CHAPTER III

PROBLEMS OF DEFINITION
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Since the middle of the eighteenth century the practice of extradition has gradually developed. Till date, today there are some 350 extradition conventions, all bilateral in nature on the basis of these bilateral treaties law of extradition has developed. These conventions regulate the various phases of extradition procedures and in most instances contain an article concerning political offenses. This circumstance, combined with the fact that political offender are numerous makes the problem of political offenders in extradition one of current importance. The recent political uprising, political refugees or political criminals in Spain, Cuba, Italy, Russia, France and Germany come readily to mind.

Historically extradition was the means resorted to for the surrender of political offenders. These were the persons guilty of crimes, which included, treason, attempts against monarchy, or the life of a monarch and even contemptuous behavior towards the monarch. The first known European treaty which dealt with the surrender of political offenders was entered in 1174 between England and Scotland. It was followed by treaty in 1303 between France and Saovy. In the XVIIth century Hugo Grotuis gave the practice, a theoretical frame
work, which is still the cornerstone of classic extradition law. Until the nineteenth century extradition constituted a manifestation of co-operation between the family of nations as attested by various alliances in existence between the reigning families of Europe. ¹

According to Oppenheimer, before the French revolution the term political crime was unknown in both the theory and the practice of law of nations, and the principle of non-extradition of political criminals was likewise non-existing. Moreover, writers in the sixteenth and seventeenth centuries did not at all object to such a practice on the part of the state, on the contrary, they frequently approved of it. It was indirectly due to French revolution that matters gradually underwent a change, since this event was the starting point for the revolt in the nineteenth century against despotism and absolutism throughout the western part of European continent. It was then that the term political crime arose and Article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home for the cause of liberty. On the other hand, the French emigrants who had fled from France to escape the reign of terror, found an asylum in foreign states. ²

Historically, the non-extradition of political offenders is a comparatively recent development in international law

¹ Bassiouni, M.C: International terrorism and political crime (edited), Charles Thomas, USA, 1975, p.398.
Early extradition cases usually concerned the surrender of persons sought for political offenses; and the few extradition treaties entered into prior to the 19th century were concluded exclusively or primarily with a view to the surrender of political offenders.  

The medieval State, whose interests and personality were in most instances identified with those of the reigning dynasty, was primarily interested in defending the political system, and sought above all to punish those who endangered it. The then existing means of communication made it difficult for criminals to escape even to neighboring countries, and once they succeeded in so doing, it was equally troublesome to bring them back. The country where the act was committed was seldom sufficiently concerned with the desirability of bringing common criminals to justice to put the machinery in motion whereby such criminals surrender might have been obtained from the State of refuge. Nor had the country of refuge any keen interest in handing over the fugitive: there was little, if any, conscious feeling of the existence of an international community which may have an interest in the suppression of common crimes; hence there was no incentive to cooperate to that end.  

There was a complete reversal of attitude in this respect

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3. Moore, J.B. 'Extradition', Volume 1, 1891 pp. 303-326

in the early part of the 19th century, when the making of extradition treaties really got under way, and from the turn of the century States began to refuse to extradite persons sought for political offences, and this practice rapidly became general.

While various reasons have been assigned in explanation of this change, and several nations claim the distinction of having initiated the practice of non-extradition of political offenders, it seems that the practice may be explained by two main factors:

(i) The evolution of political institutions following the French Revolution;

(ii) The growing consciousness of the interdependence of nations following the Industrial Revolution.

As to the first, the more liberal, representative forms of government which gradually replaced the absolutistic, dynastic governments of the Middle Ages, caused public opinion and, under its pressure, the various branches of the governments themselves, to look from a different angle at acts committed with a political motive or in furtherance of a political objective.

As to the second, the appearance of the steam engine and the increasing rapidity of the means of transportation made escape from one country to another easy and convenient. With the gradual realization of the interdependence of States and of the existence of an international community, extradition shifted its basis and aim and, instead of serving as a device
in the furtherance of a policy, it became an instrumentality of the more effective administration of justice and a method of cooperation among States in the suppression of crime.

The French revolution of 1789 and its aftermath started the transformation of what was the extraditable offence par excellence, to what has since become the non-extraditable offence par excellence. In 1833 Belgium became the first country to enact a law c i the non extradition of political offenders and by the beginning of the nineteenth century almost every European treaty contained an exception for political offenses. By 1875, the practice was sufficiently established that the determination of what constitutes a political offence was reached in accordance with the laws of the requested state. This development gave rise to the increase role of the Judiciary in the practice, which except for England and Belgium had played no part in the process. The political offence exception is now a standard clause in almost all extradition treaties of the world and is also specified in the municipal laws of many states.\(^5\)

According to whiteman.\(^6\).... 'Most extradition laws and treaties provide that extradition need not, or shall not be granted when the acts with which the accused is charged constitute a political offences or an act connected with political offence. G nerally, a distinction is drawn between "purely" political offence e.g. treason, sedition, and

\(^5\) Bassiouni. M.C., op. cit. p-399

\(^6\) Whiteman, Digest of International law, volume 6, 1968, pp.-799-800.
"relative" political offenses or offenses of "political character" e.g. murder committed in the course of a rebellion, although generally both types are excepted from extradition..... In the case of laws and treaties which contains a list of specific offenses for which extradition shall be granted, exception of 'purely' political offenses is usually considered unnecessary since such offenses may be excepted by merely not being included in the list. However, provision is often made regarding 'relative' political offenses"

Even though, widely recognized, the term political offence is Seldom defined, in municipal legislation and judicial interpretations, which have been the principal source for its significance and application. Thus it eludes a precise definition, with no clear cut statement of policy concerning the treatment to be accorded to political offenders. A matter of uncertainty and doubt prevails because of lack of agreement as to what constitutes a political offence.

The term political offence in extradition covers a broad interpretation. On one hand it refers to purely political offenses that is offenses against the political organization and governments of a state, injuring only public rights, and containing no crime element what so ever, and secondly, it refers to what are commonly termed relative political offence. i.e. offenses in which a common crime is either implicit in or connected with the political act. The problem arise with respect to the latter, as pointed out by M.De Vischer:
"The difficulty connected with political offenses arise 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 political offence, i.e. one not accompanied by any offence against the ordinary law; but in connection with extradition the conception is frequently extended to cover ancillary offenses, i.e. offenses against the ordinary law connected with political acts or events. 7

Harvard Research draft convention on extradition 8 attempted to define more specifically the meaning and application of political offence. After recognizing that the requested state may decline to extradite a person whose extradition is sought either for an act which constitutes such an offence or with the object of prosecuting him for such an offence. The term political offence as used in the convention includes, treason, sedition and espionage, whether committed by one or more persons; it includes all offenses connected with the activities of an organized group directed against the security of governmental system of the requesting states and it does not exclude other offenses having a political objective. The draft recognizes that extradition may be declined for military offenses, defining a military offence as punishable only as violation of a military law or regulation.

and which would not be punishable as a violation of a civil law if the military law or regulation did not exist. The draft also admits the possibility of a reservation as to fiscal offenses defining them as, offenses in connection with the customs or revenue law of a state, and not involving misuse of public funds.\(^9\)

The principle of non-extradition of political offenders was gaining ground by the firm attitude of Great Britain, Switzerland, Belgium, France and United States the principal later conquered the whole world but difficulty arose with the concept of political crime. According to Oppenhiem many writers consider a crime 'political' if committed from a political motive, others call 'political' any crime committed for a political purpose. In re COLMAN 1947. \(^10\) The Paris court of appeal decided that a fugitive from Belgium accused of intelligence with the enemy and carrying arms against Belgium could be extradited on the ground, that such offenses were common and non political crimes in character. \(^11\)

A unique extradition case for which there was no precedent in International law was presented on January 15th, 1920, when the supreme council, representing the allied and associated powers, addressed an official demand to the government of Holland calling upon it 'to deliver in to hands

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\(^10\) Colman case. Annual Digest of International Law, No.67, 1947, pp.125-140

William Holenzollern, former Emperor of Germany in order that he may be put on trial" The demand for extradition had its origin in Article 227 of the treaty of Versailles, which stated that "the Allied and associated powers publicly demanded William of Hohenzollern, former German Emperor, for a supreme offence against international morality and the sanctity of treaties". Provision was made for a special tribunal to try the accused. In its decision the tribunal was to be guided by the highest motive of International policy, with a view to vindicate the Solemn obligation of international undertakings and the validity of International morality. A request for surrender of the Emperor was to be addressed to the Government of Holland.\textsuperscript{12}

In its reply the Dutch government called attention to the fact that Holland was not a party to the treaty of Versailles, and that in consequence the case must be judged by the municipal laws of the state and its national traditions. The decision reached was that neither "the constituent laws of the kingdom, which are based upon the principles of law universally recognized, nor the agelong tradition which has made this country always a ground of refuge for the vanquished in international conflicts" permitted the government of Holland to accede to the request made upon it.\textsuperscript{13}

Some writers call crime to be political when committed


\textsuperscript{13} Ibid. pp 395-396
with a political purpose, "The FORT case in Germany 1921 where two persons who were accused of having murdered the Spanish Prime Minister Dato in 1921, and had fled to Germany, were extradited, although the German Spanish treaty precluded extradition for political offenses, on the ground that the alleged murder was an act of revenge, possibly arising out of a political motive, but not committed with a view to achieving a political object. There are some other writers which recognise a crime only as political when committed both from a political motive and at the same time for a political purpose, and lastly even some writers confine the term political crime to certain offenses against the state only, such as high treason and the like. Upto present day all attempts to formulate a satisfactory conception of the term have failed, and the reason for the thing will, probably for ever exclude the possibility of finding a satisfactory definition. Starke says different criteria have been adopted for defining the political crime

(a) The motive of the crime;
(b) The circumstances of its commission;
(c) That it embraces specific offences only for example, treason, or attempted treason. A number of bilateral treaties after the second world war, including the paris peace treaty

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1946 with Italy, Romania, Bulgaria, Hungary and Finland, have provided for the surrender of quisling, persons guilty of treason and so called collaborationist with the enemy occupying authorities.

(d) The act is directed against the political organization as such of the requesting state.\(^{16}\)

Two important cases need to be mentioned here, which came before the English courts.

In, In Re CASTIONI 1890, a Swiss subject, charged with willful murder of a member of the states council of the Canton of Ticino who was arrested in England at the request of the Swiss Government. The extradition was opposed on the ground that the act was committed in course of an uprising against the government of the Canton and, therefore, a political offence for which extradition is barred under section 3 of the British extradition act. Reversing the Mejisterate decision, the court of Queen bench discharged Castioni. In considering the question of what constitutes a political offence, the court said: "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 acts of violence of a political character with a political object, and as a part of the political movement and rising in which he was taking part".\(^ {17}\)

It was held that an offence has a political character


\(^{17}\) For a detail analysis of this case see, Piggot, "Extradition", 1910, pp-50 56
if it was "incidental to and formed part of political disturbances", i.e. it was committed" in the course of "and" in furtherance of" the political disturbance.\textsuperscript{18}

In contrast with the above decision, the same British Court rendered and opinion In In Re MENUIER 1894, a French anarchist, charged with wilfully causing two explosion in France was arrested upon the request of French government. The extradition was opposed on the ground, inter alia that the act was of political character. Application for the Habeous Corpus was refused. The court saying "it appears to me 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 outside or the other in pursuance of the object, it is 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 by the evidence, namely the party of anarchy, is the enemy of all governments. Their efforts are directed primarily against general body of citizen. They may, secondarily and incidentally, commit offence against some particular govenment; but the opinion that the crime charged was not a political offence within the meaning of extradition act" \textsuperscript{19}

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\textsuperscript{18} Green L. C. International law through the cases. London Institute of world affairs,1970, pp 412-414
\textsuperscript{19} Oppenhiem. Op cit., pp 418-421
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In another case"R V GOVERNOR OF BUXTON PRISON, EX. P. KOLEZYNISKI", 1955, the court further extended the meaning of political crime, "holding in effect that offences committed in association with a political object e.g. anti-communism, or with a view to avoiding political persecution or prosecution for political defaults, are political crimes notwithstanding, the absence of any intention to over throw 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". 20

In this regard several decision by municipal courts indicate that extradition will not be denied for actual offenses, including crimes of violence having no direct and close relations to political aims although committed in the course of political controversy or by persons politically opposed to the requesting government. In the case SCHTRAKS. V. GOVERNMENT OF ISRAEL, 1964 Judge viscount Radchiffe upholding the view, that to be a political offence, the relevant act must be committed in the course of political opposition to a government or in the course of political disturbances. In this connection the question of war crimes give rise to difficulties, to some extend the issues involved are matters of degree, insofar as a war crime may or may not transcend its

political implication. International law leaves to the state of asylum, the sovereign right of deciding, according to its municipal laws and practice, the question whether or not the offence which is the subject of request for extradition is political crime.\textsuperscript{21}

So far all attempts to formulate a satisfactory and generally agreed definition of the term have failed. The difficulty lies in large part in there being no general agreement as to what degree of politicisation is needed in order to classify an act as 'political', or indeed whether the act is to be regarded as political at all. What in the eyes of one state is a political movement seeking to achieve political ends within a state and such deserving a protection may be in the eyes of another, a band of criminals deserving punishment.

In spite of now universally acceptance of the principle of the non extradition of political offences. The application of this practice may raise very delicate problems due to the differentiation in determining what act constitute a political offence. No satisfactory and generally accepted definition has been found yet. An attempt is made to solve this thorny problem by defining the acts committed by individuals and groups.

There are two types of political offences

(i) Purely political offence

(ii) Relative political offence

In this regard the difference in approach in the U.K. and

\textsuperscript{21} Ibid. p.355-356
the U.S.A. to the characterisation of offences committed by
the 'Provincial Irish Republic Army' in Northern Ireland and
other parts of U.K. is illustrative. For U.K. the I.R.A.
members have committed terrorists offences which are crimes
under local law, while the U.S. Courts have denied their
extradition in several cases as being wanted for political
offences. 22

Today the political offence exception forms part of every
extradition treaty and statute between democratic countries
but its character as a binding rule of customary law is at
least debatable. Treaties and statutes confine, themselves to
excluding "political offences" or offences of a political
character and "connected offences" from extradition leaving
the classification of an offence as "political" to the
requested state.

Since a political offence will also be an ordinary crime
at the same time for in instance, crime such as murder, arson,
thief and the like, the practical difficulty in any particular
case is to determine whether the alleged political element is
sufficient to give the ordinary crime a sufficient political
colour to ensure to the preparator protection from extradition.
This balance is, in the first place, to be struck by the state
from which extradition is requested, in applying its laws as
to the non-extradition of political offenders. 23

22 The extradition of McMullen. American Journal of International Law,

Lesser problems are posed by absolute or "purely" political offences e.g., treason, espionage, sabotage, defined as offences aimed directly and exclusively against the state, its Organs. The scope of the so-called "relative or related" political offences entails much greater uncertainty. Relative political offences are common crimes assimilated to political offences because the preparator pursued a political purpose or was politically motivated or it was committed incidentally to or in the course of and in furtherance of a civil war, insurrection or commotion.24

The Purely Political Offence:

The purely political offence is usually directed against the sovereign or a political subdivision thereof, and constitutes a subjective threat to a political, religious and racial ideology or its supporting structures or both without, having any of the elements of a common crime. The conduct is labelled a crime because the interest sought to be protected is the sovereign. 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 in the case of common crimes. Such laws exist solely because the very political entity, the state, criminalized such conduct for its

self-preservation. It is nonetheless deemed a crime because it violates positive law, but it does not cause a private wrong.

Treason, sedition and espionage are offenses directed against the state itself and are, therefore, by definition, a threat to the existence, welfare and security of that entity, and as such, they are purely political offenses. A purely political offense, when linked to a common crime, loses its characteristic. This is illustrated in the following case.

In 1928, Germany sought the extradition from Guatemala of RICHARD ECKERMANN for the crime of murder. It was charged that in 1923 Eckermann, a prominent member of secret organization of former German Officers in Germany known as the Black Army whose purported purpose was to protect Germany in case of attack by its neighbours and to suppress communism and Bolshevism in Germany. When one Fritz Beyer tried to join the Black Army, the other members thought him to be a spy and Eckermann gave directions to a subordinate as a result of which Beyer was shot, killed and buried. The crime was not discovered until more than a year later. The subordinate and four others who took part were tried and imprisoned, but Eckermann escaped to Mexico and then to Guatemala. The case eventually came to the Supreme court of Justice of Guatemala, Eckermann claiming that the crime was political, particularly in the context of the abnormal conditions which prevailed in Germany after World War I as a result of social, political and economic upheavals. The Guatemalan constitution provided that

"extradition is prohibited for political crimes or connected common ones."\textsuperscript{26} In 1929, the court held that extradition should be granted. It stated

\ldots That the fact that Eckermann formed part of a patriotic society secretly organized to cooperate in the defense of his country cannot in any way tie the character of political crimes to those committed by its members.... Universal law qualifies as political crimes sedition, rebellion and other offenses which tend to change the form of government of the persons who compose it, but it cannot be admitted that ordering a man killed with treachery, unexpectedly and in an uninhabited place, without form of trial or authority to do it, constitutes a political crime.\textsuperscript{27}

The Relative Political Offence:

The concept of purely political offence is generally agreed upon and causes no difficulty. It is the relative political offence which is more complicated, because it is neither wholly political, nor yet wholly a crime, the question arises: where shall we draw a line? What are the elements which should be taken into consideration in making the decision and what is the relative weight which should be given to each? Should only the objective factor be considered, such as the nature of right which has been injured, or the actual extent of injury, or should subjective factors also be taken


\textsuperscript{27} Ibid. p. 408.
into account, i.e., the motive of the accused and the purpose which he wished to achieve? Can a general principle be laid down according to which all cases may be judged, or are the various possibilities so diverse that no general principle can be devised to meet all cases? Who is to make the decision? 28

The relative political offense can be an extension of the purely political offense, when in conjunction with the latter, a common crime is also committed or when without committing a purely political offense, the offender commits a common crime prompted by ideological motives. While the purely political offense exclusively affects the public interest and causes only a public wrong, the relative political offense 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 offense is at best 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 offense 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 attending the commission of the crime and the factors and

forces which may have led the actor to such conduct render the motivation of the actor complex but not the offense.25

The uncertainty as to what constitutes a relative political offence effects the extradition process was much as the rule has grown up that political offender shall not be extradited. In the early practice this problem did not arise. This was because at first extradition was considered in a light different 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 expense required to extradite them, it was the political offender who was the most dangerous, and whose surrender was to the common interest.30

Relative political offence have been commonly classified into connected and complex offenses. Those complex cases of crime in which the political offence comprises at the same time an ordinary crime such as murder, arson theft and the like but some categorically deny such complex crime as political but this opinion is wrong, since many political criminal have been extradited; inspite of this many complex crimes although the deed may have been committed from a political motive or for a political purpose but are not

30 Deere, op. cit. p-249
considered a political crime. For instance the case of MUBARAK ALI AND THE GOVERNMENT OF INDIA 1952. It was held with regard to a request for extradition for forgery that the court, could not inquire into the allegation that the case had political implication 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 a common law crime 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 ideologically motivated offender is not likely to commit a single or isolated criminal act. Most likely, the conduct will encompass several lesser included offenses or bear upon other concluded but related offense. These multiple offenses may either arise out of a single criminal act, a bomb placed in a plane which kills ten persons and destroys the plane will produce at least eleven different crimes or from the same criminal transaction, an elaborate scheme involving several different crimes related by the single design or scheme of the actor. These related offense technically may be considered included offenses whenever the elements of the higher degree offense are predicated on some or all of the elements of the lesser degree offense, in which case the existence of the lesser included offense would only be

\[\text{\textsuperscript{31} Oppenheim op-cit. p-708}\]
technical and not real. Other offenses deemed related but not included may be committed only by reason of the actor's design or by the necessity of the scheme, such as when one crime is only a stepping stone or a means to reach the ultimate act sought to be committed. Lesser included offenses are vertically related in that the elements of the lesser are included in the higher offense. Other related offenses are at best horizontally linked but only whenever the ac or's design relates them by reason of this scheme and not because of the interrelationship between the elements of the various offenses charged. This problem more than any other causes wide disparity in the application of the relative political offense in municipal laws and judicial decisions and, therefore, preclude uniform international practice. \(^\text{32}\)

However, three factors are taken into account:

1. The degree of the political involvement of the actor in the ideology or movement on behalf of which he has acted, his personal commitment to and belief in the cause (on behalf of which he has 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 in (1) 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

\(^{32}\) Gutteridge. "The notion of political offences and the law of extradition". British Year Book of International Law, Volume 31, 1954, pp.-171-173
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 is "sui generis". A dominant factor which emerges in the practice of all states recognizing the relative political offenses as falling within the purview of the political offense 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. 33

The sympathy of the liberal governments with political refugees received a sharp check as the result of numerous assassination of rulers during the second half of the nineteenth century. Murder committed in the course of a political uprising was obviously different from the futile murder of the head of a state by an irresponsible individual. Three practical attempts have been made to deal with such complex crimes.

The first attempt was the enactment of the 'attente clause' by Belgeim in 1856. The rule that the political offences are not extraditable to subject to an exception which is contained in the attente caluse; that murder of the head of a foreign state or a member of his family is not be considered a political crime. Its necessity was first time felt in Belguim following the case of icquin in 1854 and thus the difference of interpretation concerning the extradition law of 1833 was also clearly demonstrated in this case in 1855-56

33. Ibid. P.-175.
France demanded from Belgium the extradition of Jules and
celestin Jacquin, French man accused of attempting to blow up
the train carrying Napoleon III from Lille to Calais. Jules
was discharged on technical grounds, but the case of CELESTIN
came before the Court of Appeals at Brussels which held his
offence political by reason of the political character of the
person against whom it was directed. The court of cassation
annulled this decision, holding that Jacquin act was not
political, nor was it connected with political offence. The
court of Liege agreed with the court cassation. The Belgium
Government was required by law to get the opinion of the court
of Brussels, and this court, passing upon the question a
second time, upheld its previous decision. Although this
opinion was only advisory and not binding upon the government,
the contrary decision of the court of cassation created an
embarrassing situation. Realising this French Government
withdrew its demand.\footnote{Whiteman digest of International Law, 1968, pp.-812-819}

Consequently, Jequin was not extradited, but the Belgium
Ministry immediately took steps to modify the extradition law
so that similar offenses arising in the future should not be
exempt from extradition. The government draft, submitted to
the Chamber of Deputies, was finally adopted after a long and
bitter debate. It was as follows.

"An attempt (attentat) against the person of the head of
a foreign government or against the members of his family,
when this attempt constitutes the act of murder, assassination
or poisoning, shall not be considered a political offense or an act in connection with a political offense".  

This clause, known as the Belgium or attentat clause was soon widely adopted. Belgium and France incorporated it in all their extradition convention, except those in which the other contracting party refused to permit its insertion. It was incorporated in the extradition laws of Luxemburg, 1870; Russia, 1912; and Sweden, 1913. Its first appearance in a United States convention was in 1882, and it has been included in all United States conventions since 1909, except the recent one with Germany (1930). Nine German conventions, concluded before 1918, which contained this clause. Until 1896 Italy refused to incorporate it in her conventions, on the ground that it would conflict with her national law which recognized an offense against the sovereign as political. Its present inclusion in Italian conventions without any change in the penal law presupposes the acceptance of the point of view that denomination of an offense as political, for repressive of extradition. 

Switzerland and Great Britain are two important states which have found it impossible to accept the clause, although they are in sympathy with its purpose, switzerland adheres to the theory of predominance which is based on the principle that any common offense can have a political character. Hence one cannot categorically deny a political character to certain

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35 Deere op. cit. p-253
offenses, as is done by the attentat clause. Great Britain refuses to accept the attentat clause because it conflicts with British law, which states that offenses against the sovereign are, first of all, treason, and hence political.

Apart from the Swiss and the British, there have been others who have found fault with the absoluteness of statement of the attentat clause, Lamasch criticized it as being at the same time too broad and too narrow. It is too broad in that it does not except the killing of a sovereign or a member of his family in open battle, or by a government de facto now overthrown. It is too narrow in that it destroys the right of asylum only for assassins of sovereigns, while it should deny a political character to every assassination regardless of the circumstances or character of the victim. 37

Modifications of the clause are also found in recent extradition laws. The Finish law meets the criticisms which have been directed at the clause by omitting all reference to sovereigns or heads of states, and providing that murder or attempt at such, not committed in open battle, shall not be considered a political offense. The new German extradition law 1929 provides that extradition is permissible for a willful crime against human life except in battle or open combat, a provision which has been incorporated in a convention with the United States. The liberty of these provision depends of course, upon:the interpretation which will be given as "open battle", "battle", and "open combat". The recent French

37 Ibid. p-253
extradition law (1927) contains no article corresponding to the attentat clause.\textsuperscript{38}

The criticisms directed against the attentat clause have all been theoretical in nature. In practice no question has arisen concerning it, and since 1956 all states have shown themselves willing and able to cooperate in the surrender of persons accused of assassination. If the HARTMAN CASE 1879 constitutes an exception as some think it was not the fault of the attentat clause. The detail of the case is:

A mine which Hartmann was alleged to have placed, in December, 1879, on the railroad running from Moscow to Koursk, exploded and caused a passenger train to be overturned. Soon thereafter the police at Paris arrested an individual calling himself Mayer, but whom the Russian ambassador claimed to be Hartmann and whose extradition he asked on the charge of having intentionally damaged the railway and imperiled the passage of trains. Popular interest was aroused and some claimed that Hartmann was a Nihilist whose purpose had been to kill the Emperor by blowing up the Imperial train. The Russian Government denied any political character to the charge against Hartmann. The French Government did not pass upon this question, however, but refused the extradition on other grounds failure to establish identity and insufficient proofs of guilt. Francis Wharton considered this as merely a pretext, and thought the French government really refused the extradition because it did not want to enter into a struggle

\textsuperscript{38} Gutteridge. Op. Cit., p.-188
against the Socialist and Anarchist parties who maintained that the assassination of the Czar must be considered part of an insurrectional movement which one was obliged to consider political.\(^3^9\)

Another attempt to deal with complexe crimes without detriment to the principle of non extradition of political criminals was made by Russia in 1881. Influenced by the murder of the Emperor Alexander II in that year. Russia invited the powers to hold an international conference at Brussels to consider the proposal that henceforth no murder, or attempt to murder, ought to be considered as a political crime. But the conference did not take place since Great Britain as well as France, declined to take part in it.\(^4^0\)

Due to lack of unanimity among the members of International Community no effective measures could be taken to combat complex crimes. In 1892 another attempt by Switzerland was made on a purely new basis. In that year Switzerland enacted an extradition law, Article 10 of which recognises the non-extradition of political criminals, but at the same time, lays down the rule that political criminals shall nevertheless be surrendered, in case the chief feature of the offence wears more the aspect of an ordinary than a political crime, and that the decision concerning the extraditability of such criminals rests with the Bundesgericht, the highest swiss court of Justice. The institute of

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\(^3^9\) Ibid. p-189.

\(^4^0\) Oppenheim, op. cit. p-709
International law at its meeting at Geneva in 1892 adopted four rules concerning the extradition of political criminals. 41

(A) The Extradition in English Law: In English law extradition requires authorisation by an act of Parliament, otherwise it would constitute a serious offence under the Habeous Corpus amendment act 1697. The most important act 1870 which empowers the crown to make orders in council to give effect to extradition treaties. There are separate acts dealing with extradition to or from common wealth countries, for instance fugitive offender act 1967 and Ireland backing of warrants Republic of Ireland at 1965. Such extradition is not covered by treaties but only by parallel municipal legislation in the United Kingdom and the other countries concerned Under the English law of 5.3(I) of 1870 act a fugitive criminals "shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magisterate or the court before whom he is brought on Habeous corpus, that the requisition for his surrender has in made with a view to try or punish him for an offence of political character". The act itself though in keeping with contemporary practice in matters of extradition of political refugees made no attempt to define a political offence. The task of giving a definition has been left to courts. 42

41 Ibid. pp-709-710

To cases needs to be mentioned hear. IN RE CASTIONI 1891 the British court defined it as an act of "done in furtherance of, done with the intention of assistance, as a sought of court act in the course of acting in a political matter, political rising or a dispute between two parties in a state".

In, in RE MEUNIER 1894 the court said "there must be two or more parties in the state each seeking to impose the government of their choice on the other.

In other words, for an offence to be political in the eyes of English law it must be committed in the course of a political disturbance during which two or more parties in the state are contending and each one of them trying to impose the government of its choice on the other and it must be pursuance of that object. Difficulties have arisen in the case of refugees from Eastern Europe wanted for counter revolutionary activities, whose acts formally classified as ordinary crimes were directed against the government but not in pursuance of political disturbance. If it is policy to grant such persons asylum the English law on the subject is outmoded, especially as the burden of proving that an offence is political is an accused Harikins J. in Re Castioni made it clear that his definition was not intended to be exhaustive, and the court of appeal in In RE KOLEZYNKSI 1954 the British Court extended the meaning of the political offence to include not only the

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43. Castioni case 1891.

44. Meunier Case 1894, cited in 2QB 415, 419 N-9, p-523
political object to avoid political persecution or prosecution for the political deviation responded accordingly and modified it sufficiently to permit refugees to establish that although they were not involved in political disturbance, there extradition was sought for a political purpose. They were accordingly released. A fugitive is not permitted to argue that the requesting state is not acting in good faith, nor may be argue that if surrendered for a common offence, he will be tried for a different offence of a political character, since the principle of speciality to which effect is given in the treaties and in the act, covers this point. 45

In the case of 'SCHTRAKS V. GOVERNMENT OF ISRAEL 1955 House of Lords argued that he was at "adds" with' the requesting government of the country, and that the offence for which surrender is claimed was committed in furtherance of a political motive. A fugitive is not by strict rules of evidence in proving such, matter. Lord Radcliffe, refusing to define a political crime, stated that the idea which lies behind the phrase offence of a political character is that the requesting state seek extradition for reasons other than the enforcement of the criminal law in its ordinary aspect. Even in a case of political disturbance, if the requesting state is intent only to enforce the law there would be no reason to refuse extradition.46

46 Ibid. pp-800-801
(B) **Extradition Law of United States.**

There is no statutory provision regulating extradition for political offences, although political offences are normally excluded by the terms of the treaties entered into by the United States. If a fugitive claims that the offence for which his surrender is requested is of a political character, the issue is first considered by the committing judge. If he finds in favour of the fugitive, the fugitive is released, and that is an end of the matter. If the judge holds that the offence is not of a political character, this decision may be reviewed on an application for habeas corpus. If this application is unsuccessful, the Secretary of State has a final discretion whether to review the findings of the committing judge, including the political nature of the offence.

While this procedure is generally followed, it must be realised that extradition treaties entered into by the United States are not uniform. The extent of the judicial power depends in part, therefore, on the actual wording of the treaty with the requesting state.

In *RE EZETA*, the District Judge had a consider the effect of a provision in the treaty with Salvador that "the provisions of this treaty shall not apply to any crime or offence of a political character". It was his opinion that such a prohibition extended to the action of the committing

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magistrate", and terminated "his jurisdiction when the political character of the crime or offence is established. In other words, he has no authority to certify such a case to the executive department for any action whatever". It was suggested, on the other hand, that the effect of terms similar to those contained in the Treaty between the United Kingdom and the United States of 1889 where a fugitive should not be surrendered, "if the offence in respect of which his surrender is demanded be one of a political character". Would be to withdraw the issue from the courts altogether and place the obligation of complying with the treaty on the Secretary of State in whose hands the ultimate discretion to surrender rested.48

While this suggestion may not be completely accurate, it does demonstrate the possibility that different treaty provision might produce a different relationship between the judiciary and the executive. Whatever might be the precise effect of the treaty between Britain and the United States, it does not limit the jurisdiction of the American courts in the way that the Salvador treaty restricted it. Even if the crime for which surrender was requested by the United Kingdom was of a political character, it is the surrender that is prohibited; the offence itself does not fall outside the treaty.49

Even when the courts have decided that the offence for

which surrender is requested is not of a political nature, the Secretary of State has a power to review their finding quite apart from any allegations of bad faith on the part of the requesting state. In 1908 the Russian Government requested the extradition of one RUDEWIZ who sought to establish that the crimes with which he was charged were political offences. The Commissioner who heard the proceedings found against the accused and transmitted the record of the hearing to the secretary of State. It appeared that the fugitive had been a member of "Social Democratic Labour party", members of which at a local meeting had recommended the burning of certain premises and the killing of three persons. In the circumstances, the Secretary of State declined to surrender Rudewitz. The murder and arson were clearly political in nature, while additional acts of robbery committed in the course of the other offences must be considered incidental to those offences unless evidence could be produced separately identifying the fugitive with the robbery. No such evidence had been forthcoming.50

In the case of BURLEY 1876 51 the US asked his extradition from Canada on charges of piracy and robbery, assault with intent to commit murder. Burley and others who, unarmed and dressed as civilian had boarded the American steamboard the "Philo Parsons" later seized the vessel and

50. Hackworth Digest of International Law, volume 4, p.49

took property from the owners. Burley claimed his act had a beligerent character and should a manifesto signed by Jefferson Davis which stated that the expedition was ordered and undertaken under the authority of the confederate states and that the confederacy assumed the responsibility for the officers of the expedition. The justice held, however, that Burley should be extradited, for ever thought it was conceded that "he was an officer in the confederate service", nevertheless this could not protect him from prosecution on account of acts contrary to legitimate warfare. It was agreed that the members of the expedition had violated neutral territory and the rights of neutral.\textsuperscript{52}

It is only in recent years that the United States Courts have 'paid much attention to the question of defining a "political offence". Although there were a number of cases in which it was necessary to decide whether or not a particular offence was political. There was little discussion of what constituted a political offence. IN KARADZOLE V. ARTUKOVID 1957 it is interesting to note that the Circuit Judge referred at length to the English cases and judgments in which the question of definition was tackled. And, on a subsequent rehearing of the case, a U.S. Commissioner ventured to comment that "political character" or political offence had not been satisfactorily defined. "Generally speaking it is an offence against the government itself or incident to political uprisings. It is not a political offense because the crime was

\textsuperscript{52} Ibid. P-39.
committed by a politician. The crime must be incidental to and form part of political disturbances. It must be in furtherance of one side or another of a bonafide struggle for political power". 53

Although it is usually for the courts and not for the executive to make the primary determination of the political nature of an offence, in one situation of judicial view is that the matter is for the political arm of government to decide. This situation arises if the fugitive attempts to argue that, although the offence for which his extradition is sought is not in itself political or of a political character, the reasons why the requesting state is anxious to enforce its ordinary criminal law are political. In Re Lincoln the accused asked for the proceedings to be adjourned in order to give him an opportunity to produce evidence to show that he was being extradited for political reasons. Under the treaty, the British authorities could only try the fugitive for the extradition crimes (forgery and obtaining by false pretences), but he alleged that the charges had not been brought against him until political considerations, arising out of anti British publications of his in the United States, had led the British Government to wish to punish him in order to interfere with his future public pronouncements. The District Court refused to allow the adjournment. It was not "part of the Court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the request is made in

good faith. Such matters should be left to the Department of State. The government of the United States, through the Secretary of State, should determine whether the foreign government is in fact able to exercise its civil powers, and whether diplomatic and treaty relations are being carried out and respected in such a way that it is safe to surrender an alleged criminal under a treaty.\footnote{O'Connel. D.P. Op. Cit., p.-79.}

Though the majority of Asian African countries recognise the principle of non-extradition of political offenders, doubts have been cast on this doctrine at least by two countries, namely Ceylon and Indonesia. Ceylon considers that in the matter of extradition no distinction should be made between ordinary crimes and crimes which amount to political offences or crimes of a political nature. Indonesia is of the view that the difficulty in determining whether a crime is of a political character or not may lead to complications and if the principle of non-extradition of political offenders was accepted, it would be difficult to determine in each case whether a person should be extradited or not, especially in the case of mixed offences which have both political and criminal elements. Indonesia is further of the opinion that in any event persons, who are not nationals do not enjoy political rights in a state and as such they cannot be said to have committed a political offence. It is further suggested that an offence shall not be considered as of a political nature if there is a preponderance of the features of a common
crime over the political motives or objectives of the offender. 55

The greatest number of cases regarding political refugees have arisen in Switzerland. That country, by reason of its geographical position and the traditions and character of its people, early became a haven for political refugees. During the first part of the 19th century, however, the Powers surrounding Switzerland were apparently more concerned about the violation of asylum on the part of the refugees than in the presentation of demands for their extradition. Many countries protested to the Swiss Government in 1834 and later, when it appeared that political refugees were using Swiss soil as a base to carry on their revolutionary activities.

As the century progressed, however, extradition demands became more numerous, and this circumstance, combined with the fact that Swiss refusal to insert an attentat clause in her extradition conventions with other states was continually involving her in long explanations and a statement of the Swiss point of view, determined the Bundesrat to propose a federal extradition law. Accordingly, a law was enacted, January 22, 1892, Article X of which was as follows:

'Extradition shall not be approved for political crimes or offenses. Nevertheless, extradition will be approved, even if the author of the act claims a political motive or purpose if the act for which extradition is demanded has predominantly

the character of a political crime or offense. The federal tribunal shall freely decide, in individual cases, concerning the nature of the punishable act. If the extradition is approved, the Bundesrat exacts the condition that the extradited individual shall not be tried or punished on account of a political crime or on account of his political motive or purpose'.

Thus, the Swiss principle of "predominance", that is, that an offense is common or political according to whether its predominant character is common or political, was incorporated into law. As is seen, no attempt was made, by law, to lay down a general rule as to when an offense should be considered predominantly common or predominantly political, but the federal tribunal was to decide this question for each case, as it arose, and in order to do this it was to take into consideration all the circumstances attending the commission of the act. A study of the cases shows that these principles have been applied and, when necessary, interpreted or amplified. Thus, the tribunal pointed out that extradition might be refused even for offenses enumerated in the convention, since the convention excepted not only purely political offenses but also those bearing a predominantly political character. The tribunal strove to determine not only the motive and purpose of the accused, but also the circumstances under which the act was committed; that is, both subjective and objective factors. It held that it was

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impossible to define a relative political offense, but that the tribunal must decide on each case as it arose. The fact that the accused claimed that the offense was political did not make it so, which was another way of saying that the subjective elements were insufficient if the objective elements were not in accordance with them. Neither was the federal tribunal obliged to agree with the demanding state in this respect; the fact that the demanding state said that the offense was political was not conclusive.\textsuperscript{57}

In the case of V.P. WASSILIEFF July 13, 1908, the federal tribunal stated three general principles which it considered as determining the predominantly political character of an offense, principles which the court applied in later cases. The first of these is: the offense must have been committed for the purpose of helping or ensuring the success of a purely political offense. If it is not clear that such a purely political offense is in progress, extradition will be granted. The act of Wassilieff, accused of murdering the chief of police of Pensa, did not have a predominantly political character because it did not pursue the realization of a purely political offense, i.e. it did not prepare the way for popular representation and the guarantee of individual liberties.

In the second place, there must be a direct connection between the crime committed and the purpose pursued by a party to modify the political or social organization of the nation.

\textsuperscript{57} Deere, op. cit. p. 257
The act must be a means really efficacious to attain the political end, or at least be an integral part of acts suited to lead to this end. Thus, the murder of a public functionary would have a predominantly political character if the official embodied the political system of the state and if the opinion could be supported with some degree of probability that his removal would result in a modification of the political system.

When the accused claims the offense which he has committed is political, the burden of proof is upon him. Complete proof is unnecessary, but he must bring forward such facts as would enable a committing magistrate to form a well founded opinion; that is, to justify the inference that a direct connection exists between the crime committed and the political purpose pursued. Likewise, the burden of proof is on the accused when he claims that the extradition demand has been made to punish him for an offense of a political character. This would seem to be a difficult thing to do.

In the KOSTER CASE March 17, 1893, the German Government stated that the demand could not be a cloak to punish the accused for a political offense, because of Article 4, paragraph 3 of the treaty, and that a special assurance to this effect was unnecessary. The federal tribunal approved this point of view. It was likewise affirmed by the court in the O'DANNE CASE, July 13, 1888 and in the STEPHANY CASE, April 28, 1906 the accused claimed that, although extradition was asked for a treaty offense, the demand was really made
with a view to punish him for an entirely different offense, political in character. The court held that it must be presumed that Germany would not violate the treaty, and even though the accused was guilty of a political offense as well as the offense for which his extradition was asked, it could not infer that his extradition was for that purpose. Nor could the accused make a valid defense to his extradition by asserting that Germany would punish him more severely than would be the case if he were not also guilty of political offenses. The court has also dismissed the claim of the accused that the ordinary tribunals would not be impartial.

In spite of the now universal acceptance of the practice of non-extradition for political offences, the application of this practice may raise 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 thorny problem by attempting to define the acts, which constitute political offences.

Several definition given by courts, text writers, existing treaties and statutes have attempted to define political offences in negative form and tries to deal with the problem by exclusion from, rather than by inclusion in, the category of acts constituting political offence. Political offence which may be committed by an individual in two forms, those which may be called purely political offence: treason, Sedition and Espionage apart from this are those
offences committed by one or more persons within the category of political offences:

(a) That the act be connected with the activities of an Organised group; and

(b) That the activities of this group be directed against the security or the governmental system of a state.\(^5\)

As has been indicated above existing treaties and statutes offer little help and suggestion as to the definition of political offences. The International solutions to the difficulty of defining political offences have primarily taken the form of excluding from the concept certain categories of offences. The first attempt was the, enactment of the so-called 'attentat clause', to the effect that murder of the head of a foreign government, or of a member of his family should not be considered a political crime. Although the 'attentat' clause originated in Belgium in 1856, it has since been widely adopted.

After the assassination of King Alexendra of Yugoslavia in France on 9th October 1934, the council of League of Nations, in pursuance of proposal made by France, took steps to bring about an International Convention for the prevention and punishment of crimes of a political character, described as acts of political terrorism. Beside this only one state has attempted to define political offence for the purpose of their exclusion from extraditable crimes is - Germany in the

\(^5\) Moore. J.B. Digest of International Law. 'Extradition Volume 1, (208), 1891, p-308.
Extradition statute of 1929. Article 3 (2) provides:

"Political acts are punishable offences directed immediately against the existence or the security of a state, against the Head or a member of the Government of a state in such a capacity, against a member of the legislative body, against the right of citizen in electing or Voting or against friendly relations with a foreign state.\textsuperscript{59}

This chapter analyses the history of political offences in extradition, the practice of some important states, and the difficulties which in many cases still remain unsolved. Thus the question as to where the line shall be drawn when an act contains both political and common crime element is closely linked with problem of defining relative political offence, and the universal opinion is that the definition is both impossible and undesirable.

The most promising development of recent years has been the increase in number of states which has given the Judiciary a place in extradition procedure, thus guaranteeing to the accused an opportunity to be heard in his own defence, which is an impartial examination of the facts and circumstances attending the commission of crime and it also makes possible the development of a body of principle, as has taken place in Switzerland.

The future of the rule of no extradition of political offenders depends partly upon the political offenders themselves and partly upon the future of the states making

upon the present world order. With respect to world order there may develop an integration of political organisation to such an extent that each state or division in the organisation world feel an interest in itself punishing attacks directed at any one of the group regardless of where the act might be committed. At present however in view of the strong feeling of nationalism and the principle of territorial sovereignty. There seems to be no trend in this direction as to what constitutes a political offence for extradition purposes will therefore, frequently present itself for solution.