GROUNDS OF REFUSAL

Transnational criminal activities have become a global problem. To combat this problem there is growing international cooperation among States in criminal matters. With reference to the above statement in its Article 1, the United Nations Model Treaty on Extradition obliges States to extradite on the basis of a treaty. However there is no rule in International Law which stops States from extraditing a fugitive in the absence of a treaty, even if the requesting State satisfies the procedural requirements necessary for surrender to be authorized, the transnational fugitive offender can still plead that his extradition would violate provision which tend to be included in all the treaties. Further, there are some generally accepted defenses to criminal charges which can also be utilized in an extradition hearing. This chapter aims to analyze these restrictions. Extradition law traditionally provides for a number of grounds on the basis of which, the States may refuse extradition requests. Some concern the offence itself and relate to its nature, seriousness, or the punishment it carries, while others are based on the circumstances of the person whose extradition is sought, in addition to notions of fundamental justice, fairness and jurisdictional issues.

Bilateral extradition treaties as well as multilateral extradition agreements and conventions also provide for specific grounds for refusal to extradite on the part of the requested State. The applicable treaty or national legislation may provide for refusal of extradition in mandatory or discretionary terms; extradition law leaves it to States to define the terms of refusal. By contrast, bars to extradition under international human rights and refugee law impose an obligation on States to refuse extradition where this would result in the violation of fundamental rights of the individual concerned. On the other hand, customary International Law as well as the duty to
extradite or prosecute, as contained in a number of international legal instruments, restrict the freedom of States to refuse extradition for certain international crimes. Some of the national and international conventions applicable to extradition have limited the scope of certain grounds for refusal, most notably, the political offence exemption. In India, this provision is governed by the Extradition Act, 1962 under Section 31 of the Act as well as treaties. Extradition can be denied in India on the following grounds-

1. Political Offence
2. Military Offence
3. Lapse of Time
4. Non Bis In Idem
5. Nationality
6. Death Penalty
7. Discrimination
8. Insanity and Health of the Fugitive
9. Extraterritoriality
10. Lack of Good Faith or Trivial Nature of the Case

**Political Offence:**

Although historical evolution shows that extradition began for the purpose of punishing political offenders, but nowadays political crimes are considered as an exception. In ancient times and in the middle ages, extradition arrangements were designed primarily to secure the surrender of political offenders, rather than common criminals as a means of wiping political enemies. This trend gained influence in the wake of the French revolution, Article 20 of the French Constitution of 1793,
allowed refuge to those foreigners who exiled from their country, “for the cause of liberty”. However, other countries gave asylum to French subjects who left the country for fear of reign of terror. The surrender of a number of political refugees by the Governor of Gibraltar in Spain created loud protests from Parliament in 1815 and Lord Castlereagh expressed himself against the practice of returning political refugees of their home States. Switzerland then prevented extradition of political criminals to whom it provided asylum. In 1830 Austria and Prussia refused Russia’s demand to surrender Polish revolt. In 1829, Dutch jurist H. Provo Kluit wrote advocating non-extradition of political offenders. In 1833, Austria, Prussia and Russia entered into treaties undertaken to give asylum to political refugees. In 1833, Belgium became the first country to enact a law on non-extradition of political offenders and by the beginning of the 19th century; almost every European extradition treaty contained an exception for political offences.

The first general bilateral extradition agreement to include a political offence exemption was the 1834 treaty between Belgium and France. By 1875, the practice was sufficiently established that the determination of what constituted a political offence was reached in accordance with the laws of the requested State. Almost all modern extradition treaties provide against the surrender of political offenders and are also specified in Municipal Laws of the States. Section 31(a) of the Indian Extradition Act, 1962 restricts the surrendered of a fugitive if his surrender is sought for an offence of a political character. It stipulates that, “the extradition shall not be granted, if the offence in respect of which surrender is sought is of a political character or if he proves to the satisfaction of the magistrate or court before whom he may be produced or of the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of political character.”
The above Section can be interpreted in two ways. First interpretation is that, surrender of a fugitive criminal shall not take place if the offence is of a political character. The second interpretation of it gives emphasis on the fugitive himself that if the fugitive criminal himself proves to the satisfaction of the magistrate/court in front of whom he may be produced or of the Central Government that his requisition is made to punish him for an offence of political character.

However, on occasions fugitives have attempted to avoid return on the basis of the alleged political prosecution. In *Re C G Menon and Another* the Madras High Court did not consider Menon’s allegations that he was a victim of political animosity, as Menon was released for other reasons. In *Re Government of India and Mubarak Ali Ahmed*, the case was decided by the Queen’s Bench Division of the High Court of Justice in 1952, where the applicant filed a writ of *habeas corpus* to prevent his return to India for forgery, the Counsel for the applicant maintained that he has been persecuted for political reasons by India and was convicted to be a spy of Pakistan. Lord Chief Justice Goddard did not find that the applicant would be persecuted as a political offender and ordered his return.\(^{10}\)

In *R v Governor of Brixton Prison, Ex parte Kolezynski* 1955, the court defined political crime as, “that offences committed in association with a political object e.g. anti-communism or with a view to avoiding political prosecution or prosecution for political defaults, are political crimes notwithstanding, the absence of any intention to overthrow an established Government whether an alleged crime is ‘political’ is a question to be determined by reference to the circumstances attending its alleged commission at the material time and not in the light of motives of those who have instituted the prosecution proceedings and the corresponding application for extradition.”\(^{11}\) Whereas the term political offence, has a broad interpretation and can
be categorized into two categories. On one hand it refers to purely political offences which are done against the political organization and Governments of a State, injuring only public rights and containing no crime element whatsoever and on the other hand, it refers to relative political offences in which a common crime is either implicit or connected with the political act. However, the problem arises with respect to the latter as pointed out by M. De Visscher, “the difficulty connected with political offences arises mainly from the fact that, in connection with extradition an exceptional extension is given to the concept of ‘political offence’. Ordinarily a political offence is purely a political offence i.e. one not accompanied by any offence against the ordinary law connected with political acts or events.”

Though the general principle of non-extradition of political offenders is not disputed, States have traditionally differed in their views on what constitutes a political offence, particularly where extradition was sought for conduct which involved violence. There is no generally accepted definition. Over time, the question has engendered a considerable body of jurisprudence. Different categories of offences are commonly distinguished. Less problems are posed by purely political offences e.g. treason, espionage, sabotage are defined as offences aimed directly and exclusively against the State and its organs. The scope of the so called relative political offences poses much uncertainty. Relative political offences are common crimes assimilated to political offences because the perpetrator pursued a political purpose or was politically motivated or it was committed incidentally to or in the course of and in furtherance of civil war, insurrection or commotion.

**The Purely Political Offence:** The purely political offence is usually a conduct directed against the sovereign or its political subdivisions and constitutes opposition to a political, religious and a racial ideology or to its supporting structures (or both)
without having any of the elements of a common crime because the interest sought to
be protected is the sovereign or public order, as distinguished from any private wrong.
The word sovereign includes all the tangible and intangible factors pertaining to the
existence and functioning of the State as an organization. It refers to the violation of
laws designed to protect the public interest by making an attack upon it a public
wrong as opposed to a private wrong, as in the case of a common crimes. Such laws
exist solely because the very political entity, the State, has criminalized such conduct
for its self-preservation. It is deemed a crime because it violates positive law, but it
does not cause a private wrong.

Treason, sedition and espionage are offences directed against the State itself and
are therefore, by definition, a threat to the existence, welfare and security of that
entity. As such they are purely political offences.\(^{15}\) Thus, a purely political offence is
the one whereby the conduct of the actor based on ideology or belief manifests an
existence in freedom of thought, expression and belief (by words, symbolic acts or
writings not inciting to violence), freedom of association and religious practice, all of
which are committed in violation of a positive law designed to prohibit such
conduct.\(^ {16}\)

The Relative Political Offence: The relative political offence can be an extension of
the purely political offence, when in conjunction with the latter, a common crime is
also committed, or when, without committing a purely political offence, the offender
commits a crime promoted by ideological motives. While the purely political offence
exclusively affects the public interest and causes only a public wrong, the relative
political offence affects a private interest and constitutes at least in part, a private
wrong but done in furtherance of a political purpose. The term relative political
offence is at least a descriptive label of doubtful legal accuracy because it purports to
alter the nature of the crime committed depending upon the actor’s motives. There is nothing that makes a given common crime political, because the nature of the criminal violation and the resulting harm constitute a private wrong which by definition, is a common crime. The actor seeks to use the offence or its impact for ulterior political purposes does not alter the nature of the act or its resulting harm, nor does its ulterior or ultimate purpose change its character. The circumstances altering the commission of the crime and the factors and forces may have led the actor to such conduct render the motivation of the actor complex, but not the offence.  

Relative political offences have been commonly classified into connected and complex offences. In complex cases of crime the political offence comprises at the same time an ordinary crime such as murder, arson, theft and the like. However, some categorically deny such complex crime as political. Their opinion seems to be wrong, since many political criminals have been extradited. In spite of this many complex crimes although the deed may have been committed for a political motive or for a political purpose, are considered a political crime. For instance, in the case of Mubarak Ali v. the Government of India 1952, it was held with regard to a request for extradition for forgery that the court could not enquire into the allegation that the case had political implications and that the accused would not receive a fair trial. This aspect of the decision probably had reference to the particular circumstances of the case. The possibility of a political prosecution being investigated under the color of the law, cannot, in principle be ruled out. Such cases have aroused the indignation of the world and have indeed endangered the very value of principle of non-extradition of political criminals. 

The confused state as to what constitutes a relative political offence affects the extradition process. In the early practice this problem did not arise. This was because
at first extradition was considered in a different perspective from today. Instead of being a well regulated legal institution by which one State surrenders individuals accused of crimes committed beyond its borders to another State for trial and punishment, it was rather an arbitrary tool of kings by means of which they sought to gain control of person who had offended them. Common criminals were not worth the trouble and expenses require extraditing them, it was the political offender who was the most dangerous, and whose surrender was to the common interest.\textsuperscript{19}

Three factors can be accountable in this regard:

1. The degree of the political involvement of the actor in the ideology or movement on behalf of which he had acted, his personal commitment to and belief in the cause on behalf of which he had acted) and his personal conviction that the means (the crime) are justified or necessitated by the objectives and purposes of the ideological or political cause;

2. The existence of a link between the political motive (as expressed above) and the crime committed; and

3. The proportionality or commensurateness of the means used (the crime and the manner in which it was performed) in relationship to the political purpose, goal or objective to be served.

The first of these factors is wholly subjective, the second can be evaluated somewhat objectively and the last \textit{sui generis}. A dominant factor which emerges in the practice of all States recognizing the relative political offence exception, namely that the political element must predominate over the intention to commit the common crime and constitute the purpose for the commission of that common crime.\textsuperscript{20} A dominant factor which emerges in the practice of all States recognizing the relative
political offences as falling within the purview of the political offence exception is that the political element must predominate over the intention to commit the commission of that crime. In explaining the political offence, exception being universally accepted principle, the application of this practice may arise very delicate problems due to the difficulties in determining what constitutes a political offence. No satisfactory and generally acceptable definition of a political offence has been found yet. Attempts have been made to solve this problem by attempting to define the acts, which constitutes political offences. However, existing treaties and statutes offer little help to this problem.

The States that had entered in extradition treaties mostly give a list of offences which should not be considered as political offences. But, if no such offences are listed in the treaty then the matter will be dealt in accordance with the laws of the requested State. Whereas few treaties provide a list of offences which should not be treated as political offences. Many international conventions have come into force to specify acts that shall not be regarded as the acts of political character. A list of the same is given in the Schedule to the Extradition Act, 1962.

However, the world gradually recognized that this exception which had originally protected the human rights of the fugitive was being used to crush the human rights of the victims. This problem was resolved through a series of multilateral conventions and numerous bilateral treaties that describe specific acts which regardless of their motivation, will be subject to extradition and will not count as political offences. It is noteworthy that this exception is being opposed at present because it is high time the violent criminal activities must be punished whether it is politically motivated or not, particularly the terrorism. Terrorism has grown to be in different forms which have created a remarkable disturbance in maintaining world
public order. It has also been a matter of concern for India and it was prominent when it ratified 1937 convention on terrorism.\textsuperscript{26} The interpretation of the concept of a political offence has been particularly divisive with regard to acts considered terrorist crimes by some, acts of legitimate resistance by others. From the 1970s onward, an increasing number of offences have been declared non-political for the purposes of extradition in regional and international conventions dealing with terrorism-related crimes, thus precluding the application of the political offence exemption by the requested State. Other international anti-terrorism instruments adopted during the 1970s and 1980s has instituted a duty to either prosecute or extradite, rather than opting for “de-politicising” the offences covered. Some States declare these offences to be “non-political” under national law. Moreover, as noted above, courts in a number of countries have held that terrorist acts which indiscriminately endanger the lives and physical integrity of civilians, do not qualify as political offences. Some more recent general extradition instruments also exclude the political offence exemption as a ground of refusal, if the fugitive is sought for a conduct, “depoliticised” by other international treaties or conventions, although it may still be relevant in other contexts.\textsuperscript{27}

Various treaties have specified terrorism which shall not fall under the political offence exception.\textsuperscript{28} Apart from that, India is a party to International Convention for the Suppression of Terrorist Bombings (which came into force on 23 may 2001), under which India got extradited Abu Salem to which Portugal is also a party. In this regard Section 3(4) of the Extradition Act, 1962 confers power on the Central Government to treat any convention to which India and a foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of offences specified in that convention by notified order.
Military Offences:

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. But extradition will be possible if a soldier commits an ordinary crime, even though the offence is also regulated by the Military Penal Code, and the offender is to be tried by a court martial. However, it is noteworthy that the exception of military offences from extradition is not a fixed rule. Exceptions from it are quite common, especially in case of States which are bound by military alliances. For instance, few treaties entered into with India provide that extradition of a fugitive can be refused if the offence is purely a military offence. A considerable number of bilateral treaties and national statutes expressly prohibit granting extradition for acts punishable under the military laws of the requesting State. There are, however two conditions which limit this exception, namely, (a) that the acts charged do not constitute a crime under the ordinary laws of the requesting State; and (b) that the acts do not constitute a violation of war which would be international crimes.

This provision has also been included in treaties between India and other foreign States. Whereas, it is noteworthy that some treaties do not have any mention of this kind which clearly means that extradition cannot be refused on this ground. The rationale for this exclusion rests on the appraisal of the very offence, i.e., it is particular rather than general and affects a disciplinary aspect of an internal organization within a given State without causing any private wrong, as in the case of common crimes, or without causing any harm to the world community, as in the case of international crimes. It is also important to reassert that extradition is a means of
cooperation between States to combat common criminality and therefore such offences are excludable from that objective. States which are bound by mutual security pacts and other military agreements are, however, likely to include such offences in their treaties or in any event to engage in the practice of disguised extradition to accomplish their purposes of exchanging such fugitive offenders.\textsuperscript{32}

**Lapse of Time:**

One of the most common exceptions from extradition relates to the offences for which prosecution or punishment is barred by time, usually referred as barring by “lapse of time”, prescription or statute of limitation. A provision prohibiting extradition in such cases appears in most treaties and laws dealing with the subject of extradition. In treaties, the provision sometimes appears in the form of a prohibition of extradition where punishment or enforcement of penalty is barred by the law of the requested State.\textsuperscript{33} A remark on US practice by Michael John Garcia states, “many [States]… preclude extradition if prosecution for the offence charged or enforcement of the penalty has become barred by lapse of time under the applicable law. Under some treaties, the applicable law is that of the requested State, in others that of the requesting State; under some treaties extradition is precluded if either State’s statute of limitation has run. …when a treaty provides for a time –bar only under the law of the requesting State or only under the law of the requested State, United States courts have generally held that the time bar of the State not mentioned does not bar extradition. If the treaty contains no reference to the effect of a lapse of time neither State’s statute of limitation will be applied.”\textsuperscript{34} Section 31 (b) of the Extradition Act, 1962 stipulates that, “a fugitive criminal shall not be surrendered or returned to a foreign State if prosecution for the offence in respect of which his surrender is sought is according to the law of that State or country barred by time.” This provision has
been embodied in treaties between India and foreign States.\textsuperscript{35} Whereas few treaties make it compulsory ground for extradition and some make it optional. The European Convention on Extradition makes the same provision in its Article 10 which stipulates that, “extradition shall not be granted when the person claimed has, according to the law either the requesting or requested State, became immune by reason of lapse of true law to prosecution or punishment.” Article 4 of the Harvard Research Draft on Extradition recommended that extradition of a fugitive may be refused if he has obtained immunity from prosecution under the law of the requesting State or that of the territorial State where the fugitive has taken refuge.\textsuperscript{36}

**Non Bis In Idem:**

This rule opposes a practice which would subject a person to repeated harassment for the same act or acts. Under this rule, extradition may be refused if the offender has already been tried and discharged or punished, or is still under trial in the requested State, for the offence for which extradition is demanded.\textsuperscript{37} The Extradition Act, 1962 does not make a specific mention of it, but the rule is incorporated in Section 403 of the Criminal Procedure Code.\textsuperscript{38} In *State of Rajasthan v Hat Singh* and Ors\textsuperscript{39} the Supreme Court of India held that “Article 20 (2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. To attract applicability of Article 20(2) there must be a second prosecution and punishment for the same offence for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct. The rule against double jeopardy is stated in the maxim *nemo debet bis vexari pro una et eadem causa*. It is a significant basic rule of Criminal Law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of autrefois
acquit and autrefois convict. The manifestation of this rule is to be found contained in Section 26 of the General Clauses Act, 1897, Section 300 of the Code of Criminal Procedure, 1973 and Section 71 of the Indian Penal Code.”

In the US as well in India, the protection against double jeopardy is a constitutional right. This provision is embodied in that part of the fifth amendment of the American Constitution which provides that no person shall be subject for the same offence to be put twice in “jeopardy of life or limb”. At present the countries like Australia, Canada and UK, parts of Asia and the United States guarantee protection against double jeopardy. In fact it forms a part of International Covenant on Civil and Political Rights and European Union constitutions and numerous documents governing International Criminal Court. A case came before the Supreme Court of India in which it was held that a person cannot be convicted even for a different offence under a different statute if the facts of the conviction in both the statutes are the same. The learned Counsel for the appellant submitted that the appellant was already convicted under Section 138 of the Negotiable Instrument Act, 1881 and hence he could not be again tried or punished on the same facts under Section 420 or any other provision of the IPC or any other statute. However, it may be noticed that there is a difference between the language used in Article 20(2) of the Constitution of India and Section 300(1) of the CrPC Article 20(2) of the Constitution of India provides that, “no person shall be prosecuted and punished for the same offence more than once.” On the other hand, Section 300(1) of CrPC states, “Person once convicted or acquitted not to be tried for same office- A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which
a different charge from the one made against him might have been made under sub-
section (1) of section 221 or for which he might have been convicted under sub-
section (2) thereof.” Thus, it can be seen that Section 300(1) of CrPC is wider than
Article 20(2) of the Constitution. While, Article 20(2) of the Constitution only states
that, no one can be prosecuted and punished for the same offence more than once,
Section 300(1) of CrPC states that no one can be tried and convicted for the same
offence or even for a different offence but on the same facts. In the present case,
although the offences are different but the facts are same. Hence, Section 300(1) of
CrPC applies. Consequently, the prosecution under Section 420, IPC was barred by
Section 300(1) of CrPC.\textsuperscript{41}

This provision has been incorporated in extradition treaties. The treaty with
Poland provides that “a person shall also not be extradited if in respect of the offence
for which his extradition is requested, he has been previously proceeded against in the
requested State and convicted or acquitted with final effect.”\textsuperscript{42} Another treaty with
Spain\textsuperscript{43} stipulates that, “the extradition shall not be granted if final judgment has been
passed by the competent authorities of the requested State upon the person claimed in
respect of the offence or offences for which extradition is requested. Extradition may
be refused if the competent authorities of the requested State have decided either not
to institute or to terminate proceedings in respect of the same offence or
offences.” Some other treaties have also incorporated the same provision in them.\textsuperscript{44}
Every State has a provision against double jeopardy so that no person shall be put to
criminal trial twice for the same offence. It is a right given to the accused to keep him
away from being prosecuted again for the same offence he can take plea of it.
Nationality:

Nationals of a State, who have taken refuge in a foreign State and are accused of an extraditable crime committed within their own State, are usually extradited on demand. On the other hand, extradition of the nationals of a State who are within its jurisdiction is at present at the discretion of the State, though they are usually given up on demand.\(^{45}\) Most States are unwilling to surrender their own citizens for trial before the foreign courts. Some States like Italy, France, and Germany have adopted the principle of never extraditing their own subjects for committing grave crimes abroad. For they have adopted the rule of criminal law according to which a crime committed by their citizens in any part of the world is a crime against their own law. But some other countries like Great Britain and United States following the tradition of common law hold that crimes must be tried at places where they are committed and therefore their criminal courts have no jurisdiction over offences committed outside the State. Therefore if one of the citizens of such States commit a crime abroad, and if he is not extradited, he escapes due punishment. The Montevideo Convention on Extradition, therefore made a provision that if a State did not extradite its own citizens for trial to another foreign country for crimes committed by him there, such State was under an obligation to prosecute him for such crime.\(^{46}\)

In International Law, State may deny extradition of its national, but as a past practice, the nationality of a person sought may not be invoked as a ground for denying extradition except when the laws of the requested State otherwise provide. In other words, States sometime show their inability to extradite their nationals in view of the ban to that effect by national legislation. If such exists in national legislation, national shall not be extradited; therefore, the United Nations Model Treaty on Extradition arranges the surrender of nationals as an optional ground for the
refusal. States like USA, UK and India which do permit extradition of their nationals if there is no such bar under a treaty. This is despite the fact that Sections 3 and 4 of India Penal Law authorize the Indian Judiciary to take cognizance of offences committed by Indians in foreign countries. Nationals may therefore, be extradited if there is no national or treaty bar. In India, extradition treaties make provision in this regard. The treaty between India and France stipulates that:

“1. Neither of the contracting States shall extradite its own nationals. Nationality shall be determined at the time of the commission of the offence for which extradition is requested.

2. If, pursuant to paragraph 1, the requested State does not surrender the person claimed for the sole reason of nationality, it shall, in accordance with its laws and at the request of the requesting State, submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. If the requested State requires additional documents, such documents shall be provided free of charge. The requesting State shall be informed of the result of its request through the channels provided for in Article 9.” Some of the treaties provide that, “a person may not be extradited if he is a national / citizen of the requested party.” Other treaties also make the same provision. Whereas, the treaty with South Africa, treaty with United Kingdom of Great Britain and Northern Ireland, treaty with United States of America are in favor that the extradition shall not be refused on the ground of the nationality of the fugitive criminal. However some treaties between India and foreign States make no provision in this regard.

Now, of course reasons are given for this practice. These may be summed up as, (i) assumption of the duty of protecting nationals by the territorial State; (ii)
treating the surrender of nationals for trial in a foreign State as an indignity to itself and; (iii) considering a national judge to be the natural judge.\textsuperscript{54}

**Death Penalty:**

Since the middle of the nineteenth century there has been a tendency to limit the application of the death penalty as to persons who have been extradited. This may be accomplished by excluding from the application of the extradition treaty persons charged with crime upon whom the death penalty can be inflicted according to the laws of the jurisdiction where the charge is pending or the Government may undertake to recommend to its own authorities the commutation of the sentence to life imprisonment.\textsuperscript{55} Some extradition laws and treaties allow the requested State to deny extradition if the offence for which extradition is asked is punishable by death under the law of the requesting State, no human rights convention outlaws the death penalty; although protocols to ICCPR\textsuperscript{56}, European Convention on Human Rights\textsuperscript{57} and American Convention on Human Rights\textsuperscript{58} do so. The rationale behind refusing extradition on the ground that the fugitive is likely to incur death penalty is twofold:

1. The abolition of death penalty by a given State is predicated on humanitarian considerations and public policy, and therefore;

2. It would be abhorrent to that State to grant extradition because this would be using its processes to reach an outcome which is in violation of its laws and public policy.\textsuperscript{59} The European Convention on Extradition in its Article II provides that if the offence for which extradition is requested is punishable by death under the law of the requesting party, and if in respect of such offence the death penalty is not provided for by the law of the requested party gives such
assurance as the requested party considers sufficient that the death penalty will not be carried out.\textsuperscript{60}

Section 34 C of the Extradition Act, 1962 makes provision in this regard, which provides that “notwithstanding anything contained in this any other law for the time being in force, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence.” Mostly treaties make provision in this regard. The treaty between India and Bulgaria\textsuperscript{61} in Article 3 stipulates that “if under the laws of the requesting State the person sought is liable to the death penalty for the offence for which his extradition is requested but the law of the requested state does not provide for death penalty is a similar case, extradition may be refused, unless the requesting State gives assurances as the requested State considers sufficient that the death sentence will not be carried out.” Other treaties also have such provision. It is legal in India, although rarely used, between 1975 and 1991; forty people were executed and there was a period between 1995 to 2004 when there were no executions. However, in August 2004, a forty year old man Dhananjoy Chatterjee was executed for raping and killing a fourteen year old school girl in Calcutta. This was the first execution since 1995 and first execution in West Bengal since 1993 when Kartik Sil and Sukumar Burman were hanged and as far as author’s knowledge is concerned; there has not been any execution since then.\textsuperscript{62}

Now days States are irreconcilably divided over the morality and effectiveness of the death penalty. Hence the inclusion of the ‘death penalty clause’ in many extradition treaties allowing the requested State to refuse extradition unless
satisfactory assurances are given by the requesting State that the death penalty will not be imposed. However, even where a bilateral treaty fails to include such a provision, the requesting State should be sensitive to the convictions and values of the requested State and be prepared to give firm assurances that the death penalty will not be imposed on the extraditee. This is a subject on which the requesting State cannot in most circumstances impose its values on the requested State.⁵³

**Discrimination:**

International Law requires that extradition should be refused when its result will not be persecution by the requesting State, of the fugitive criminal, on the basis of race, religion, nationality, sex or political opinion. Article 9 of the International Convention Against the Taking of Hostages provides that States should not grant requests for the extradition of offenders under this convention if there are substantial grounds for believing that the alleged offender would be punished on account of his race, religion, nationality, ethnic origin or political opinion.⁶⁴ Article 3(2) of the European Convention provides that a person shall not be extradited if the requested party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons.⁶⁵ The United Nations Model Treaty on Extradition 1990⁶⁶ in its Article 3(b) makes the same provision. Various treaties between India and other foreign States have this provision.⁶⁷ A recent treaty with Bulgaria⁶⁸ provides that “extradition shall not be granted if the requested party has substantial reasons to believe that the request for extradition has been made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality, ethnic origin, political opinions, sex or status or that of person’s
position may be prejudiced for any of those reasons; or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights.”

Insanity and Health of the Fugitive:

Extradition may also be refused on humanitarian grounds which include fitness, health and age of the fugitive. Article 3 of the treaty with Poland provides that “where it appears to the requested State that extradition would be totally incompatible with humanitarian considerations, in particular the state of health or old age of the person sought, the contracting State shall consult to mutually determine whether the extradition request should continue.” Some other treaties also make the same provision.

Extraterritoriality:

Extradition may be refused if the offence for which extradition is requested has been committed outside the territory of either contracting party and the law of the requested party does not apply to such offence when committed outside its own territory.

Lack of Good Faith or Trivial Nature of the Offence:

“Extradition of a fugitive may not take place if it appears to the requested State that the request was not made in good faith or in the interest of justice or was made for political reasons or that it would otherwise be unjust having regard to all the circumstance including the trivial nature of the offence.” Other treaties also have this provision.

The above discussion shows that States have long accepted that extradition may be refused on certain grounds so as India and extradition treaties as well as
national extradition laws regularly contain provisions to this effect. However, in most of the times it is denied on human rights ground of the fugitive. International human rights law does not establish a right not to be extradited. On the contrary, as an instrument which enables States to obtain custody of and prosecute the alleged perpetrators of human rights violations, extradition can make a significant contribution to the fight against impunity for such crimes. Human rights law does, however, impose certain restrictions and conditions on the freedom of States to extradite, most importantly by prohibiting the surrender of the wanted person to a risk of serious human rights violations. In some circumstances, this means an absolute bar to extradition, while in others – in particular, cases involving the death penalty – it has long been established practice to grant extradition only if the requesting State gives assurances concerning the treatment of the wanted person upon return. Evolving human rights standards have fundamentally changed the position of the individual in the extradition process. Traditionally, extradition was viewed as a matter solely between States and the wanted person was deemed to have standing to oppose extradition only on the grounds that it would be in breach of the applicable inter-State agreement. This traditional view would appear to be incompatible with State’s human rights obligations. However, it still has an influence on current extradition practice.

The refusal of a country to extradite suspects or criminals to another State may lead to international relations being strained. Often, the country to which extradition is denied will accuse the other country of refusing extradition for political reasons regardless of whether or not this is justified.
References


3. For example, (i)Section 7(a), Australia, Extradition Act, 1988,  
(ii) Section 14, Austria, Law on Extradition and Mutual Legal Assistance,  
(iii)Section 5(2)(a), Bangladesh, Extradition Act 1974,  
(iv)Section 415(1)(e), Bosnia and Herzegovina, Code of Criminal Procedure, 2003,  
(v)Section 439B, Bulgaria, Code of Criminal Procedure,  
(vi)Section 46(1)(c), Canada, Extradition Act, 1999,  
(vii)Section 8(c), China, Extradition Law of 2000,  
(viii)Section 6(1)(a), Cyprus, Extradition of Fugitives Law 1970,  
(ix)Section 5, Indonesia Extradition Act, 1979,  
(x)Section 433(1), Kyrgyzstan, Code of Criminal Procedure,  
(xi)Section 490(1)(4), Latvia, Code of Criminal Procedure,  
(xii)Section 9(3)(2) Lithuania, Criminal Code, in force as of 1 May 2003,  
(xiii)Section 5(1)(a), Namibia, Extradition Act 1996,  
(xiv)Section 7(a), New Zealand, Extradition Act 1999,  
(xv)Section 5(1), Norway Extradition Law 1975,  
(xvi)Section 7, Peru, Law on Extradition 1987; Article 37, Peru Constitution,  
(xvii)Section 9(1), Romania, Extradition Law, 2001,  
(xviii)Section 394(d), Slovak Republic Code of Criminal Procedure,  
(xix)Section 530(2)(a), Slovenia, Code of Criminal Procedure,  
(xx)Section 4(1), Spain, Law on Passive Extradition,1985,  
(xxi)Section 24(a), Syria, Criminal Code,  
(xxii)Section 12(3), Thailand, Extradition Act 1929,  
(xxiii)Section 313(1), Tunisia, Code of Criminal Procedure,  
(xxiv)Section 6(1) (a), United Kingdom Extradition Act 1989,  
(xxv)Section 31(1)(a), Zambia, Extradition Act 1968,  

4. For example the extradition treaties concluded between Austria and Hungary (1976); Austria and Poland (1980) (See G.S. Goodwin-Gill, *The Refugee in
International Law, 2nd edition., Clarendon Press, Oxford, 1996, p. 148), Peru and France (1874), Peru and Belgium (1888); Peru and United States of America (1899); Peru and the United Kingdom(1904); Peru and Brazil (1919); Lithuania and the United States of America (1924); Peru and Chile (1932); France and Germany (1951); France and Australia (1988); France and Canada (1988); Peru and Spain (1989); China and Thailand (1993); Moldova and Ukraine (1993); Peru and Italy (1994); Moldova and Romania (1996); France and the United States of America (1996); Peru and the United States of America (2001, annexed to the earlier treaty); Peru and Costa Rica (2002); the United Kingdom and the United States of America (2003).


15. M.C. Bassiouni, op. cit., pp.604-605

16. Ibid, p.607


22. Article 3 of treaty with French Republic, Notified on 1 June 2007

23. (i) Extradition treaty between India and Kingdom of Bahrain, 2005, Article 5.1
(ii) Extradition treaty between India and Republic of Belarus, 2008
(iii) Extradition treaty between India and Poland, 2008, Article 5.2
(iv) Extradition treaty between India and Turkey, 2004, Article 5.2
(v) Extradition treaty between India and Spain, 2003, Article 3.2
(vi) Extradition treaty between India and Government of United Kingdom of Great Britain and Northern Ireland, 1993, Article 5.2
(vii) Extradition treaty between India and Republic of Uzbekistan, 2002, Article 6.2
(viii) Extradition treaty between India and United Arab Emirates, 2000, Article 6.1
(ix) Extradition treaty between India and Ukraine, 2008, Article 5.2


28. Some of them are as follows-
(i) Extradition treaty between India and Canada, 1987, Article 5.1(e)
(ii) Extradition treaty between India and Kuwait, 2007, Article 6.1(a)
(iii) Extradition treaty between India and United Arab Emirates, 2000, Article 6.1(c)
(iv) Extradition treaty between India and United Kingdom of Great Britain and Northern Ireland, 1993, Article 5.1(o)


30. (i) Extradition treaty between India and Canada, 2003, Article 4
(ii) Extradition treaty between India and French Republic, 2007, Article 4
(iii) Extradition treaty between India and Federal Republic of Germany, 2004, Article 4
(iv) Extradition treaty between India and Poland, 2008, Article 4.1 (d)
(v) Extradition treaty between India and Republic of South Africa, 2007, Article 3.4
(vi) Extradition treaty between India and Spain, 2003, Article 4
(vii) Extradition treaty between India and Turkey, 2004, Article 6
(viii) Extradition treaty between India and Tunisia, 2004, Article 6(i)
(ix) Extradition treaty between India and Ukraine, 2008, Article 8(c)

31. (i) Extradition treaty between India and Bhutan, 1997
(ii) Extradition treaty between India and Hong Kong, 1999
(iii) Extradition treaty between India and Nepal, 1963
(iv) Extradition treaty between India and Netherlands, 1989
(v) Extradition treaty between India and United Arab Emirates, 2000


34. [http://books.google.co.in/books](http://books.google.co.in/books) (Last Visited on 30 April 2012)

35. A recent treaty with Poland in its Article 4.1.b, which was Notified on 15 May 2008 provides that “A person shall not be extradited if, the person claimed
has, according to the laws of either the requesting or the requested State become immune, by reason of lapse of time, from prosecution or the execution of punishment.” Other treaties also make provisions in this regard.


39. AIR 2003 SC 791 (Section 26 of the General Clauses Act provides "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence (emphasis supplied)." Section 300 of the CrPC provides, inter alia, - "A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 221 or for which he might have been convicted under sub-section (2) thereof (emphasis supplied)."

Both the provisions employ the expression "same offence". Section 71 of IPC provides "Where anything which is an offence is made-up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided)


41. *Kolla Veera Raghav v Gorantta Venkateswara Rao and Anr* 2011 2 SCC 703

42. Extradition treaty between India and Poland,2008, Article 4.2

43. Extradition treaty between India and Spain, Notified on 8 December 2003, Article 9

44. (i) Extradition treaty between India and France, 2007,Article 6.1

(ii) Extradition treaty between India and Nepal,1963, Article 6
(iii) Extradition treaty between India and Bhutan, 1997, Article 5
(iv) Extradition treaty between India and Canada, 1987, Article 5.2 (b)
(v) Extradition treaty between United Kingdom of Great Britain and Ireland, India and Netherlands, 1989, Article I
(vi) Extradition treaty between United Kingdom of Great Britain and Ireland and Swiss Federal Council, 1996, Article XIII
(vii) Extradition treaty between India and Russia, 2000, Article 5.2
(viii) Extradition treaty between India and Germany, 2004, Article 8
(ix) Extradition treaty between India and United States of America, 1999, Article 6.1
(x) Extradition treaty between India and Tunisia, 2004, Article 6(f)
(xi) Extradition treaty between India and Turkey, 2004, Article 11
(xii) Extradition treaty between India and Korea, 2005, Article 3(b)
(xiii) Extradition treaty between India and Sultanate of Oman, 2006, Article 8 (2)
(xiv) Extradition treaty between India and Kuwait, 2007, Article 6.2(a)

49. Extradition treaty between India and France, 2007, Article 5
50. (i) Extradition treaty between India and Belarus, 2008, Article 6.1(a)
(ii) Extradition treaty between India and Mongolia, 2004, Article 5.1(1)
(iii) Extradition treaty between India and Poland, 2008, Article 4.1(a)
(iv) Extradition treaty between India and Russia, 2008, Article 5.1(1)
(v) Extradition treaty between India and Uzbekistan, 2002, Article 5.1(1)
51. Extradition treaty between India and South Africa, 2007, Article 5
52. Extradition treaty between India and United Kingdom of Great Britain and Northern Ireland, 1993, Article 4
53. Extradition treaty between India and United States of America, 1999, Article 3
58. Additional Protocol to the American Convention on Human Rights to Abolish Death Penalty, 8 June 1990, OASTS No.73 ,29, ILM 1447 (1990)
60. European Convention on Extradition, 13 December 1957, 597 UNTS 338
61. Extradition treaty between India and Bulgaria, 2008 (Treaty with Poland 2008, Article13; Treaty with Ukraine,  2008, Article 16 and Treaty with Belarus , 2008, Article 15; also make the same provision.)
67. (i) Extradition treaty between India and South Africa, 2007, Article 3.2
(ii) Extradition treaty between India and Hong Kong, 1999, Article 6.1(b)(c)
(iii) Extradition treaty between India and Tunisia, 2004, Article 6(a)
(iv) Extradition treaty between India and Korea, 2005, Article 3(d)
(v) Extradition treaty between India and United Kingdom of Great Britain and Northern Ireland, 1993, Article 9.1
68. Extradition treaty between India and Bulgaria, 2008, Article 3.4
69. Extradition treaty between India and Poland, 2008
70. (i) Extradition treaty between India and France, 2007, Article 7.5
(ii) Extradition treaty between India and South Africa, 2007, Article 4.4
(iii) Extradition treaty between India and Hong Kong, 1999, Article 6.4(d)
(iv) Extradition treaty between India and Tunisia, 2004, Article 6(a)(h)
71. (i) Extradition treaty between India and Bulgaria, 2008, Article 4
(ii) Extradition treaty between India and France, 2007, Article 7.2
(iii) Extradition treaty between India and Turkey, 2004, Article 9
(iv) Extradition treaty between India and United Arab Emirates, 2000, Article 6.2(c)
72. Extradition treaty between India and Canada, 1987, Article 5.1(b)
73. (i) Extradition treaty between India and United Kingdom of Great Britain and Northern Ireland, 1993, Article 9.1.c (i),(iii)
(ii) Extradition treaty between India and Germany, 2004, Article 5
(iii) Extradition treaty between India and Hong Kong, 1999, Article 6.4