duty of the Court to see that the criminals are not allowed to go unpunished, but at the same time the Court should also take into consideration of the fact that they are protected from the legal processes of the requesting State.\(^95\) The Court should also see that there are substantial grounds for believing that the offender once extradited shall not be prosecuted to or in substitution for the offences mentioned in the warrant. The consideration of this point is important in view of the fact that once the extradition is granted the accused cannot raise the defense in the Court of the requesting State that as a political offender he is not justifiable before it.\(^96\)

In view of these considerations it may be noted that it would be desirable if the Courts of different countries, with their differing ideas of public order, examine the question of political offenders in each case on merits in the light of its facts. Due regard should be given to the prevalent political conditions and the circumstances under which the crime has been committed.\(^97\)

4. Non Extradition of Own Nationals

In many cases a person after committing a crime in a foreign country flees back to his own country. Whether a State would extradite such person, i. e., its own nationals, to a State where crime has been committed is a controversial point and practice of States considerably differs on it. Many countries such as the Netherlands, Belgium, Italy, Germany, Switzerland and France have adopted a principle for not extradition of their own nationals to foreign State.\(^98\) Those who support the view, give arguments that national Judges are regarded as natural Judges, foreign Judges cannot be trusted.

Moreover, it is not dignified for a State to extradite its own nationals for concluding a trial in the foreign country. Again, they do so as a step to protect their

\(^95\)Ibid.  
\(^96\) Ibid.  
\(^97\) Ibid.  
\(^98\) Supra note 48 at p. 171.
own nationals. However, they prefer to inflict punishment to such persons in their own States. On the other hand, Great Britain, United States and India have favored the practice of extraditing them, if a treaty provides for extradition of such person. Nationals of the states of the former category therefore attempt to flee back in their own country in order to avoid extradition, though they may be punished there for the crimes committed in foreign countries. It is desirable that a person should be given punishment by the State where the crimes have place. It remains in a better position to try the offenders in view of the fact that witnesses are readily available in that country alone.

Extradition treaties therefore should contain a clause of the extradition of ‘all’ or ‘any’ persons so as to include their own nationals as well. Extradition Treaty conclude between Canada and India has inserted a clause under Article 1 para, 1 that “each Contracting State agrees to extradite to the other … Any person who being accused or convicted of an extradition offence … Committed within the territory of the one State is found in the territory of other State”

The above provision follows that the extradition of Canadian or Indian citizens is not precluded by both the states. Extradition Treaty between India and U. S. A. in 1999 also provided under Article 3 that, extradition shall not be refused on the ground that the person sought is a national of the requested State. Extradition or non-extradition of its own nationals depends upon the wordings of the extradition treaties. Nationals may therefore be extradited if there is no bar in the national extradition law or in the treaty. But if the restriction is imposed therein regarding the extradition of its own nationals, it becomes a duty of the territorial State to punish them, so that criminals may not go unpunished.

Extradition treaty between India and Russia of 2000, lays down under Article 5 para (1), that a person may not be extradited if he is a citizen of the requested party, but Article (7) provides that in such person for the same offence according to its laws,

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99 Supra note 37 at p. 243.
100 Ibid.
101 Supra note 82.
the requesting party shall transfer the relevant documents and evidence to the requested party.\textsuperscript{103} The Model Treaty on Extradition adopted by an UN General Assembly in 1990 also stipulates under Article (4) that, extradition may be refused if the person whose extradition is requested is a national of the requested State. Where the extradition is refused on this ground, the requested State shall, if the other State so requests submit the case to its component authorities in respect of the offence for which extradition had been requested.\textsuperscript{104}

5. \textbf{Non Extradition in Time Barred Crimes}

It has been noticed that nations are presently withholding extradition of such fugitives who have obtained immunity from prosecution for the crime(s) they have committed. This has been the result of some being of some national legislation which gives immunity to fugitives from being prosecuted after lapse of sometime. The Harvard Research Draft on Extradition had recommended that a fugitive may not be extradited if he has obtained immunity from prosecution under the law of the requesting State of the territorial State where the fugitive has taken refuge.\textsuperscript{105} While there can be no controversy over the non-extradition of fugitives who cannot be tried due to a lapse of time of time, controversy may, however, arise with respect to effective date which may determine whether or not the prosecution is time barred. There may be a number of dates, which may be relevant for determining this question e. g.-

1. The date of request for extradition,
2. The date of receipt of such request by the territorial Government,
3. The date on which the magistrate decides on the preliminary issue,
4. When the magistrate submits his report to the Government recommending the fugitives extradition,

\textsuperscript{103} Treaty between India and Russia, (2000) \textit{IJIL} 906.
5. 15 days from the date of submission of magistrate’s report which is the normal period before which the fugitive cannot be extradited in a number of countries.\textsuperscript{106}

6. When the Government orders extradition.

However, the date on which the Government passes the order of surrendering the fugitive is the crucial date. If the fugitives can be prosecuted on this date, he may be extradited. But if he has acquired exemption from prosecution by this time, he may be discharged.\textsuperscript{107} An interesting case arose in England on this point. A fugitive who had been convicted in Belgium managed to flee to England. Belgium asked for extradition However, his extradition was delayed because he was to undergo sentence for the crime he had committed in England. When he completed his term of imprisonment, he challenged his extradition on the plea that the Anglo-Belgium Treaty provided limitations on surrender if the fugitive had acquired exemption under the English law.

The Court, of course, rejected the plea on the ground that the committal order was passed before the exemption was acquired.\textsuperscript{108} In fairness, the period of sentence which the fugitive may undergo in the State of refuge should not be computed towards determining the period of limitation, irrespective of the fact whether the order of committal was passed before or after. Besides, the rule of time bar should be applied to prosecution alone, it should not be applied to cases where the person has been convicted but has managed to escape from the custody of the requesting State.\textsuperscript{109}

\begin{footnotesize}
\begin{enumerate}
\item Sec. 31 of Indian Extradition Act, 1962.
\item \textit{Supra} note 48 at p. 170.
\item \textit{Rexus Governor of Brixton Prison} (1908), 96 TLR 821, Cited in \textit{supra} note 48
\item \textit{Ibid.}
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