

T O P I C

EXTRADITION AND POLITICAL OFFENCES UNDER INTERNATIONAL  
LAW:

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## DEDICATIONS

This dissertation is dedicated to my dear parents MOSE AKUMA and NELLIAH NYARINDA MOSE. my brothers and sisters in the entire spectrum can not be left out. Indeed, I can not forget my nephew KEVIN OKEMWA. On the same magnitude of appreciation I salute the sons and daughters of this Global Village who have vehemently fought in bid to uphold the letter and spirit of the 1966 universal Covenant for civil and political rights.

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My special acknowledgement goes to my Supervisor JOHN NTAMBIRWEKI whose constructive suggestions gave me impetus and forward linkage that kept me a determined person to the last word in this dissertation. This further, goes to my brothers who have constantly cheered me up as I endeavour to finish this course. I am not at pains to acknowledge in entirety the contribution of my cousin AGNES K. OETA. It is her patience and kindness that reduced my clumsy hand script into the print in which the paper appears. It is within my competence, too, to remember my valuable friends in their own special ways. To all these people my message is that you helped me in struggling against formidable odds and for that reason I am heavily indebted.

## TO THE READER

I bear sole responsibility for any deficient argument in this dissertation. And indeed if I did not become a highway I hope I become a pathway. As the peasant of pointers once sang: How many trees goes up to make a forest? How many houses make up a city? By attempting to answer the posed questions one would find out that the topic herein dealt with cannot be exhaustively tackled for it has many unresolved issues. It is unthinkable too that I can pretend to say that I have done a logically conclusive research work. All I have done is to set the ball rolling or at least jumped into the bandwagon of those in quest to understand the issue of political offence in the context of extradition under international law.

The horizon of knowledge lurches away as new discoveries are made, none therefore is the alpha and omega of knowledge in this world. Thus a blow goes to that man who said that little knowledge is dangerous. Anyway, where is a man with so much knowledge as to be out of danger? Those who can not feel the littleness of great things in themselves are apt to overlook the greatness of little things in others. This is meant to forewarn those who will have occasion to read this piece of research work. The warning should, however, not foreclose the frontiers of knowledge as far as the issues herein tackled are concerned. The best player of a game is a Watcher - ask him. And whoever seeks only his own welfare does not taste full success. Therefore I am obliged in advance to whoever will appreciate or even logically



depart from materials injected into this work. Any would be readers are asked to assess the materials after reading thoroughly through the thesis. These views are anchored in the belief that the profit and loss are assessed at the end of the day's trade, not at the beginning.

Before I abandon this part let me consider the quixotic spirit. The spirit of Don quixote appears at a certain stage of every idea, every reform, every discovery or improvement, every programme and every fight for truth or justice. There is always need for somebody to point the way, to make mistakes to become a target for mockery and even blows, to fight against windmills of prejudice, against the ill-will, indifference and the thoughtless raillery of the masses.

## OBSERVATION

The international refugee situation is a reflection of the world's political health. Countless number of people flee their homes and seek refuge in other countries. The violation of human rights the chief causer, takes many forms; deliberate killings and acts of genocide, political and religious persecution and denial of fundamental civil, political and social-economic rights. But at the same time governments are placing a completely new emphasis on international law. Foreign policy is now seen in terms of devolving new policies which respond to common challenges and good of international community.

The extent to which international law can be applied to regugees and assylum seekers has not been fully explored by United Nations, Human rights bodies, Yet it is quite broad. The universal Declaration of Human Rights affirms full civil, political, economic and social rights for all persons, citizens or non citizens. Significantly it also provides for a right to seek and enjoy assylum.

In many countries of the world authoritarian systems have broken down or have been profoundly modified under the power of popular protest, paving the way for free election and formation of governments based on the rule of law and accommodative political tendencies. Because of divergencies in political beliefs and opinions people have gone underground in their countries and in some cases others have sought refuge elsewhere. Those in power know or think they know that any breath of

liberalism will collapse the government. Their duty is to nature and maintain the status-quo. Refugees in short are people with well founded fear of being persecuted in their home country.

Rita Sussmuth, president of the federal parliament of Germany had this to say in an exclusive interview by journalists;

"The countries of Europe have to welcome and take in those who suffer from political persecution"

Extradition of political offenders is in the same gravity, contrary to the letter and spirit of Article 29 of the Universal Declaration of Human Rights. Article 2 (1) of the International covenant for Human Rights is assertive that everyone has to take part in the government of his own country directly or indirectly through freely chosen representatives; that the will of the people is the basis of authority in every legitimate government.



## INTRODUCTION

The relationship that exists among independent states involve no mutual guarantee of their integrity or stability of government. The international duty of each of them in terms of common law is to repress those subversive activities of persons which by their collective character constitute a particular serious threat to the external and internal fabric of state security.

In the global village, people are always moving in and out of their countries, some move on business matters, others on diplomatic missions. Others move as tourists to enjoy the gifts of nature in different environments like exquisite flora and fauna. Apart from such legally and univervally accepted undertakings, it is garmane to note that there is an additional class fleeing their countries for disputed reasons.

There are many factors which make people to flee their countries and seek refuge elsewhere. The international refugee situation is indeed a sound reflection of the worlds's political health. The violation of Human Rights in the global community is the root cause and therefore the most salient as far as the refugee crisis in the world is concerned. This violation takes many forms; Acts of genocide; deliberate killing, political and religious persecution and denial of fundamental civil liberties and political rights. Predicated upon this is the issue of criminals who take refuge in a state which has no jurisdiction to

try them. The procedural intention is to escape liability. This is because the concept of territorialism is the centre of gravity for the exercise of criminal law sanctions.

To cope with this state of affairs international law has evolved a system of extradition, which is accepted and practised by many states. But those guilty of crimes of political nature or character are exempted from extradition, which political crimes are crimes against the government like treason and sedition. It can also include any violent political disturbance in reference to any crime. For the purpose of non-extradition, it is pertinent to submit that the term must denote crimes which are incidental to and form part of the political disturbance. But it might also be understood to include offences of an attack upon the political order of things established in a country where committed, and even include offences to obtain any political object. Status of the offences shall be determined by circumstances attending it and not by motives of those who subsequently handle prosecution.

The scope of this dissertation is limited to discussion and analysis of the rules of extradition and exceptions thereof. The exception of political offender shall be the centre of focus. In the field of treaty relations, the organization of extradition attests the alternation of sometimes diametrically opposite political and legal conceptions. Under the old regime as will be noted in due course of the research work only political crimes



were extraditable from yore. From 1830 it will be noted that most countries allowed it only for ordinary criminals.

Revolutionary power separated power from religious foundations. Liberalism declined by emphasizing the contingent character of institutions and their merely relative value destroyed the traditional solidarity of Nations. By the same blow they believed attempts against the state and its absolute criminality excluded international cooperation domain, where the moral law calls for a more less than the law of success. The authoritarian regimes had no mercy on political criminals whom they regarded and indeed regard as dangerous malefactors. Their disappearance was marked by a return to liberal practices.

The legislations of 1830's had inspirations which authorised expulsion of political offenders under conditions of reciprocity. But the present Italian constitution in Article 10 re-establishes the principle of non-extradition for political offenders. Many of these trends will be covered in this research work. This goes on to 1870 and subsequent eras. Article 3 of the 1830 Extradition Act, enacted by British parliament states;

"Extradition shall not be extended to political offenders".

Unless the municipal law rules otherwise it is now accepted that political offenders are not extraditable. Emphatically, this Dissertation is to give attention to the rules of international

law prohibiting the extradition or forcible return of political offenders and persons fearing persecution. In an examination of trials for sedition in Scotland in (1888), it was stated that to see "no difference between political and other offences is a suremark of an excited mind or stupid head"

The first chapter of this dissertation will venture into the issues of extradition generally. First and foremost it will be endeavoured to expose attempts made by various scholars to define the term and concept of Extradition. It will then proceed to examine the concept of extradition in historical perspective: which will pave the way to analysing the contemporary understanding and practice of extradition. Issues of asylum, extraditable and non-extraditable offenders will form the crux of this chapter and then shall come the concluding remarks as far as extradition is concerned. The said remark will point to the subsequent chapter.

The second chapter forms the core of this dissertation. First and foremost attempts to define political offence shall be made in view of the extradition process. It will be noted in so defining that, no comprehensive and universally binding definition has been evolved in this. The definitions will nonetheless give attention to the international rules prohibiting extradition of political offenders. The chapter then historically follows the rules pertaining to extradition of political offenders. The reaction of the courts to the issue of extradition of political offenders is vitally important. In the

same chapter a distinction shall be made between purely political and relatively political offences. It will be pertinent too, to delimit the frontiers if any between political offenders and ordinary criminal offenders in tripartite and bipartite conventions.

The third chapter will undertake to find out from declarations whether there is any obligation upon the states to grant asylum to reguge seekers. It is above all the purpose of this chapter to find out how far international law recognises or imposes duty upon states to provide asylum to political offenders. The question is; how are political offenders treated under international law? Is there a right to grant asylum? Further we shall seek to establish whether it is mandatory not to extradite political offenders as stated in some municipal legislation and international agreements. Having endeavoured to establish whether the states are obligated not to extradite political offenders, comes the fourth chapter.

The fourth chapter deals essentially with international terrorism as an emerging political problem in extradition law. It shall endeavour to indicate the position of terrorism as a political offence under international law. Then shall come concluding remarks.

The fifth chapter essentially deals with procedures of extradition in case of extraditable offences. In the issue of examinig the procedures to be followed great reliance shall be



based on case law and legislative provisions of various countries and international conventions.

The conclusion and recommendation forms the sixth chapter. The study of contemporary policy and practice of states with respect to the use of extradition and exception of political offenders should be undertaken under government or private auspices. The study should determine why extradition appears to be less frequently used than exclusions and departations as a means of obtaining criminals who have fled their countries. A clearing house of information about instances of extradition of political offenders would be established. The issue of multilateral conventions to establish a common standard regarding extradition for the purpose of rendition shall be looked into. Once such a common standards have been made no return should be made outside the due process of extradition. It should be recognized that the defence of political offence exception is historically and philosophically accepted by many states. The need to circumscribe "political offence" by selected elimination in offences of this category on absolute terms without exceptions should be emphasised. Finally, it will be congruous to note that the processess of extradition are cumbersome and need to be streamlined. The political offence exception is a serious impediment to the effectiveness of the process and elimination thereto has to be developed. It is the purpose of this chapter to propose the modalities of doing the same.

## CHAPTER I

TITLE : THE CONCEPT AND HISTORICAL EVOLUTION OF EXTRADITION AND  
POLITICAL OFFENCE EXCEPTION

### DEFINATION OF THE TERM EXTRADITION:

A criminal may take refuge in a state which has no jurisdiction to try him or in a state which is unable or unwilling to try him because all the evidence and witnesses are abroad. To tackle this problem international law evolved the practice of extradition: A system where individuals are handed over by one state to another in order to face charges in the latter state for offences committed contrary to the law. The province of extradition involves the surrender of both convicted and untried criminals who have become fugitives in another country<sup>1</sup>.

Various authors have attempted to define the term extradition, their definitions have not been at great variance with each other. But for the purpose of this dissertation we shall rely on; The concise Law Dictionary which defines it as hereunder:

" The delivery of a person who has committed a crime in one country by the authorities of another state in which he has taken refuge to the authorities of a country (state) where the crime was committed. The law of this subject is contained in the extradition Acts of 1870 to 1935, which Acts define offences to which extradition applies and the procedure for the surrender of the offenders".<sup>2</sup>



Extradition is recognised as a duty independent of treaty in international law, but it is usually the subject of Treaty terminable by one year notice. Extradition Act of England, 1870 states that:-

"Where an arrangement has been made with any foreign state with respect to the surrender of such state of any fugitive criminal, her majesty may by order of council direct that this act shall apply in case of such foreign state"<sup>3</sup>.

The Act as ammended in 1873, 1875, 1906 provides for the arrangements and procedure regarding extradition.

Some writers consider extradition as a duty of mutual aid or assistance, others consider it as a theoritical obligation founded on the principle of International law, but deny it positive obligation in the absence of a convention to the same effect. Ideally, the trust of international duty to extradite in the absence of prosecution of those who commit international crimes should not have unbridled limitation particularly the political offence exception<sup>4</sup>. This limitation is the main impediment to the effective fulfilment of the relevant treaty obligations and to the customary duty to extradite violators of international criminal law, so that they may face trial for their conduct. To that extent there is a conflict between duty to extradite such offenders and the right of the requested state to refuse to do so on ground of political offence exception.

Most states refuse to extradite political offenders. This is usually codified in the form of political offence exception; a standard clause in extradition laws and the treaties which provides that extradition shall not be granted for political crimes. So many countries have incorporated this principle into their legislations, that the political offence exception can be considered as generally accepted principle, atleast insofar as Western "nations" are concerned.<sup>5</sup>

This general acceptance, however, is limited to the recognition of the principle; whereas states agree not to extradite political offenders there are no common standards as to the practical application of the rule. This is due to the fact that extradition laws and treaties almost never define the term "political offence" in abstracto and consequently the interpretation of the term in concreto is left to the judicial and administrative authorities who have to decide in each particular case whether or not the acts for which extradition is requested constitute political crimes.<sup>6</sup>

While there are no universally recognised definitions of the term political offence, there are however, a number of negative definitions; in that it has been provided that certain offences are not considered as political crimes for the purpose of extradition. Such negative definitions have been formulated inter-alia, for attempts on the lives of the Heads of States, war crimes, genocide, collaboration with enemy or acts of terrorism.<sup>7</sup>

As such the scope of political offence exception has been considerably restricted.

Conversely, the scope of the exception has been extended by means of an additional provision prohibiting extradition, not so much on the grounds of the political character of the facts for which extradition is sought but on the political character of the extradition request. According to this provision the exception can also be applied if it appears that the extradition request has been made with the purpose of prosecuting the requested person for a political offence or if the extradition would subject him to prosecution on account of his race, religion, nationality, political opinion or other reasons.<sup>8</sup> This provision is referred to as the discrimination clause.

At the time the first political offence exception clause was formulated in Belgium Extradition Act of October first 1833, the drafters were already conscious of the practical difficulties arising from the vagueness of the concept "political offence". From the words of Honourable member DOIGNON in parliament it appears that, to a certain extent they realised that the possible drawback of the political offence exception as it was formulated by the new law. Doignon remarked

"In the era in which we are living, it appears to be very difficult to make a law which does not have these serious drawbacks. At this moment, almost all states are full of political passions, for which the governments are making constant efforts to suffocate or suppress... It would perhaps be desirable if we could wait for a calmer time to draft this statute, which only seems to offer



guarantees required by the contemporary situation."

The first provisions concerning the political offence exceptions were drafted in an atmosphere of romanticism and glorification of political offenders, starting from an almost naive identification of political offender with liberal revolutionary, without, however, taking into account the possibility that other political offenders would in return oppose the new liberal legal order itself.<sup>10</sup>

Nonetheless, treaties, bilateral or multilateral as well as extradition statutes and codes of penal procedure in some states' constitutional provisions generally if not universally and particularly, exempt the political offenders from extradition. They do not, however, define the political offence affirmatively, if at all. Increasingly, treaties and statutory provisions are defining it negatively, that is by declaring that certain offences cannot be classified as political offences."

The first formal exception to the political offence exception in statute law was introduced by Belgium at the occasion of the famous Jacquin Case. The facts of the case were that in September 1854, the French emperor Napoleon III made a trip by train to Tournai, Belgium. Celestin and Jules Jacquin, two French men residing in Belgium had placed a bomb in the railway where the emperor's train was going to pass. The bomb exploded but the attempt was unsuccessful. Napoleon survived and Celestin and Jacquin fled to Belgium. France subsequently

requested Calestin's extradition from Belgian authority. Facing the extradition request from its mighty and militarily superior French neighbour, the Belgium government was in an embarrassing position, as the court of Appeal of Brussels had rendered a negative advisory opinion with respect to the extradition request, holding that the crimes charged were political offences. Although the government was not bound by this opinion, it was politically very delicate to grant extradition in derogation from it.<sup>12</sup>

The problem was ultimately solved because France withdrew its extradition request, in compensation the Belgian government was urged by France to have a law voted which would prevent similar judicial interpretation of the political offence exception in the future. Accordingly the Belgian government introduced a bill providing;

"that it shall not be considered as a political offence or as a fact "connected" to such offence, the attempt against the person of a foreign Head of state or against the person of his family member, whether the attempt be by means of murder, assassination or poisoning".<sup>13</sup>

In the explanatory note, the government declared it would be very dangerous to protect persons against extradition who had committed attacks against the Head of State. The note declared that a state which isolates itself in this respect should expect serious difficulties. The text of the Bill, however, was not changed, despite numerous proposals in the house of representatives and in the senate.<sup>14</sup>



The way the bill was formulated was a clear answer to the court of Appeals holding that the fact of attacking a foreign sovereign was a political crime, and hence the text says: shall not be considered as political crime." This somewhat illogical formula, based upon legal fiction of depolization was maintained notwithstanding numerous objections and criticism in parliament and the bill introduced by the government was enacted without amendment by the majority 15.

Subsequently, many countries have followed the Belgian example and have enacted a similar clause in their extradition laws treaties. Therefore, the clause is somewhat referred to as the Belgian clause. The importance of this clause lies not only in the fact that it has been widely accepted, but also in the technical approach to the formulation of political offence exception.

## THE RATIONALE FOR POLITICAL OFFENCE EXCEPTION

The rationale of political offence exception is based on the three interest which converge in the rule: those of the requested person, the states concerned and the international public order. Under classic extradition theory this rationale has been explained as follows:

First with respect to the requested person, the political offence has a humanitarian function. It is meant as a protection against unfair and retaliatory trial in the requesting state which being the target of political crime, would function simultaneously as a judge and jury.<sup>16</sup>

Secondly, as regards the state as a party in interest, the political offence exception is based on the principle of neutrality.<sup>17</sup> According to classic extradition theory, extradition of political offenders does not further good relations between the states concerned, as the inquiry into the credibility of a political crime implied a judgement with respect to the conflict situation in the requesting state. Such judgement could amount to taking of a position which in turn, could be interpreted as a disguised intervention in the internal affairs of the requesting state. Therefore, it is better to refuse extradition of political offenders, a priori motive of self-interest understandably underlying this reasoning; today's political offenders could be tomorrow's political leaders and consequently the state requested is best advised to keep itself

neutral with respect to political conflicts in the requesting state.

The third part of the rationale underlying the exception is the assumption that political crimes do not violate international public order and, therefore, states are supposed not to have a mutual interest in suppression of such crimes. 18 Political crimes have only a local character because they are directed against the domestic public order of the requesting state, and consequently perpetrators of such acts do not constitute a danger for the public order of other states. In addition, international penal cooperation with respect to public offence is less essential than in respect to common offences because political crimes have only a relatively anti-social character. As opposed to common crimes, "political offences" are not inherently "criminal" because the perpetrator in theory, does not act for personal motives, but for the benefit of a wider society. Consequently his acts are not anti-social but on the contrary altruistic and "hyper-social" because they are committed for the general well being. This altruistic distinguishes the political offender from other offenders and makes his acts less reprehensible and in some cases even excusable.

Moreover, the possible "criminality" of state or of the regime against which the act is directed can, it is true, not eliminate its criminal character, but can possibly shed another light upon it. The nineteenth century idea that rebellion



against oppression is legitimate plays an important role in this reasoning.

Finally, the ultimate "criminal" character of political crimes is in the end only dependent upon the outcome of political struggle. The remark made by Balzac:

" Vanguished conspirators are Villians, victorious they are heroes, still holds true today."19

Many of today's leaders are the terrorists of yesterday, whose acts are only justified because they won their political struggle. However, they could as well have ended their lives as criminals had they been the losers.

In the supreme court of Ireland decision, made in 1950

"a study of the history of extradition shows that a change has come about in the attitude of states towards it".

Grotius and other known writers took the view that according to the laws and usage of civilised nations every sovereign state was obliged to grant extradition freely and without restrictions. In the views of other jurists of high authority, extradition was almost a duty of imperfect obligation.

## EXTRADITION - HISTORICAL PROFILE AND ANALYSIS

The political offence exception is of relatively recent origin: before the French revolution of 1789, the term political crime was unknown, both in theory and practice of the law of nations, and political asylum as we know it today was non-existent. Traces of political asylum before the nineteenth century are thus to be found in the General framework of historical development of both asylum and extradition.<sup>21</sup>

Asylum as an institution has been known in many cultures since antiquity<sup>22</sup>. Asylum was strongly developed among the Greek city states. It is noteworthy that asylum was granted to all offenders including political offenders; whereas the latter were excluded from asylum elsewhere. The victims of ostracism always found protection in other city states where they were often cordially welcomed. <sup>23</sup> The Romans on the other hand never directed the law on asylum. During the middle ages ecclesiastic asylum was widespread, political criminals however were excluded from the protection of ecclesiastic asylum. From the 14th Century, on, sovereigns started to restrict ecclesiastic asylum and even violated it. Ecclesiastic asylum and territorial asylum co-existed until the sixteenth century. From the sixteenth century on ecclesiastic asylum had totally disappeared and only territorial asylum subsisted.

Extradition on the contrary developed much later and has always been considered as exception to the traditional hospitality of asylum. The development of extradition into a

well ordered legal process only took place in the eighteenth century and especially in the nineteenth century. Nevertheless, some extradition cases can be found in antiquity and in the middle ages. Extradition was usually stipulated in subsidiary clauses of peace treaties or in ad hoc agreements for extradition of certain persons. The oldest agreement was in 1280 B.C. It was included in a peace treaty between Egyptian pharaoh Rameses II and Hittite prince Hattusili. 25 The emergence of the practice to extradite common criminals came in the eighteenth century. In the instruments such as the Jay-treaty of 1794 and in the peace treaty of Amiens of 1802, extradition was still provided for in subsidiary clauses.

The term extradition was considered as an exception to asylum. For this reason, some authors interpret the term as "extraditio" as if it would be an "extra-traditio", that is an exception to tradition. 26 The term extradition was first used in a convention concluded in 1781 between King of France and Bishop of Basel. Even today extradition still retain an exceptional character: As a principal most states only grant it by virtue of treaty in which they have assumed duty to extradite: otherwise, the general principle of asylum is applicable.

An example is the charter of the Dukes of Brabant which declared a constitutional principle that nobody, notwithstanding his nationality or rank and regardless of the crime he might have committed could be extradited without the consent of the three states. 27 The required authorization had been refused since



1682. In that year Holland executed Balthazar van middelburg who had been extradited by Brabant on the condition that nobody punishment whatsoever would be inflicted on him.

Precisely, because extradition was so exceptional, it was only used for the most serious crimes. Before the French revolution of 1789, these were crimes against the state or sovereign, that is "political crimes".<sup>28</sup> The escape of common criminals was not considered as a public danger, and public prosecution for such crimes was usually left to the victims of crimes and as such could only result in private sanctions such as indemnity and individual revenge, but not in punishment imposed and sanctioned by public authorities. In general sovereigns were totally indifferent towards persons who fled their country and normally took no measure to continue prosecution extra-territorially. Offenders themselves tended not to flee abroad because such voluntary exile itself constituted one of the harshest penalties. Foreigners abroad were not well treated as they did not enjoy the rights and freedoms which were granted to other citizens. Some traces of this can be found in the criminal procedure of Great Britain. There is no public prosecutor and prosecution is left to the private initiative thus in principle to the private person.

For crimes against the state, however, the situation was completely different since sovereigns had a direct interest in the suppression of such crimes; public prosecutions were indeed pursued and perpetrators severely punished. It was only for this

type of offences that prosecutions were continued abroad and that collaboration with other sovereigns by means of extradition were sought. Political offenders, were usually extradited. Sovereigns, feudal lords and even the church frequently used this technique in political bargaining; the technique was practised between both political rivals and friendly sovereigns.<sup>29</sup> In Rome for example common criminals were not prosecuted if they succeeded in fleeing the country; exile was deemed a sufficient penalty. For political criminals, however, the penalty of exile was non-existent. They were usually pursued extra-territorially and punished severely. Ecclesiastic asylum during the middle ages was not applicable for some political crimes. High treason and political crimes against the church such as heresy or return to judaism were excluded from ecclesiastic asylum and the church vigorously pursued the perpetrators of these crimes. They did not hesitate to threaten feudal Lords with ex-communication if they would grant asylum to such perpetrators.

In the first stage of its Historical development, extradition was not much more than an act of courtesy by which two sovereigns surrendered their mutual political adversaries to each other. As such the earliest extradition treaties mainly contemplate the surrender of political offenders. Thus, the treaties of extradition were comparatively infrequent prior to the French revolution of 1789, <sup>31</sup> and contrary to the modern usage they were usually directed against political offenders than



ordinary criminals. The earliest treaty in this respect was concluded in 1174 between Henry II King of England and William, King of Scotland, the purpose of which was mutual surrender of traitors and "felons". The treaty of Paris signed in 1303 created the same obligation between England and French Kings. In 1413, both sovereigns concluded an agreement for surrender of rebels who had participated in the Paris rebellion. Similar agreements were concluded all over Europe.

It cannot, however, be said that political asylum was non-existent in that period. It was, nevertheless, rather exceptional as it was only granted in so far as it could serve the interests of the sovereigns concerned. There are a number of cases in which extradition of political offenders was refused because it was considered by the asylum state as a tool to attract rebels from enemy countries to thereby exploit them. as such ALCABIADES was used by Sparta in the war against Athens, 443 - 403 B.C. The tribe of Benjamin, as stated in chapter 20 of the Biblical book of Judges was totally exterminated for refusing to extradite a person; the Lucedaimonians declared war on Messenians because they had refused to extradite a murderer<sup>32</sup>. Sparta's refusal to extradite a person who had taken up arms against Athens greatly jeopardised the alliance between Sparta and Athens.<sup>33</sup> Political asylum saw a certain degree of development among the politically divided and unstable Italian City States during the fifteenth century. Here, also political asylum was only granted when the authorities of the neighbouring



state considered that it would be for their benefit, that is when expected that the person in question would ultimately win political struggle, otherwise he was extradited.

Religious wars gave new impetus to development of the laws of asylum and gave rise to the first theoretical consideration concerning extradition and political asylum. During the sixteenth century, the counter reformation and bloody religious persecutions throughout Europe had made religious asylum a social need. In that period the Northern Netherlands was an important place of refuge both for the English who fled from the regime of Mary Tudor and for many victims of the Spanish inquisition in the Southern Netherlands. They had also sheltered hundreds of shephardic Jews fleeing from Spain and Portugal for fear of religious suppression. Many French protestants sought refuge in Germany, Russia, Denmark and Switzerland. As such the practice of political asylum saved the lives of thousands of refugees. These persons can be compared with political refugees because their only crime consisted of non-compliance with political dogmas.<sup>34</sup>

In that period legal philosophers developed new ideas with respect to law of asylum which would thoroughly change its content and scope. The problem of extradition was approached for the first time from the perspective of international cooperation in the suppression of criminality.<sup>35</sup> This idea which had been advanced by Jean Bodin in the sixteenth century was further elaborated by Dumoulin, Grotius and the school of natural law.

Extradition received more and more emphasis, while the practice of asylum as a means of escaping criminal prosecution was sharply condemned. On the other hand, however, this totally new-asylum was advocated in favour of political refugees, that is, in favour of those whom, until then, asylum had precisely been denied.

Hugo Grotius who was himself a political refugee, even advocated a kind of individual right to asylum. Accordingly, he felt that States were obliged to grant asylum to persons who were the victims of unreasonable hatred or enmity. Grotius is known to have occupied an important political position in Netherlands, however, he was condemned for political reasons and was incarcerated in the castle of Loeventein from where he escaped in 1621 and fled to France; where he wrote his book De jure Belli ac Pacis, dedicated to Louis XIII. It could however, be incorrect to say that, Grotius defended the principle of non-extradition for political offenders in all aspects. As a matter of fact, he accepted that extradition was granted in most cases for crimes against the state. Without any criticism, whatsoever, he observed that extradition was primarily used for crimes which affect public order or which are atrociously criminal. In addition he took a position that states have a duty to extradite or to punish persons who have committed crimes by which another state or its sovereign is particularly injured. As such the right of asylum as viewed by Grotius was rather limited to what could be called "humanitarian asylum" today. 36

The idea that states have a duty either to extradite or to punish was also an entirely new development because it was a first attempt to approach the problem from a broader perspective that is in light of what he called "Cavitas maxima" 37, which in modern terms could be translated as an international criminal justice policy. Moreover Grotius did not conceive the alternative duty either to punish or extradite as a bilateral obligation arising from mutual relations between the states concerned, but as a duty which states have to assume in the name of and on behalf of international community, the "cavitas maxima". Therefore, until the twentieth century his ideas found little acceptance. Today, however, they are considered with renewed interest and they underly the indirect control mechanism on which many recent duties are based. The modern version of Grotius "either extradite or punish", the rule either "extradite or prosecute" is the central treaty obligation in inter-alia the Hague convention on the unlawful seizure of Aircrafts.



**CHANGE IN EXTRADITION TREND AND THE  
CONTEMPORARY PRACTICE:**

During the eighteenth century extradition gradually developed into a legal institution: the mobility of offenders between states had increased and robbers, deserters and vagrants started to create problems to international commerce and Traffic. As a result of this, states were compelled to cooperate in criminal matters and for this reason more and more extradition treaties were concluded. 39 The extradition agreements during this time mainly focused on the surrender of deserters, robbers, murderers, arsonists and vagrants.

Under the impulse of the natural school of law, extradition was increasingly viewed as an instrument of general prevention and the right of asylum was considered in a more restricted manner. The first clear condemnation of asylum came from Cesare Beccaria, who in this book "Dei Delitti Delle Pene" wrote:

" Impunity and asylum are more less the same  
.... Asylum is a better invitation to crimes  
than punishment adeterrent".40

Although Beccaria theoretically advocated extradition as a means to prevent criminality, he nevertheless opposed a general application of extradition as long as repressive regimes existed to which persons could be subjected through the process of extradition; Nevertheless, whether it is useful for nations to mutually surrender offenders, I would not endeavour deciding this question until laws better conform to the needs of humanity, until penalties become less harsh and dependence on arbitrariness

will come to and end... although the persuasions not to find a spot on earth where real crimes are pardoned would be an effective means to prevent them. Beccaria did not, however, elaborate the general theory on political crimes.

The rise of revolutionary ideology in the course of the eighteenth century brought about a totally new attitude towards political offenders and completely undermined the traditional conception that political crimes being the most serious, ought to be subjected to most severe penalties. The notion that resistance against oppression is legitimate was increasingly supported by political thinkers and philosophers. In time the notion spread that political offenders were inviolable. 41 As such Voltaire while being prosecuted in France for the publication of his "letters philosophique" found protection in the court of Potsdam. In 1789 the Southern Netherlands refused to extradite Sir Henry Van der Noot, the leader of Brussels Rebellion to Austria.

The emergence of the Philosophical conception of freedom and its penetration into French society ultimately culminated in the right to revolt as proclaimed by the French revolution which established the moral and legal basis for the exercise of the right to revolutionary political actions. 42

The Jacobin constitution of 1793 proclaimed for the first time an individual right to asylum and declared that the French people give asylum to foreigners banished from their countries for the cause of freedom. 43 This asylum was to be denied to

Tyrants. The liberal revolutions drove the most enthusiastic liberals underground or to exile, which exile got recognition in the Jacobin constitution. The state of affairs during this period was such that people were not supposed to think unless those in power knew what they were thinking about. Thus people left their states to join Liberal and accommodative regimes prompting the Jacobins to so create such clause in their constitution.

However, many years passed before political asylum was really accepted. The modern principle of non-extradition of political offenders was not accepted until the middle of the nineteenth century. Until then treaties for the surrender of political offenders were frequently concluded especially among the countries of the so-called HOLY ALLIANCE, that is Russia, Austria and Prussia, which suffered the most from revolutionary uprisings and which vigorously pursued the extradition of rebels. 44

But even in the new liberal democracies, the principle was not immediately accepted or was accepted only to a limited extent. The new rulers vehemently protested when Asylum was violated by other states but did not hesitate to infringe it themselves whenever they wanted to get hold of their political opponents. For example in 1801, the senate of Hamburg extradited three Irish rebels to England. Napoleon Bonaparte wrote a letter to the authority of Hamburg in which he strongly protested the surrender. He wrote:



" You have violated the laws of hospitlity. This has not even occurred among the most barbarian hordes of the desert. Your co-citizens will blame you for ever over this: The unfortunates whom you delivered will die illustriously but their blood will bring more harm to their persecutors than a whole army."<sup>45</sup>

This, however, did not prevent Napoleon as far as his own adversaries were concerned from exhausting all the available means to obtain their extradition including the use of threats against other states. Immediately after the signature of the peace Treaty of Amiens in 1802, he requested England to expel the French immigrants. The refusal do so was one of the causes of the long wars which followed. This refusal by England was based on the ground that such expulsion was deemed contrary to the dignity and honour of His majesty and to the laws of hospitality.<sup>46</sup> During the same year England refused to extradite to Russia the Anthors of the "rebellion of petersburg", also on the same argument.

## LIBERALISM AND EXTRATATION

After the 1815 Vienna Congress the HOLY Alliance used every means available to obtain the expulsion of rebels and the revolutionaries. In this regard the Swiss Confederation, which because of its geographical situation received many refugees from Poland, Hungary and Russia was put under pressure that it ultimately succumbed and introduced immigration controls in order to prevent the influx of political refugees.<sup>47</sup>

In spite of the vehemence of the HOLY Alliance's reaction it was not possible to stop the new tendency towards Liberalism, as public opinion in western Europe was becoming increasingly opposed to the extradition of political offenders.<sup>48</sup> Liberal democracies which in most instances had themselves originated from revolutionaries developed great popular sympathy towards political offenders who fought against autocracy and despotism. This new image, however, constituted a complete turn about. The political offender who had always been considered as the enemy of the people was now being protected and sheltered by those same people.<sup>49</sup> Their roles were completely reversed and in the words of Jean Graven, it was:

" a true revolution of ideas, the substitution of one idea to another: that of exaltation and maximum protection of the individual and the "citizen" of his rights including his freedom of thought and expression and to defend his thought, predominating over that of the absolute and primordial sovereignty of the state and the political power.<sup>50</sup>

The public protests voiced each time political refugees were extradited were symptomatic of this change in public opinion. For example, when the Governor of Gibraltar had extradited a number of rebels of Spain in 1815 a storm of protests was provoked in England. Sir James Mackintosh, declared before the Westminster parliament that no nation should be allowed to refuse asylum to political refugees.<sup>51</sup> From this and many other interpellations in parliament, it appeared that English public opinion was clearly opposed to the extradition of political refugees.<sup>52</sup>

A similar commotion was provoked in France at the occasion of Galotti incident in 1829. Galloti was a Neapolitan officer who had participated in the Revolutions of 1820 and fled to France as soon as the Bourbons came back to power. Naples had requested his extradition for a number of common crimes and extradition had been granted by France on condition that he would not be prosecuted for his political offences. As soon as Galotti was extradited, however, he was prosecuted for his participation in the 1820 revolution and condemned to death. Strongly shocked by this incident, the French Government revoked this extradition decree and formally requested the return of Galotti. When Neapolitans refused to send him back, the French threatened to declare war and sent a few war ships to Naples. As a result of this pressure, the Neapolitans finally decided not to execute Galotti and in the wake of 1830 revolutions his penalty was commuted to exile 53.



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This case, however, had provoked such deep emotions in French public opinion that shortly after the incident the French government declared that henceforth extradition of political offenders would no longer be requested and granted. 54

In the meantime the principle of political offence exception had already been defended a few times in legal writings. Bonald in his book, "Legislation primitive", was the first to oppose the extradition of political offenders. In Germany the theory was defended by Schmaltz and Tittmann 55. The first systematic study of the problem was published in 1829 by a Dutch Jurist H. Provoit in his "political juridical inaugural dissertation on the September fugitives."

In 1833 political asylum was for the first time officially codified in statute law. The Belgian extradition Act of 1833 was the first recorded extradition Act in the History and also the first official condification of the political offence exception. The mere fact of regulating extradition by state was in itself an important development. Until then, extradition had always been a purely executive matter which had completely been left in the hands of interested sovereign. The Act subjected extradition to a number of conditions and even installed judicial control. According to some scholars the historical origin of extradition can only be traced back to that date. It is at this time that there is a withdrawal of extradition from the realm of policy, making it a legal institution. 56 It was however, a limited judicial control because the courts could only give



advisory opinions with respect to extradition requests. It would, nevertheless, remain a very progressive system for a long time. Other countries introduced this judicial control later: England and Luxemburg 1870; Netherlands in 1875; Switzerland 1892; France only in 1927 and Germany in 1929.

The introduction of political offence exception in the new statute had a very important political function. It was hoped that through this provision the intervention of the mighty neighbour states concerning the extradition of political refugees could be avoided. The pressure exerted by the Holy Alliance against the Swiss confederation was still fresh in the mind and at the time of discussion of the law in parliament, the members gave particular consideration to the polish refugees, who after the unsuccessful rebellion of Warsaw had come to Belgium to seek asylum. The simultaneousness of the revolutions and the failure of the polish revolution had created enormous sympathy in Belgium for the polish refugees. It was infact especially then that 1833 extradition Act 57, was introduced and the related facts were added to the originally proposed formulation of the political offence exception.

Since then Belgium has inserted the clause in all bilateral extradition agreements and as such, it has been systematically imposed on contracting states with which such extradition agreements are concerned. The first extradition treaty was concluded with France on November, 21, 1833. France subsequently spread the principle in the same way as it had to Belgium. In

1843 it was inserted in the extradition treaty with the United States. In this manner, the political offence exception was introduced in Anglo-saxon countries. 58

The last important attempt to obtain a recovery of political offenders took place in 1849 after the unsuccessful Hungarian revolution against the Hapsburgs, Russia and Austria tried to obtain the extradition of 5000 rebels, including Kossuth the leader of the rebellion, who had fled to Turkey. with support from Great Britain the Turkish government refused extradition. During this incident Lord Palmerston sent a note to Great powers declaring that political asylum had become an international rule and that extradition of political offenders would violate the laws of hospitality and immunity. Nevertheless, Russia maintained its efforts to obtain the extradition of political offenders for a long time.59

POLITICAL OFFENCE EXCEPTION:

THE CONTEMPORARY PRACTICE:

The political offence exception is a typical offshoot of the nineteenth century. It is the logical outgrowth of the political and ideological controversies between the new democracies and ancient regime. In the ancient regimes, Democracy was according to Metternich of Austria, "a disease that must be cured", "an hydra with open jaws to swallow the social order" and above all, "a gangrene that must be burnt with hot iron". This position was held by the conservative monarchs of the ancient regime. The political offence exception allowed liberal democracies to protect political dissidents from despotic states. In doing so, however, they could at the same time support democratic tendencies in their countries without directly interfering with their internal affairs.<sup>60</sup>

In this context the political offence exception had no clear political function but a protection to those who had committed themselves to the cause of "democracy". This limitation, however, was not explicit in text text books. The political offence exception has incorporated since in extradition law and treaties has a general scope and consequently, both those who fight for and those who fight against democracy are equally entitled to political asylum.<sup>61</sup>

This broad general formula became untenable from the second half of the 19th century onwards, anarchists, nihilists and communists started fighting the new liberal democracies) <sup>62</sup>.



Politically, there emerged a certain class of persons who opposed the liberal states. From the legal perspective the political offence exception appeared to be too broad because it protected persons who albeit for political reasons had committed very serious crimes. In these states the granting of the asylum conflicted with the duty of the state to suppress criminality and to protect the population against criminal conduct, including politically motivated offences. Indeed, the protection given to political offenders was too broad since they were not only protected against extradition, but also benefited from complete criminal immunity, whereas on the level of domestic law, political offenders are still prosecuted although they enjoy a better treatment. On the international level, they were not prosecuted at all, and as such were also protected from criminal liability. As a result law makers, courts and legal writers since the middle of the last century have tried to restrict the scope of political asylum with respect to more serious crimes and also with respect to international offences. Nevertheless, there are presently no universally recognised limitations and the rule has been transferred unaltered from the nineteenth century context to the contemporary situation, the texts have hardly been changed. In Belgium for example, the original text of the political offence exception remained unchanged.<sup>63</sup>

The last centuries political controversies have been replaced by new ideological divergencies in the twentieth century, which have maintained and reviewed the political offence

exception. After the second world war East - west relations gave a new impetus to political asylum. During the 1950s courts tended to give a broader interpretation to the term "political offence", when extradition was sought by a totalitarian state which in that period meant a socialist country.<sup>64</sup>

Later due to decolonization movement, North-South relations have come to the fore and the independence of a number of new states has created numerous political asylum havens. Many of these new states have given another meaning to political asylum and have granted it systematically to persons whom they considered as "freedom fighters", but who by western countries are stigmatised as terrorists. In addition the contemporary religious revival of some Islamic states might in future add another dimension to the political offence exception.

In this setting the political function of the exception has remained unchanged, that is the protection of political dissidents fleeing from states to others due to ideological persuasions. The original political content of the conception, however, has remained the same only with respect to the western countries, that is although in an implicit manner the protection of persons who have committed themselves to the cause of democracy. More than ever, the period since the second world war has shown that persons who reject democracy can equally enjoy the protection of political offence exception together with the criminal immunity resulting therefrom. This is exemplified by the numerous cases

in which asylum was granted to persons whose extradition was requested for war crimes and crimes against humanity.<sup>65</sup>

Nevertheless, extradition law is general and political offence in particular find themselves today situated in a changed international framework. As opposed to the last century, the political and ideological divergencies underlying the rule stand out against the background of all ever increasing mutual interdependence between states. The relative shrinking of the globe as a consequence of development in mass communication and transport media has shortened the bridge between nations.

This identification of common interests was also manifested at the level of criminal law because like most other problems criminality has taken an international complexion. Offenders also benefit from the development of transport and the liberalisation of border controls, not only facilitates their flight abroad but also to plan, prepare and carry out crimes in other states.



## C O N C L U S I O N

As the title of this study indicates the overall approach is made from two perspectives; that of the individual and of the international public order. The problem of conciliation of these two conflicting interests is not original, it is simply the core of criminal law itself which embodies the same double perspective - the protection of the accused on one hand and the protection of the society on the other.

In addition modern developments have created a number of new vulnerabilities which are easy target for persons who want to attract public attention and extort political concessions from governments. This phenomena has increased the actual power of politically motivated offenders and as such considerably potentialized them. The political offence exception is not as argued by Hammerich during the sixth conference for unification of penal law in 1935, an anachronism. the rule has still an essential and fundamental protective function with respect to requested person.

The political offence exception should be maintained for the interests of the states concerned: they should retain the possibility of determining their position with respect to political conflicts abroad. If the requested state has similar political institutions, extradition for political crimes should be possible subject to absolute protection for the individual liable to be extradited to a state where he would be persecuted:

On the other hand, the requested state should retain the right to refuse extradition for political crimes if it wishes to remain neutral with respect to the political conflict in the requesting state. If the requested state would refuse extradition, it should prosecute the person concerned before its own courts.

Contemporarily one of the most fundamental legal problem lies in the question of whether acts of "terrorism" are to be considered as political crimes for the purpose of extradition. The answer to the question is difficult to discern because neither the term "political offence" nor the term terrorism are satisfactorily defined. The "term terror" does not correspond to a well-defined legal concept and is only a collective noun denoting a number of divergent delinquent behaviour, which are characterised by the tautological characteristic "terror", that is the conscious causing of panic and fear within the population. The authors are skeptical as to the desirability of defining the term "terrorism", it is imprecise; it is ambiguous and above all it serves no operative legal purpose. From the broad sociological perspective, most of these acts of terror can be considered as political offences because they are usually politically motivated and in the majority of cases, directed primarily against the state or sub-division thereof.

## CHAPTER TWO

### POLITICAL OFFENSES: DEFINITION AND USAGE

#### OF THE CONCEPT IN EXTRADITION LAW

Political offenders are given a special place under international law. They belong to a class of offenders who are not extraditable. It is now universally accepted that political offenders are exempted from extradition process. But there is unfortunately no agreement as to the nature and content of political offence, and no satisfactory definition has yet been evolved.

The difficulties of definition arise from two sets of facts. In the first place a crime may be purely political or it may be partly political and partly personal or private. In the next sense, a crime may be political in appearance, but really private or vice versa. A political crime may be of gross and outrageous character as in the case of assassination of a constitutional sovereign or chief of state.

Although the international community as a human organization is based upon and conditioned by the interests, motivations and capabilities of people composing it, it has not been easy to define the term political offence with any precision. Courts



approach the subject from different perspectives and no universal definition has been evolved. It is no wonder then that the approach differs from state to state. It is more rigid in the United States and United Kingdom but a bit liberal in Germany.

The political offence exception is defined in the Extradition Act of 1870<sup>1</sup>, and echoed in Re Castioni<sup>2</sup>: In this particular case, it was held that:

"A political offence must be incidental to and form part of political disturbances. Section 3 of the 1870 Extradition Act provides that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is political character".

In Re Kaphengst, the accused Kaphengst in 1929, together with some accomplices committed bomb outrages in several places in Prussia (Germany). He caused besides some slight personal injury to bystanders, considerable damage to buildings. He then fled to Switzerland. The Prussian Ministry of Justice requested his extradition. The accused resisted extradition on ground that this was a case of political offence. He argued that the bomb outrages were committed in order to further the ends of the "Country Peoples Movement" which aimed in the first place at a change of law of taxation said to be unbearable for the peasants and rural middle class and in the second place at an amendment of

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<sup>1</sup> British Extradition Act 1870 Art. 24.

<sup>2</sup> 1891, I.q.B. 149.

Social-Democratic constitution of Weimar on nationalistic lines. It was held that the contention of the accused must be rejected and extradition granted. The court said:

"There is here no question of purely political offence pre-supposing an objective state of facts; an attack on the state and its fundamental institutions<sup>3</sup>".

The practice of the federal court in regard to extradition showed that the court always refused to attribute the character of political offence to purely terrorist acts, which were not mere episodes in the course of an action aiming at an immediate overthrow of the state. The court went further to say that for a common delict to be classed as predominantly political offence, it is not enough that it has a political motive and object or that it is capable of realizing and furthering that object. Bomb outrages of this kind perpetrated in the present case in the struggle to amend the fiscal legislation cannot, according to Swiss conceptions be regarded as a means justified in the above sense, by the object of the crime. The danger of the innocent persons brought about by the bomb outrages causes the common element of the delict mentioned in the warrant of arrest to become predominant so as to prevail completely over the political aspect of the act.

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<sup>3</sup> Switzerland Federal Court 17 October, 1930. Int. Law Cases Ann. Dig. VOL. 5 Page 293.

In Re Meunier, justice cave had this to say about political offenses:

"It appears to me that in order for an offence to constitute a political character, there must be two or more parties in the state, each seeking to impose the government of its own choice on the other and that the offence is committed by one side or the other in pursuance of the object, is a political offence, otherwise it is not<sup>4</sup>".

Justice cave further stated in obiter dictum, that in his opinion the idea that lies is behind the phrase political offence is that the fugitive is at odds with the state that applies for his extradition, on some issue connected with the political control of government of the country. In truth, he said, the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary sense.

In the Extradition Treaties, it is normal to find a provision to the effect that extradition shall not be granted to political offenders or what amounts to the same. That the fugitive should not be surrendered if the crime or offence in respect of which the surrender is sought is one of political character.

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<sup>4</sup> 1894 2.q.B. 415.



Thus, in a relatively old treaty of extradition between Austria and Hungary, Sweden and Norway, of June 1868, Article 2 provides *inter alia* that:

"Extradition shall not be granted for political crimes".

And in relatively modern treaty as that between Belgium and Poland of May 13, 1931, the equivalent in Article 6(1) states that:

"Extradition shall not be granted if the offence for which it is requested is regarded by the state applied to as political offence or an offence connected with such offence<sup>5</sup>".

It may be argued, however, that the rule of non-extradition of political offenders is a rule of municipal law and not international law. The political offender who is thus extradited will be generally barred from pleading that he has a right to be tried before the court of the requesting state, unless he otherwise benefits under the rule of speciality. Nevertheless it does not remove the possibility that the state which orders the extradition is acting in violation of an international obligation.

Otherwise, if the municipal law condones the surrender of political offenders, the individual may be conditionally prejudiced by the fact that there is no other state in a position

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<sup>5</sup> Extradition Treaty: Austria-Hungary; Switzerland-Norway 1868 Art. 2.

or interested to claim that there has been a breach of international law. Political offence is manifestly one area which involves special consideration and the traditional view has been that while international law permits and favours non-extradition of political offenders it leaves it to individual states to interpret this competence more or less after their own fashion. Developments in the last quarter century have introduced a limitation to the permissible content of "political offences", it is clear that a state is no longer free for example to refuse extradition in respect of the crime of Genocide.

The European Convention on Extradition 1957, Article 3(1)

states:

"Extradition shall not be granted if the offence in respect of which it is requested is regarded as a political offence".

The same convention in Article 3(2) also contains a provision of more recent origin namely:

"That the same rule shall apply if the requested party has substantial grounds for believing that a request for extradition for an ordinary offence has been made for the purpose of prosecuting or punishing a person on account of his race, his religion, nationality or political opinion or that a person's position may be prejudiced for any of these reasons<sup>6</sup>".

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<sup>6</sup> 1957 Art. 3(1); 3(2).

More than that, in Re Extradition Act 1870 Exparte Treasury Solicitor, it was held:

"That an offence of persecution in West Germany of former Nazi concentration camp officials in respect of their participation in the killing of inmates is not a criminal matter of political character within the meaning of section 29 of the 1870 Extradition Act<sup>7</sup>".

As regards political fugitives a distinction must be drawn between the offence and the offender. Reference to leading text books on international law indicate that political offenders are normally regarded as non-extraditable. The concept of political offenses which appears to have gained popularity and acceptance is that propounded by Justice Denman in 1891. The Learned judge rejected the view of John Stuart Mill that a political offence was any offence committed in the course of furthering a civil war, insurrection or political commotion. Instead he propounded that:

"To exclude extradition from such an act as murder which is one of the extradition offenses, it must at least be shown that the act is done in furtherance of, or done with an intention of assistance as a sort of overt act in the course of acting in a political matter, a political rising or dispute between two parties in the state as to which is to have the government in the hands ... The question really is whether upon the facts it is clear that the man was acting as one of the number of persons engaged in acts of violence of political character with

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<sup>7</sup> I. W. R., December 12, 1969.



political movement and uprising in which he was taking part<sup>8</sup>".

But not all those crimes that might be described as criminal were covered in Re Castioni<sup>9</sup> definition, which clearly reflects the era of general liberal Democracy based rival organized political parties in which it was renounced. So much so that in 1894 Justice Cave, refused to concede that terrorist act by an anarchist could ever be a political offence:

"For there are two parties in the state, each seeking to impose the government of their own choice on the other, for the party with which the accused is identified, namely the party of anarchy is the enemy of all governments<sup>10</sup>".

The tendency to regard anarchists as something apart from other political offenders has sometimes been expressly embodied in national legislations and is by no means uncommon in treaty practice particularly among Latin American countries. While the 1902 Pan-American treaty for extradition of criminals and for protection against anarchists provides".

"There shall not be a political act which may be classified as pertaining to anarchism<sup>11</sup>".

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<sup>8</sup> 1891 I.q.B. 149.

<sup>9</sup> Ibid Page 149.

<sup>10</sup> Schtracks V. Governor of Israel 1964: 2.q.B. 566, 584.

<sup>11</sup> Ibid.

However, Justice Cockburn when looking at an examination of trials for sedition in Scotland in 1883, had this to say:

"To see no difference between political and other offenses is the sure mark of an excited or stupid head<sup>12</sup>".

In 1955 Lord Justice Goddard<sup>13</sup>, was faced with a group of Polish sailors who had mutinied and sought asylum in the United Kingdom. There was no suggestion that the seamen were part of an organized political movement seeking to overthrow the established Polish Government. Instead they feared they would be subjected to political persecution when the ship reached Poland and they sought to evade the fate. The evidence showed that a police officer was recording their conversation and keeping observation upon them for the purpose of preparing a case against them on account of their political opinion, presumably in order that they might be punished for holding or at least expressing them. As a result the prosecution will thus have been a political prosecution ... a revolt of the crew was to prevent them from being prosecuted for political offenses, therefore the offence had a political character.

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<sup>12</sup> Green L. D: Law and Society: London Oceana Publication 1975, page 370.

<sup>13</sup> Exparte Kolczyski 1955 I.q.B. 540, 550.

Lord Goddard explained his deviation from the classical view by pointing out that in Castioni's case<sup>14</sup>, the court had emphasized that they were not giving an exhaustive definition of the word political character. In view of this Lord Goddard had no difficulty in holding that:

"The evidence about the law prevalent in the Republic of Poland today is that it is necessary if only for the reasons of humanity to give a wider and more general meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused<sup>15</sup>."

*Premafacie*, therefore, the Learned Lord Chief Justice preserved the fiction that it was the nature of the offence that qualified the fugitive from asylum or more correctly from non-extradition. In this case, however, the offence was mutiny aimed at preventing the possibility of a charge for political offence. Further, the fugitives had acted as individuals protecting their own liberty and not as members of an organized political movement seeking to take over the reigns of government. While preserving the appearance of continuity with earlier practices *Kolczynkis* case opens the door for the granting of asylum to an individual *qua* individual rather than as an offender who has committed a particular type of offence.

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<sup>14</sup> 1891 I.q.B. 149.

<sup>15</sup> Times London December 5, 1973.



This has a clear instance in the High Court of Dublin decision, in Reshields<sup>16</sup>, where it was held that the charge against the defendant relating to the possession of explosives in England in connection with the Irish Republican Army activities was a political offense; certainly connected with political offence. In a written answer to a parliamentary question, the Home Secretary implied that the British practice with regard to grant of asylum accorded with his view, explaining that the application for asylum are:

"Dealt with on their own merit, if it is possible to assume that the result of refusing admission ... would be his return to a country in which on ground of political opinion, race or religion he would face danger to life or liberty as to render his life unsupportable, he would normally be admitted unless there were positive grounds, for considering him undesirable."

The above view was of Executive quality, not of judicial quality, having come from the Home Secretary. Therefore, later British cases on the issue were based on a more traditional point of view. Thus in Re Schtraks<sup>17</sup>, Viscount Radcliff recognized that:

"If the idea of political offence is not all that remote from that of political asylum, it is easy to regard as political offence any offence committed by someone in furtherance of his design to escape from a political

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<sup>16</sup> Ibid.

<sup>17</sup> 1964 A.C. 556, 584.

regime which he found intolerable. I have no criticism to the maker of the decision in ... Kolczyski<sup>18</sup>, but the grounds on which it was decided are expressed too generally to offer much guidance for other cases, the phrase offence of political character means that the fugitive is at odds with the state that applies for his extradition on some issues connected with the political control of government of that country."

Lord Hodson also reverted to the guiding principle of Re Casioni<sup>19</sup>, for there must be either in existence or in contemplation a struggle between the state and the fugitive criminals ... It may be that cases will arise as in Kolczyski<sup>20</sup>, where special circumstance have to be taken into account. In some modern states justice and politics may be inextricably mixed that it is not easy for example to say what amounts to a revolt against the government.

As recently as 1973<sup>21</sup>, the House of Lords again applied the more restricted conception of "political", in connection with the offence committed in the United States, but not directed against the United States. The object was wholly directed to the overthrow of Chiang Kai Shek's Government to establish a free and Democratic Republic of Taiwan. The object was not hostile to United States although the movement sought to persuade the

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<sup>18</sup> 1955 I.q.B. 540, 550, 551.

<sup>19</sup> 1891 I.q.B. 149.

<sup>20</sup> Supra 18.

<sup>21</sup> Supra 15.

American Government to change its policy towards Taiwan. Applying Re Schtracks case<sup>22</sup>, a political character connotes the notion of opposition to requesting state.

In his Persian Letters Montesquieu told of a king who having defeated and imprisoned a prince who disputed the crown with him and began to reproach him for infidelity and treachery. It was decided only a moment ago said the unfortunate prince, which one of us was the traitor.

Treason is accordingly one of the political offenses and a somewhat liberal view of treason was taken by a British Secretary of state Jafferson in 1873"

"Most codes extend their definition of treason to acts not really against one's country. They do not distinguish between acts against the government and acts against the oppression of the government. The latter are virtues, yet they have banished more victims to the executioner than the former. Unsuccessful strugglers against tyranny have been the chief martyrs of Treason law in all countries ... Treason often taking the simulated with the real, are sufficiently punished to exile<sup>23</sup>."

In 180 years since then governments have tended to become less rather than more liberal. They have sought, therefore, to punish those guilty of simulated or real treason and far from

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<sup>22</sup> 1964 2.q.B. 556, 584.

<sup>23</sup> Weiss and Fagen Patricia; Well founded Fear and Burden of Proof in Political Asylum. Page 673, quoted Inyra note 24.



sending them to exile they have endeavoured to prevent them from going into voluntary exile and to recover them from the country concerned when they have succeeded in doing so. The increase in the number of dictatorial states governed by a monolithic party denying all political rights to its opponents led to the desire to tamper tyranny with mercy at least where the enemies of one's political opponents are concerned<sup>24</sup>.

These humanitarian sentiments find perhaps their loftiest expression in Article 14(1) of the Universal Declaration of Human Rights. It states:

"Everyone has a right to seek and enjoy in other countries asylum from persecution<sup>25</sup>."

But nowhere in the Declaration does there appear any obligation upon any state to grant asylum to a refuge seeker and it is therefore our purpose to examine how far international law recognizes or imposes any duty upon the states which are its subjects to grant asylum for political offenders. This is hinged on the 1870 Extradition Act whose Article 3<sup>26</sup>, states that extradition shall not be granted for political offenders.

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<sup>24</sup> Universal Declaration of Human Rights Art. 14, paragraph I: Green L.C. Law and Society: London, Oceana Publication 1973, 370.

<sup>25</sup> Ibid.

<sup>26</sup> Supra I

In February 1959, the Yugoslav citizen maintained that a charge lodged against him by the Yugoslavia government were false and claimed asylum as a refugee in accordance with Article 16 of the Federal Constitution. The court pointed out that the legislative history of this clause indicated that political asylum was:

"A right granted to a foreigner who cannot continue living in his country because he is deprived of liberty or property by the political system prevailing there. The concept of political persecution should not be narrowly interpreted. It is characterized by deep seated social-political and ideological contrasts between states which have developed basically different internal structures. There are a number of states in which for the purpose of enforcing and securing political and social revolutions, the power of the state is exercised in a manner contradictory to the principles of liberal democracy hence, the concept of political offence must not be limited to the so called political offenses<sup>27</sup>.

Extradition Act of 1870<sup>28</sup>, states in Article 3 that political offenders shall not be extradited, National Legislations too frequently provide protection for political offenders and section 27 of the Canadian Extradition<sup>29</sup> Act is as good example as any. It states:

"No fugitive is liable to surrender if it appears that such proceedings are taken with a view to punish him for an offence of

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<sup>27</sup> Yugoslavia Supreme Court 1957, Federal Constitution, Art. 16.

<sup>28</sup> Supra 26.

<sup>29</sup> Canadian Extradition Act Section 270.

political character; that the offence in respect of which the proceedings are taken under this Act is one of political character.

The case that has been accepted for almost a century throughout the larger part of Common law world and has even had its effect elsewhere is Re Castioni. Justice Denman laid down the rule that for an offence to be regarded as political for the purpose of extradition proceedings:

"It must at least be shown that the Act is done in furtherance of; done with intention of assistance as a sort of overt act in the course of acting in a particular manner, political rising or dispute between two parties in the state as to which to have the government in its hands ... The real question is whether upon the facts it is clear that the man was acting as one of the number of persons engaged in acts or violence of political character with political movement and rising in which he was taking part<sup>30</sup>."

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<sup>30</sup> *Supra* (2).



POLITICAL OFFENCE EXCEPTION  
PRACTICE IN HISTORICAL PERSPECTIVE<sup>31</sup>

From antiquity and historically extradition was the means resorted to for the surrender of political offenders. This was logically and definitely different from and indeed incongruous to the usage in the modern sense. The political offenders were persons guilty of crimes against her majesty; which crimes include treason, attempts against the monarchy or the life of the monarch and even contemptuous behaviour towards the monarch.

Historical and philosophical considerations may prevent states from arriving at affirmative definition of political offence. At the International Action Against Anarchists, Her Majesty's government stated in response to the Belgian proposal for International Conference upon extradition, which inter alia intended to formulate a definition of a political offence that"

"It appears there is a great difficulty and disadvantage in a way of attempting to define political crimes strictly. There has hitherto not been sufficient experience of cases in which the question might arise to permit starting definition of the same<sup>32</sup>."

However, it is handy to seek salvation from the courts whose role in providing the definition and province of political offence cannot be overlooked. A more comprehensive definition of

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<sup>31</sup> Green L.C. Law and Society; London Sijthoth, Oceana Publication 370, (1975).

<sup>32</sup> International Action Against Anarchists 1912, Supra 31.

refugees and in extradition law, albeit in different forms and with a different scope of applicability<sup>34</sup>.

Furthermore, an additional tendency emerged to widen the scope of the political offence exception by not only applying it to those who have committed an active political crime, but also to those who are the passive victims of political persecutions. Besides, the development of human rights law on an international level indicates that the individual has been elevated to a more important position in international law in that in a discipline which rejected him a priori as a legal object, he obtained a limited degree of recognition in the form of certain restrictions on the power of sovereign states. The rule of non-refoulement "provides that a person shall not be returned to the country from which he escaped from, for fear of prosecution on account of race, religion, nationality, membership of a particular social group or on account of his political opinion<sup>35</sup>. This is totally a new legal evolution which is only in the early stages and which in the future, will probably increase in importance and dimension.

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<sup>34</sup> Convention Relating to Status of Refugees: Geneva July 28, 1951, U.N. T.S. Page 137: Protocol relating to the Status of Refugees U.N.T.S. Page 267.

<sup>35</sup> Convention Relating to the Status of Refugees, Art. 23(1), 1974.

The first Extradition treaty which dealt with the surrender of political offenders was entered into in 1174 between England and Scotland. It was followed by a treaty in 1303 between France and Savoy<sup>36</sup>. In the seventeenth century Hugo Grotius gave the practice a theoretical framework which is still the linchpin of the classical extradition law. Until the nineteenth century extradition constituted the manifestation of co-operation between the family of nations as attested by various alliances in existence between reigning families of Europe. The French revolution of 1789 ushered in, the transformation of what was extradition per excellence to what became non-extraditable offence per excellence.

In 1830, even Austria and Prussia refused Russian's demand for extradition of Polish refugees. Belgium in 1830 went ahead to pass the famous extradition law which expressly forbade the extradition of political offenders; a provision which found its first incorporation in modern treaty in the convention of 1834 between France and Belgium. Since 1866 even Russia had felt herself obliged to non-extradition for political offenders<sup>37</sup>.

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<sup>36</sup> Supra (31) Page 370.

<sup>37</sup> A.S. Hershey: Essentials of Int. Law and Public Organizations: New York, Rev. ed. MacMillan Co., Page 350, 1927.



Although in 1833, Belgium became the first country in Europe to enact a law on non-extradition of political offenders, the beginning of political offenders, witnessed an avalanche of European treaties which treaties at least contained an exception for political offenders. In 1875, the practice was firmly and sufficiently established that the determination of what constituted a political offence was reached in accordance with the laws of the requested state. This development gave rise to increased role of the judiciary in practice, which exception for England and Belgium, since 1833 had played no part in the process<sup>38</sup>.

Article 13 of the Oxford Rules of 1880 adopted by the Institute of International Law as modified at Geneva in 1892<sup>39</sup>, states that extradition is inadmissible for purely political offence or crimes. Nor can it be admitted for unlawful acts of mixed crimes or offenses, also called relative offenses, unless, in the case of crime of great gravity from the point of view of morality and of the common law such as murder, manslaughter, grave wounds inflicted wilfully with pre-meditation and attempts on crimes of that kind.

The political offence exception is now a standard clause in almost all extradition treaties of the world and it also specified in various municipal laws of many countries. Even

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<sup>38</sup> Ibid 383.

<sup>39</sup> Ibid 383.

though recognized, the very term, "political offence" is seldom, if ever, defined in treaties or municipal legislations and judicial interpretation has become the source of its significance and application. This may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus by its nature it eludes the precise definition which could restrict the flexibility needed to assess the facts and circumstances of each case<sup>40</sup>.

The introduction of political offence exception in the practice of extradition offers Belgium's legislative initiative of 1833 was aptly discussed in Re Fabijan<sup>41</sup>, where the supreme court of Germany in 1933 stated:

"What the Belgian legislature understood by the term political offence is to be ascertained from the Belgium public criminal law of the time when the law of 1833 was made ... using the term, not in the legal sense, but also as it is understood in politics, the legislature meant essentially treason, capital treason, acts against the security of the state and the incitement of the civil war."

When the alleged offence involves both political and common law crime aspects, the latter must be incidental to the former and in no way overshadow it. If the crime is so outrageous that its

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<sup>40</sup> Supra 31, Page 371.

<sup>41</sup> Ibid 372.

motive cannot be accepted as justifying what has happened, many countries are willing to consider that the political character of his activities protect him from extradition<sup>42</sup>.

The rules of non-extradition of political offenders as asserted in Article 3 of the 1870, Extradition Act has found concerted support from International practice way back in 1904, in the case of Bondelworths Natives<sup>43</sup>, in which case Germany Council at Capetown applied in March 1904 to the Cape Colong for extradition of twelve natives of Bondelworths tribe on charges of murder, house breaking, arson and robbery with violence. The crimes were against Germany sovereignty and therefore in reality a political offenses. The government proposed to refuse the surrender of the accused. The foreign office concurred with the colonial office in granting asylum. However, in this case it can be doubted as to whether the minister was competent to decide this matter. The political nature of the case could have been more concretely determined by the court.

The case that has been accepted for almost a century throughout the larger part of the common law world and has even had its effect elsewhere is Re Castioni<sup>44</sup>. Justice Denman laid

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<sup>42</sup> Ibid 373.

<sup>43</sup> Supra 23, Page 677.

<sup>44</sup> 1891 I.q.B. 149.



down the rule that for an offence to be regarded as political for the purpose of extradition proceeding:

"It must at least be shown that the act is done in furtherance of; done with the intention of assistance as a sort of overt act in the course of acting in a political rising or dispute between two parties in the states as to which have the government in its hands ... The question real is whether the man was acting as the of the member of persons engaged in acts or violence of political character with political movement and rising in which he was taking part."

However, in the case of Nord Alexisigog<sup>45</sup>, the government of Haiti in 1909 requested the government of Jamaica the surrender of former President Nord Alexis and several of his cabinet ministers on a charge of having caused to be shot, various persons accused of complicity in what was called the colony plot. The foreign office concurred with the colonial office that this case there is room to depart from the usual practice for the arrest to be made and the accused to take the point that the offence was political ... before the court of law on analogy with Re Castioni case<sup>46</sup>, the offenses with which the ex-president is charged are clearly of political character. The persons who lost their lives were part of a conspiracy to overthrow the government.

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<sup>45</sup> Supra 23, Page 677.

<sup>46</sup> 1891 I.q.B. 149.

Just under twenty years later, in Rudewitz case<sup>47</sup>, the secretary of state Root, was used a similar language in refusing the extradition requested by the Russian Ambassador. The refugee was a member of the social Democratic Labour Party, who had taken part in a meeting which decided upon certain acts of murder and arson as revolutionary acts. It was stated:

"The aim, purpose and work of this social Democratic Party was revolutionary and the death of these persons was ordered by one of the organizers of the party. The department finds that the offence of killing and burning with which the accused is charged are clearly political in their nature and that robbery committed on the same occasion was a natural accident to executing the resolutions of the revolutionary group and cannot be treated as a separate offence."

Therefore, none of these offenses is such as will afford a proper and efficient ground for extradition of the accused to Russia. The government of United States finds itself impelled to these conclusions by the generally accepted rules of international law jurisprudence which proclaimed and acted upon by the courts of this and other countries declare that<sup>48</sup>:

"A person acting as one of the persons engaged in an act of violence of political character, with political movement and rising in which he is taking part is a political offender and is entitled to an asylum in this country, and by the long and consistent course of ruling in which the executive

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<sup>47</sup> January 26, 1947, Dig. Int. Law 49.

<sup>48</sup> Ibid.

branch of the government was expressly adopted and carried out such laws, and principle, but also by the express provision of Article 3 of the Extradition Treaty with the government of Russia 1893<sup>49</sup>, which in precise terms prohibit the surrender of political offenders."

Finally it is imperative to note that the process of extradition on historical plane has been cumbersome, it therefore needs to be streamlined. The political offence exception is a serious impediment to the effectiveness of the process of extradition. It has been suggested that judicial assistance be intensified. The case of Castioni<sup>50</sup>, should act as the centre of gravity and be cited authoritatively. In this case a divisional court led by Justice Stephen held that: the fugitive criminals are not be surrendered for extradition if these crimes are incidental to and form part of a political disturbance. Applying this test Hawkins J. asked:

"Now was this act done by Castioni of political character? That there was a general rising of one party, there can be no doubt. They were loyving was against the government. That they anticipated violent resistance, there can be little doubt. I find no evidence which satisfies me that his object in firing Rossi was to take that poor man's wife or to pay off any old grudge or to revenge himself for anything in the least degree which Rossi or any one of the community had ever done<sup>51</sup>."

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<sup>49</sup> Article 3, 1893 Extradition Treaty between Russia and U.S.

<sup>50</sup> 1891 I.q.B. 149.

<sup>51</sup> Ibid



## C O N C L U S I O N

The political offence exception is now a standard form clause in almost all extradition treaties of the world, and is also specified in various municipal laws of many countries. Even though recognized, the very term political offenses is seldom, if ever defined in treaties or municipal legislations and judicial interpretation has become the source of its significance and application. They may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus by its nature it eludes the precise definition which could restrict the facts and circumstances of the case. Pertinent therefore is the fact that the history and present usage of political offence exception is inexorably linked to the rise of the eighteenth century theories of political freedom and etiquettes of democracy.

As a result of this pre-eminent role played by the judiciary in defining and applying this exception, the courts of the requested states unavoidably apply national conceptions and standards, and policies which relate, however, to a process transcending the interests of one participant.

As to the term political offence Oppenheim says, it was unheard of in international law vocabulary until the aftermath of the French Revolution of 1789. When the alleged offence involves

both political and common law crimes aspect, the latter must be incidental to the former and in no way overshadow it. When the crime is so outrageous that its motive cannot be accepted as justifying what has happened, many countries are willing to consider that political character of his act or his activities protect him from extradition.

Accordingly, most definitions of the term "political offence" are tautologous rather than explanatory since they refer themselves to the political motivation or political context of the act without however defining the element "political" itself. Thus it is probably impossible to give a non-tautological definition of the term political crime because it does not have an independent legal term, rather it is to be considered as a label which as soon as a number of criteria are fulfilled may be attached to every crime. Cheriff Bassouni in his book *Extradition and political offence exceptions* calls it a descriptive label of doubtful accuracy. The political offence exception is certainly undefinable as attempts to formulate a satisfactory definition have miserably failed.

## CHAPTER THREE

### EXTRADITION AND HOBIBICAL OFFENSES: THE SANCTITY OF NON-EXTRADITION CLAUSE

International law has had to justify its legitimacy and reality. Its title to law has been challenged on ground that by hypothesis and definition there can be no law governing states. Skeptics have argued that there can be no international law, since there is no international legislature to make laws, international executive to enforce the same and the international judiciary to interpret and develop it or to resolve disputes about it<sup>52</sup>. The positivists state that international law has become a music - hall joke; that is a system which nobody takes the slightest notice of. It is so dramatically expressed by one of the characters in "Leon Levis Exodus" as:

That thing which the evil ignore and the  
righteous refuse to enforce<sup>53</sup>."

How then do we position the magnitude of regard that is accorded to the concept of extradition and political offenses under the international law? Laws properly so called it is argued are commands. Being a command every law properly so called flows from a determinate source. Every sanction so called is annexed to a command and hence it inevitably follows that the law obtaining between nations is not positive law, for every

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<sup>52</sup> Louis Henkins, Richard C. Pugh Oscar Schachter, Hans Smith; Int. Law Cases and Materials. AM. Law Series: Second ed; West Publishing Co. St. Paul, 1987 Page 156.

<sup>53</sup> Greg L. J.: Law and Society: New York, Oceana Publications Inc. 1985 Ferry.



positive law is set by a given society to the person or persons in the state of subjection to its authority<sup>54</sup>.

In due respect and regard to the above positivist position, what then entails a political offence? Why is it given a special place under international law in regard to extradition? Besides, it is mandatory for states not to extradite political offenders? Are there effective sanctions in case of non-compliance? Is non-extradition a right or a duty in international law?

There is a great network of extradition treaties by which states have obliged themselves to surrender to each other persons guilty and wanted for certain crimes. However, it is a common feature of many international treaties to have a provision to the effect that extradition should not be granted in case of political offenses." Article 3 of the European Convention on Extradition states:

"That extradition shall not be granted if the offence in respect of which it is requested is regarded by the requesting state as a political offence or as an offence connected with a political offence. It is further states that the same rule shall apply if the requested state 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. This Article, it is further provided shall not affect any

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<sup>54</sup> Supra I Page I, Paragraph 3.

obligations which the contracting parties may have undertaken or may undertake under any other international obligation of multi-lateral character. The killing or attempted killing of the Head of State or a member of his family shall not be deemed to be a political offence for the purpose of extraction in this convention<sup>55</sup>."

The Montevideo Convention on Extradition, was of no less unequivocal terms. Article 3 of the convention provided that:

"Extradition shall not be granted when the offence is political in nature or of a character related thereto. An attempt against the life or person of the chief of state or member of his family shall not be deemed to be a political offence<sup>56</sup>."

Having looked at provisions of international convention on political offence exception, it is perfectly legitimate to proceed and examine the quality of what constitutes a political offence.

#### POLITICAL OFFENCE: QUALITATIVE ANALYSIS

In the eighteenth century, extradition was most frequently sought and granted for what are now termed political offenses. By the nineteenth century public opinion in Western Europe turned against the extradition of fugitives accused of political

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<sup>55</sup> Grahl Madsen: Territorial Asylum, London, Rome, New York; Oceana Publication, January 1980; European Convention on Extradition 1957, December 13 U.N. Treaty Series 357: 273.

<sup>56</sup> E 1933 Dec. 26; League of Nations Treaty Series 165:45 Ibid Page 117.

offenses. Belgium which enacted the first extradition law in 1833 incorporated the principle of non-extradition of political offenders in the law. Today most treaties exempt fugitives accused of political offenses from extradition. Although the principle has been universally accepted political offenses have never been precisely defined. The first attempt to define it was at the attentat clause in many treaties which provides that murder of the head of a sovereign government or a member of his family is not to be considered as a political offence<sup>57</sup>. Many treaties extend the exclusion to any murder or attempt on the life in general. However, in 1934, in the absence of such clause in the applicable treaty, the Turin court of appeal refused to extradite the assassins of King Alexander of Yugoslavia to France on ground that the crime was political<sup>58</sup>.

In 1892, Switzerland adopted the law which provided that a crime was not to be considered political if it was primarily a common offence even though it had a political motivation or purpose<sup>59</sup>.

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<sup>57</sup> Dr. Christine Vander Wijngaert: Political Offence Exception to Extradition: Entwerp, London, Frankfurt 1980, Page 12.

<sup>58</sup> Supra I Page 887 Paragraph 3.

<sup>59</sup> Ibid Page 887 Paragraph 1.



Some treaties provide that criminal acts which constitute a clear manifestation of anarchism or envisage the overthrow of the base of political organizations shall not be considered as a political offence. British and American courts have held that for the offence to be political it must be committed in furtherance of a political movement or in the course of struggle to control government of the state; Re Castioni<sup>60</sup>. However, this rule has been relaxed recently to provide refuge to private individuals feeling totalitarian state, Regina V Governor of Brixton Prison Exparte Kolczynski<sup>61</sup>. Treaties also frequently prohibit extradition for purely military offenses.

In the later case of Re Gonzelez<sup>62</sup>, the court after stating the facts of the case had this to say<sup>63</sup>:

"The concept of "political offence" in the concept of extradition is a familiar one. Both the English and the American cases dealing with this issue recognize the leading case in Re Castioni<sup>64</sup>."

That was the case of the first impression in England, applying for the first time a political offence exception contained in the applicable extradition statute<sup>65</sup>. In that case

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<sup>60</sup> 1891 I.q.B. 149.

<sup>61</sup> 1955 I.q.B. 540, 550, 551.

<sup>62</sup> June 19, 1901 Case No. 50.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> 33 and 34 Vic C.52 1866.

the Swiss government sought the extradition of one Casion for fatal shooting done by him while he was participating in a violent popular demonstration protesting the government's refusal to submit proposed constitutional revision to popular vote. The Queens Bench Division held that:

"Extradition for this offence was barred since it was a political offence."

There are three concurring opinions in Castioni which discuss the political exception at length. However, they are fairly summarized by the much quoted definition set aside by Justice Hawkins, according to which:

"Political offenses are those incidental to and from part of the political disturbances."

Authorities in international law restate the prevailing Anglo-American law in essentially this form<sup>66</sup>:

"A leading American case in this area establishes that a political offence exception is applicable to acts of government agents seeking to suppress an uprising as well as the acts of those participating in the uprising. The general rule is that there must be an uprising and that the acts in question must be incidental to it."

Notwithstanding the validity of this general proposition of law, it must be emphasized that the political offence exception is essentially flexible on. Judge Denman in Re Castioni stated:

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<sup>66</sup> Ibid.

"I do not think it is necessary or desirable that we should be tempted to put the language in the form of an exlianstive definition exactly ... to every state of things which might bring a particular case within the description of an offence of political character. This in essence presaged a recent holding of the same court, in exparte Kolczyski that a muting by the crew of a small Polish fishing trawler was a political offence, notwithstanding that it was not an accident of political uprising<sup>67</sup>."

This case shows that at least under the English law, there is no absolute requirement that there be a political uprising in order for the political offence to be applicable, but the only indispensable ingredient is that the acts be politically motivated and directed towards political ends (Emphasis added).

Secondly, Kolczyki as well as the history of political offence exception in Anglo-American law arguably indicate that the political exception legitimately can be applied in greater liberality. Where the demanding state is a totalitarian regime seeking the extradition of one who has opposed that regime in the cause of freedom.

The Swiss Federal Tribunal recognizing this deficiency has said in Bjelonove and Arsenijevik case<sup>68</sup> that:

"Restrictive interpretation does not meet the intention of the law, nor take account of recent historical development such as the growth of totalitarian states ... those who

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<sup>67</sup> 1891 I.q.B. 149.

<sup>68</sup> 39 I.L.R. Page 371, No. 30, 1952.



do not wish to submit to the regime have no alternative but to escape it by flight abroad ... This more passive attitude for the purpose of escaping political constrain is no less worthy of asylum than active participation in the fight for political power used to be in what were earlier considered to be normal circumstances... Recent practice has been too restrictive in making the relative political character of an offence dependent on its commission in the framework of a flight for power<sup>69</sup>."

If extraditions were available for all manner of crimes, then the concept of political asylum would be valueless. In fact however, the English liberal attitude of political refugees in the nineteenth century promoted this policy of exempting political offenders from extradition. This involved a derogation from the general pattern of extradition developed in the eighteenth century, when political crimes were primarily those aimed at the arrangements than made. One approach is the formal one of fitting facts to the elements of the crime of, say, murder or malicious injury to property and ignoring political motive. Another is to exempt from extradition any person who was politically motivated, irrespective of the formal crimes with which he is charged.

Then there is a distinction between doing a crime with a political motive and doing it to achieve a political end. In 1921, the murderers of a Spanish Prime Minister were extradited

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<sup>69</sup> Ibid.

from Germany on the ground that though the act was one of political vengeance, it was not done with a political object<sup>70</sup>.

The English courts have not been happy with their choice of approach of attempting to define the term political offence. In Re Castioni<sup>71</sup>, it was held that for an offence to be "political", it must at least be shown that the act is done in furtherance of, done with intent of assistance, as a sort of overt act, in the course of acting in a political matter, a political rising or a dispute between two parties in the state as to which to have the government in its hands<sup>72</sup>.

A fugitive is not permitted to argue that the requesting state did not act in good faith, nor may he argue that if surrendered for common offence, he will be tried for a different offence of political character since the principle of speciality for which effect is given in treaties and in the Acts covers this point<sup>73</sup>. It was held in the house of Lords in Schtraks V Government of Israel<sup>74</sup> that:

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<sup>70</sup> D.P. O'Connell: International Law: Volume two Second ed. Page 726.

<sup>71</sup> Supra 16.

<sup>72</sup> Supra 19 Page 727.

<sup>73</sup> Re Arton No. (1) I.q.B. 108 (1896).

<sup>74</sup> 1964 A.C. 556, 584.

"He might argue only that he was at odds with the requesting government on some issue connected with political control of the country, and that the offence for which surrender is claimed was committed in furtherance of political motive<sup>75</sup>."

The fugitive is not bound by the strict law of evidence in providing such matter. Lord Redcliffe, refusing to define a political offence, stated that the idea which lies behind the phrase offence of "political character" is that:

"The requesting state seeks extradition for reasons other than the enforcement of criminal law in its ordinary aspects<sup>76</sup>."

Even in the case of political disturbance, if the intent of the government is to enforce the law there could be no reason to refuse extradition.

In the United States, the test is whether the crimes were committed in the course of and incidental to a revolutionary uprising or other political disturbances<sup>77</sup>. The French system excludes mere motive as the test and insists on the act affecting the political organization of the state; it must be an act directed against the constitution and the government, which aim at changing or at destroying or bringing into disrepute one of

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Jimenez V Arisleguita: Supra 19 Page 547.



these authorities or act exercising illegitimate pressure on the play of their mechanism<sup>78</sup>.

Other continental systems have founded the distinction between "common" crimes and "political" crimes on consideration of whether the act was "isolated" one or was "connected" with an attack on the political order<sup>79</sup>. The first significant delimitation of the area of "political crime" occurred in Belgium law of 1856 embodying what is known as the clause. This enactment followed a decision of a Belgium court of Appeal refusing extradition in the case of certain French men who had tried to assassinate Napoleon III. It provides that murder of a sovereign of a government or a member of his family is not to be considered a political crime, and hence the offender is extraditable<sup>80</sup>.

The Switzerland government adopted the law with "predominance" test. According to the said test, if in the opinion of the federal tribunal the act is a primarily a common offence, it may grant extradition, notwithstanding that the act had a political motivation or purpose. The French law of 1927 tried to lend a little more precision to the matter by adopting a

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<sup>78</sup> Supra 19 Page 547 Paragraph 2.

<sup>79</sup> Germany Case Refabijan Ann. Dig Int. Law 1933-1934 Case No. 156.

<sup>80</sup> Extradition of Greek (Germany) Case I.L.R. 1955 Page 320.

lest of odious brutality or vandalism under which anarchists could be extradited<sup>8 1</sup>.

The Harvard Draft Convention<sup>8 2</sup> itself proposes a specification of political offenses listing treason, sedition, espionage and offenses connected with the activities of an organized group directed against the government system and security of the state. But apart from its inherent vagueness this test is valueless for political reason that "treason" is a concept of Anglo-American law with feudal roots and few common law-elements with similar crimes under civil law.

It is noted in Re Bohne<sup>8 3</sup>, that in respect to charges of genocide, said to have been committed under the Nazi regime, the supreme court of Argentina held that:

"The exception of political offence could not be pleaded in cases of cruel or immoral acts which clearly shock the conscience of civilized people."

It has been further submitted that for the political offence exception to apply in extradition, the alleged offence must be proved as politically predominant. In Ktir V Minister of Federal

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<sup>8 1</sup> Volume 62 Feb: C72 (1894).

<sup>8 2</sup> L.O.C. Cit Art. 5(b).

<sup>8 3</sup> A. I. VOL. 62 (1968) at Page 784.

Republic of Switzerland<sup>84</sup>, it was so stated. The Judge went further to state that:

"Extradition must be granted for the following reasons: that political offenses included common crimes which had a predominantly political character from their motive and factual background. However, the damage must be proportionate to the aim sought, in the case of murder, this was to be shown to be the sole means of attaining the political aim. The offence in this case did not satisfy the requirement of proportionality<sup>85</sup>.

The reason for definition of political offence is not to criminalise certain acts, but to know whether acts which have already been criminalized can be considered as political crimes. If such acts are to be considered as political, they will benefit from domestic and international preferential treatment, consequently the importance of the definition of the term political offence in extradition law lies in the fact that it is determined for extraditability of the crimes for which a duty to extradite has been created in the extradition treaty. Accordingly, the definition of the term political offence in extradition law as it is, is not a purpose in itself but a function of another factor, namely the extraditability of the facts<sup>86</sup>.

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<sup>84</sup> Int. Law report VOL. 34 Page 145-146: Swiss Federal Tribunal May 17, (1961).

<sup>85</sup> Ibid.

<sup>86</sup> Art. 1 and 2 of Extradition Treaty between France and Swiss Republic.



In Belgian domestic law, the term "political offence" has been clearly circumscribed by the courts. The supreme court held that political crime is essentially the crime which both in intention of the another and by its effect constitutes a direct attack against the political institution. As such both the mental and material elements must be required together with the requirement that the act should constitute a direct attack on the political institutions of the state. With respect to political offence in extradition law, however, the courts have given much broader meaning to the same term. For example, the court has held that the robbery of a Portuguese bank constituted the political crime, because to the mentioned foreigner seem to show an exclusively political motive but do not by themselves constitute a direct and immediate attack upon the political institutions, so that the application of the notion political offence to the facts can give rise to reservations, under a juridical conception which is not purely subjective<sup>87</sup>.

The related political crimes have only ben formulated in extradition law, no in domestic legislations with respect to political crimes. Since these related political crimes have not been confined either in courts, courts have still greater freedom of discretion when ruling on extradition, which allows them to rely on either exclusively subjective, that is the authors intention or exclusively objective, that is the circumstances or

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<sup>87</sup> Supra 33 Doc. 31 1968 Page 98-99.

the result of the act, criteria, whereas according to domestic law both a mental and material element are required in order to constitute a political offence or crime<sup>88</sup>.

POLITICAL OFFENSES: THE QUESTION OF UNRESOLVED AMBIGUITY

The concept of "political offence" has been observed by several preconceived ideas which have given it an ambiguous character. There are in particular its implicit political content and its implicit positive significance<sup>89</sup>.

The implicit political content of the concept "political crime" derives from the fact that the legal system desired for political crimes in the nineteenth century was mainly, if not conclusively meant as a protection for the advocates of democracy. Accordingly, there was and still is a tendency not to consider democratic legal order on the grounds political offenders. The implicit positive significance of the term political crime image of the political offender and the legal consequences which result from that approach. As this has been observed above, this image was circumstantial. It was also typical of liberal democratic states. Totalitarian regimes usually consider political offenders as the most dangerous among all criminals, which is usually reflected in their criminal justice systems by the fact the definitions of crime are broader

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<sup>88</sup> Supra 33 Page 99 Paragraph 3.

<sup>89</sup> Supra 6 Page 100 Paragraph 3.

and more vague, the penalties much harsher and procedural safeguards restricted<sup>90</sup>. How about the question of terminology and distinction of political crimes?

Just as there is no generally accepted definition of the term "political offence" in extradition law, no recognized terminology exists for the classification of political crimes. Usually they are divided into different sub-categories including "purely and mixed", "absolute and relative", "connex and complex" and, "subjective and objective" political crimes. None of these terms was a definite content and the significance attributed to them differs from one author to another. Accordingly, many use the term relative political crime as the counterpart of absolute political crimes, whereas others consider the relative political crimes while still others assimilate relative with complex political crimes<sup>91</sup>.

This confusion, however, occurs in legal writing. Extradition Acts and Treaties are relatively simple and uniform in their terminology. Nonetheless, in extradition theory and practice, the necessity has been felt to introduce a certain terminological nuances in order to distinguish political from common crimes. This distinction is usually based upon the right insured and the commission of common offenses. Accordingly, a

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<sup>90</sup> Ibid Page 107 Paragraph 2.

<sup>91</sup> Ibid 105.



distinction can be made between purely political and related political offenses.

Purely political offenses are those exclusively directed against the state or the political organization without injuring private persons' property or interest. They are in addition not accompanied by commission of common crimes. The first factor focusses on the more classic political crimes such as treason, espionage, conspiracy and collaboration with the enemy. The second applies to crimes which do not constitute a direct attack against the state or its institutions but which consists of merely passive dissidence that of not-agreeing with the prevailing ideology. Most of the writings on extradition mainly emphasize on the first category<sup>92</sup>.

Theoretically purely political crimes are easily dealt with in extradition law because in most cases they do not meet the requirements of double criminality and in addition, they usually do not fall within the enumeration of extraditable crimes in the extradition treaty. Consequently, there is usually no duty to extradite, with regard to purely political offenses, so that the political offence exception is in this case, as a matter of fact superfluous. Thus the problem here is the possible circumvention of extradition, consisting of the requesting state's attempt to get custody of the person concerned by using their technique for

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<sup>92</sup> Ibid 105-106.

example, it can base request on common crime or take recourse to alternative extradition procedures such as abduction, deportation and internal surrender<sup>93</sup>.

As pertains to related political offenses, these are crimes assimilated to political offenses because the perpetrator pursued political purpose subjectively or because the act had political consequences or was situated in a political context; the objective criterion<sup>94</sup>.

The political offender is a person who violates the criminal law on grounds of his ideological and political conviction. This political ideological motivation is the only criterion on which to distinguish political criminal from common offenders, and presuedo-political offender since there is often no difference between the crimes committed<sup>95</sup>.

The foregoing is especially the so called related political offenses because of the ideological motivation for the act. The term political offence does not refer to well-determined criminal action which can be analyzed in terms of material and mental element. It is a comprehensive term comprising various forms of delinquent behaviour and as such it covers a wide range of

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<sup>93</sup> Ibid Page 106-107.

<sup>94</sup> Ibid page 108.

<sup>95</sup> Ibid Page 27 Paragraph I.

offenses. It can be viewed as a spectrum with at one extreme purely passive offenses such as political dissidence and on the other hand active offence of opposition against the prevailing social order against the ruling group in power. It is a continuum of offenses in which the political and common elements are more less represented rather a distinctive category of crimes which could be distinguished from the common offenses<sup>96</sup>.

Most common offenses can as a matter of fact be considered as political crimes under certain circumstances namely when they are committed with political purpose or when they have a political consequence. Consequently, the label "political" can be attached to practically every offence, the moment it subjectively or objectively affects the existing social political order<sup>97</sup>.

Accordingly, most definitions of the term "political offence" are tautologous rather than explanatory since they refer themselves to the political motivation or political context of the act without however defining the element "political" itself. In his report before the Sixth Conference for the Unification of the Penal Law, Hammerich explained this by observing that it is probably impossible to give a non-tautological definition of the term political crime because it does not have an independent legal term, rather it is to be considered as a label which as soon as a number of criteria are

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<sup>96</sup> Ibid Page 45 Paragraph I.

<sup>97</sup> Ibid Page 95 Paragraph I.



fulfilled may be attached to every crime. Thus the term political offence is probably undefinable conclusively. To conclude with Sir Lauterpacht: "Up to the present day all attempts to formulate a satisfactory conception of the term have failed and the reason for an act done, will, probably forever exclude the possibility of finding a satisfactory definition<sup>98</sup>."

IS THERE A BINDING OBLIGATION ON STATES NOT TO  
EXTRADITE POLITICAL OFFENDERS?

States as a matter of fact are not persons however convenient it may often be to personify them; they are merely institutions, organizations which men establish among themselves for securing certain objectives of which the most fundamental is the system of order within which the activities of their common life can be carried on. They have no will except the wills of the individual human beings who direct their affairs and they exist not in a political vacuum but in a continuous political relations with one another. Their subjection to law is yet imperfect although it is real as far as it goes; the problem of extending it is one of great political difficulty, but is not one of intrinsic impossibility<sup>99</sup>.

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<sup>98</sup> Ibid Page 95-96.

<sup>99</sup> Int. Law Cases and Materials: Supra I Page 5 Paragraph I.

Until the nineteenth century, extradition of fugitive offenders was very rare and was a matter of sovereign discretion rather than obligation. With the dramatic improvement in transportation in the nineteenth century the number of criminals fleeing the foreign states increased and states began to conclude bilateral treaties providing for their extradition. In Factor V Laubenheimer, the court noted that"

"The principle of international law recognizes no right of extradition apart from treaty. While a government may if agreeable to its own constitution and laws voluntarily exercise the power to surrender a fugitive from justice from the country has fled ... the legal right to demand his extradition and the correlative duty to surrender him to the demanding state exists only when created by treaty. In fact, the municipal law of many countries prevent arrest and extradition of fugitives except pursuant to a treaty operating as international law or statute providing for extradition<sup>100</sup>.

In Valentine V US. ex rel Neidecker<sup>101</sup>, it was stated that the United States extradition is governed by Federal law. The states have no power to extradite fugitives for foreign countries.

Non-extradition of political offenders is a rule of municipal law and not of international law. This was stated in the Spanish-Germany Extradition treaty case<sup>102</sup>. Hence, if

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<sup>100</sup> 290 U.S. 276, 287, 54 Sct 191, 193 78 L. Ed. 315 (1933).

<sup>101</sup> 299 U.S. 5, 9 57 Sct 100, 102, 81 L. Ed. 1936.

<sup>102</sup> Ann. Dig (1925) 26, Case No. 234.

extradition is granted, the accused cannot raise the defence in the court of the requesting state that as a political offender he is not justiciable before it. The only conclusion which one can come is the characterization of the offence as a political one must be left to the law of the requisitioned state which must adopt its own standards in the light of its own policies.

The Harvard Draft Convention<sup>103</sup> proposes that a state should have discretion in the matter of extradition of military offenses. However, it was admitted that the practice of non-extradition of military offenders had not gained universal acceptance or been widely adopted in the treaty law on the subject.

Is non-extradition of political offenders a duty or a right? In extradition treaties it is normal to find a provision to the effect that extradition "shall not be granted for political offenders or what amounts to the same". That a fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of political character<sup>104</sup>.

Thus in a relatively old treaty of extradition as the one between Austria-Hungary and Sweden-Norway of June 2, 1868,

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<sup>103</sup> Green L. C: Political Offence and Extradition: I.C.L.q. VOL. Two (1952).

<sup>104</sup> Grahl Madsen: Territorial Asylum: New York, Oceana Publication 1980 Page 47 Paragraph One.



Article 3 provides *inter alia*: "Extradition shall never be granted for political crimes or delicts. And in a relatively modern treaty as that between Belgium and Poland of May 13, 1931, we find the equivalent of Article 6(1)<sup>105</sup>.

A practically identical provision is found in the perhaps most important instrument of post world war two period; The European Convention on Extradition, 1957, whose Article 3(1) provides that:

"Extradition shall not be granted if the offence in respect of which it is requested is regarded by requested party as a political offence or an offence connected with a political offence<sup>106</sup>."

The European Convention on extradition also contains in Article 3(2), a provision of more recent origin namely that:

"The same rule shall apply if the requested party has substantial ground to believing that a request for extradition for any ordinary criminal offence was 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<sup>107</sup>."

That provision such as the ones quoted above give the requested party a right to refuse extradition and thus grant

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<sup>105</sup> Ibid Page 47 Paragraph 2.

<sup>106</sup> Ibid Page 47 Paragraph 3.

<sup>107</sup> Ibid Page 47.

asylum is quite clear. But may such provisions be construed so as to lay down an international obligation for the requested state to refuse extradition? That there are provisions of municipal law prohibiting extradition is quite another matter. We shall endeavour to answer the question first in the context of bipartite treaties of extradition, therefore on the context of multi-partite treaties<sup>108</sup>. Let us quickly go into the concept of bipartite treaties.

To be sure expressions such "extradition shall not be granted" and "fugitive offender shall not be surrendered", are when viewed in isolation clearly capable of construction to the effect that the requested state is duty bound to refuse extradition. But irrespective of the merits of the words chosen it must be borne in mind that in the case of bipartite treaty the only subject of international law which may protest against a violation of a treaty as such is the other contracting state; the very state requesting the extradition of the person concerned. In some parts of the world, where today's presidents may be tomorrow's asylum seekers and today's refugees tomorrow's head of state, it is certainly possible to envisage that the governments may wish to try to prohibit absolutely the surrender of the alleged political offenders and other refugees. Also, it is thinkable that a new government would resent it if a foreign state had surrendered one of its promoters to the former regime.

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<sup>108</sup> Ibid Page 147.

But even if the clause prohibiting the extradition of political offenders and refugees should indeed and would include a clause to the effect that it could not be abrogated it would be very difficult, to say the least, if it could give occasion to any successful action in the case of non-compliance.<sup>109</sup>

Like that of several other Latin American countries, the constitution of Mexico, United States, 1917 prohibits the extradition of political offenders. The relevant part of Article 5 of the constitution reads as follows:

"No treaty shall be authorized for extradition of political offenders or offenders of the common order who have been slaves in the country where the offence was committed." For the purpose of this thesis only the first section can be certainly relevant and therefore of interest<sup>110</sup>.

According to extradition law, states are only bound to extradite if they expressly assumed this obligation in an extradition agreement. The duty to extradite can only be created by an extradition treaty, the right to extradite however exists independently from any extradition treaty because states are completely free to extradite or not to extradite by virtue of their sovereign right to grant or refuse to grant asylum. Thus the extradition treaties have to be viewed as exceptions to the general principle of asylum; they contemplate the creation of a

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<sup>109</sup> Ibid Page 35.

<sup>110</sup> Ibid Page 31.



duty to extradite and in this framework the political offence exception can only be considered as a reservation by which states reserve themselves the right to refuse extradition for the said crimes. It is a freely made reservation in respect to a freely assumed treaty obligation and merely a reservation of freedom which in the absence of a treaty the territorial sovereign could in any case be able to exercise. Accordingly, the political offence exception should be considered as a right to refuse extradition and not as a duty to refuse extradition, which from a logical point of view precisely contemplates the creation of obligation to extradite<sup>111</sup>.

Consequently, from a strictly legal point of view the political offence exception is to be considered as a reservation with respect to an international treaty obligation. Accordingly, states cannot be assumed to have intended to provide the political offence exception when such an exception has not been stipulated in the relevant extradition treaty<sup>112</sup>.

It has, however, been completely different when the exception is considered from the political perspective that is not as a legal, but as a political principle. It has been demonstrated above that the non-extradition of political offenders was an embodiment of political principle resulting from

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<sup>111</sup> Supra 6 Page 45 Paragraph I.

<sup>112</sup> Ibid Page 45.

the nineteenth century's political and ideological contradiction between new liberal democracies and despotic regimes of the ancient regime. In this framework, the political offence exception was and still is considered as an embodiment of great democratic tradition of hospitality and tolerance towards political offenders from other states. Those who oppose treaties which derogate from the political offence exception refer to this political principle rather than the legal principle. It is in this sense that the critics of the European Convention for Suppression of terrorism are to be understood<sup>113</sup>.

The new multipartite agreements with respect to this situation is different, as in their case there are states other than the requesting and requested state having the locus standi, should there be a violation of the provisions of the convention. In such a case therefore, the construction of the relevant provision is decisive.

According to Article II(2) of the Central American Extradition Convention, 1934, extradition shall not be granted when the offence is of political character, or begin a common crime is connected there with. In Article III, it is further provided that "the person whose extradition is conceded because of one of the (extraditable) crimes mentioned in Article I, shall in no case be tried and punished in the country to which he is

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<sup>113</sup> Ibid Page 46.

surrendered for a political crime committed before his surrender nor for an act which may name a connection with a political crime. The convention here is that all the other states are in a position to take action in case of default by both the states.

At the other end we find the proposed Article 5(a) of the Harvard Draft Convention on Extradition which stipulates:

"A requested state may decline to extradite a person claimed if the extradition is sought for an act which constitute a political offence or it appears to the requested state that extradition is sought in order that the person claimed may be prosecuted or punished for political offence."

In their comment on this paragraph the drafters underline that is in drafted in a permissive form leaving it to the discretion of the requested state to grant or to decline extradition for an act constituting a political offence. The reasoning behind the choice of this form is worthy being quoted: In justification of the adoption of the permissive form in paragraph (a) of this Article, it may be pointed out that this formula seems to be better adopted to a multipartite convention that is the peremptory term of mandatory prohibition. It is also in harmony with the general tendency of this draft convention. There is no reason why a state should be precluded from surrendering, if it so chooses, a person sought for political offenses. It may well be that some states because of close association or because of the close similarity of their political



constitutions, would find the extradition of political offenders desirable<sup>114</sup>.

In other words it is the express intention of the drafters that the requested state shall be under no international obligation to refuse extradition of political offenders. Article 3(1) of the European Convention on Extradition which we have quoted above, is couched in terms which on the face of it place it somewhere in between these two extremes<sup>115</sup>.

The phrase extradition shall not be granted appears to be mandatory. And this may well be its meaning. According to the Explanatory report on the European Convention on Extradition published by the Council of Europe<sup>116</sup>, forbids extradition for political offenses<sup>117</sup>. This is clearly peremptory language. But its effect is somewhat weakened by the comment in the following subsequent paragraph, which paragraph allows the requested party to refuse extradition. For according to the actual wording of Article 3, there is no difference between the two paragraphs in this respect. Article 3(2) flatly states: "The same rule as laid in Article 3 shall apply ... No inference may therefore

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<sup>114</sup> Supra 53 Page 37.

<sup>115</sup> Ibid Page 37.

<sup>116</sup> Article 3 Paragraph I.

<sup>117</sup> Supra 64 Page 15.

really be drawn from the words used in the explanatory report in this connection<sup>118</sup>."

According to Article 3(1), it is for the requested party to determine whether an offence is political one and whether it is therefore not extraditable. The requested party is clearly obliged to exercise this function in good faith<sup>119</sup>.

It seems that the correct construction of Article 3(1) is that so long as the requested party exercises in good faith its functions of determining the character of the offence in question, it is not answerable to anybody. It may apply the subjective or the objective criteria as it deems fit. But if the requested party leaves the path of good faith and either refuses extradition out of hand on mere pretext that the offence is a political one, or if it grants extradition in flagrant disregard of its duty to exercise discretion, the requesting party or third party, as the case may be, may complain and in appropriate cases, bring the matter before the international court of justice<sup>120</sup>.

According to the Montevideo Convention on political asylum<sup>121</sup>, Article 2 provides that the judgement of political

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<sup>118</sup> Ibid Page 37.

<sup>119</sup> Ibid Page 37.

<sup>120</sup> Supra 53 Page 37-38 Paragraph 5.

<sup>121</sup> D. 1933 December 26.

delinquency concerns the state which offers asylum. Article 3<sup>122</sup>, provides that political asylum as an institution of humanitarian character is not subject to reciprocity. Any man may resort to its protection, whatever his nationality, without prejudice to the obligations accepted by the state to which he belongs; however the states that do not recognize political asylum except with limitation and peculiarities can exercise it in foreign countries only in the manner and within the limits recognized by the said countries.

In the case of Glaisdale Cheng V Governor of Pentonville prison<sup>123</sup>, Lord Simon had this dictum: "It is unlikely that the world will ever be free of political crimes. Subjects will always tend to feel grievance against their governors, there will always be conflict of ideology and some people seem to have a natural propensity to express themselves violently. But there is the less exercise for and therefore will be less public condonation of political violence if there is institutional power to influence the decisions of government, and if substantial freedom is safeguarded by law. This country he said, provides itself its tradition of constitutional government and freedom under the law. Our tradition of asylum for political criminals is closely associated with our cherishing of our rights.

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<sup>122</sup> Ibid Art. 3; Swiss Federal Tribunal May 17, 1961: Int. Law Report VOL. 34 Page 145-146.

<sup>123</sup> Ibid: Page 389-394.



I am naturally conscious, said Simon J, that this instant appeal takes place at the time when horrifying acts of political terrorism are much in public mind. Although it is perhaps more acute today, the problem of how to reconcile a policy of asylum for political criminals with the curbing of terrorism is not new as seen by Wheaton and Oppeheim, it has so far defined generally acceptable solution. Oppeheim himself proposed the way of dealing with the matter. Oppeheim, a distinguished Editor had this to say of the proposed convention against terrorism, consequence upon the assassination of the King Alexander of Yugoslavia"

"It is doubtful whether states wedded by the law and tradition to the principle of non-extradition of political offenders will acquiesce in any conventional regulation impairing the asylum hitherto granted to political offenders. Such acquiescence on their part is unlikely at a time when the suppression, of individual freedom and the ruthless persecution of opponents in many countries tend to provoke violent reaction of a treasonable character against the government concerned."

While this is the general practice there does not seem to be any rule of international law forbidding a state from surrendering a person who is accused of a political offence, subject of course to any provision to the contrary which may be embodied in its national legislation. This became clear in Duggin V Tapley<sup>124</sup>:

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<sup>124</sup> 1952 I.L.R. 62, 18 Int. Rep. 336 at 343.

"The attempt to establish that non-surrender of political refugees is generally recognized principle of international law fails. The farthest that the matter can be put is that international law permits and favours the refusal of extradition of persons accused or convicted of offenses of a political character, but allows it to each state to exercise its own judgement as to whether it will grant or refuse extradition in such cases and also as to the limitations which it will impose upon such provisions as exempt from extradition." While depending on its own national law provisions, there is no obligation on the state to grant extradition at the request of another, unless there is a treaty between the two creating such an obligation; there is equally no rule of international law to prevent a state from exercising its discretion so as to concede such request even if there no treaty between itself and the requesting country. In the absence of a treaty, however the requesting state can only rely upon the good will of the requisitioned state but cannot assert that there is any duty upon that state to comply with the request<sup>125</sup>.

The reasons for the political offence exception rest in part upon the asylum state's sense of humane treatment and belief in human rights and personal political freedom. Further more it is generally acknowledged that political crimes affect the demanding state's most sensitive interests, and, therefore, inspire a passionately hostile atmosphere which makes an orderly and fair trial very difficult. The asylum state also sees the political offence, unlike ordinary crimes as a reflection of the individual's resistance of the regime of the requesting state and therefore presence of the offender in the requested state is not

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<sup>125</sup> G. Madsen: Law and Society: New York; Oceana Publication 1980 Page 370.

usually a threat to its domestic tranquility<sup>126</sup>. Consequently the requested state will not be moved by ordinary criminological considerations but will be suaded one or another by political reasons<sup>127</sup>.

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<sup>126</sup> Garcia Mora: Int. Law and Asylum as a Human Right (1956).

<sup>127</sup> Gracia Mora: The Present Status of Political Offence in the Law of Extradition and Asylum: 14 U. PIH L. Rev. 371-374 (1953).



## C O N C L U S I O N

As the title of this study indicates, the overall approach is made from the perspectives; that of the individual and that of the international public order. The problem of the conciliation of these two conflicting interests is not original, it is simply the core of criminal law itself, which embodies the same double perspective - the protection of the accused on the one hand and the protection of the society on the other. On the international level, however, the problems are much more complex because they are affected by non-legal factors and as long as there is no world wide legal system, including international legislative, executive and jurisdictional mechanism, this influence cannot be avoided.

Political offence exception though much emphasized entail a very nebulous area. Courts all over the world have invariably experienced difficulty in arriving at a workable definition of what constitute a "political offence." This is a double edged sword, while it is intended to protect individual rights and personal freedoms it imposes national standards and values on other states. The defence of political offence exception is therefore not a settled matter. Its amorphous nature hampers those interested in "unadulterated" application of the concept. It is because of this state of affairs that it has been encompassed

to include acts of international terrorism. This has compounded one problem. Instead of contributing towards diminishing the occurrence of international terrorism, it has instead aggravated the state of affairs. This ugly state of affairs can be curtailed by selective elimination of offenses from this category in absolute terms; that is without exceptions.

# CHAPTER FOUR

## INTERNATIONAL TERRORISM AND POLITICAL OFFENCE

### EXCEPTION IN EXTRADITION LAW

TERRORISM: (Be not afraid of sudden  
terror.  
Proverbs 3:25)

Terrorism is the use of violence in order to induce a state of fear and submission in the victim. The object of terrorism is to secure a change or modification in the behaviour of the intended victim himself or to use him as an example to others<sup>128</sup>. According to the European Convention for the Suppression of Acts of Terrorism, the expression "acts of terrorism" means:

"Criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or group of persons or the general public<sup>129</sup>"

The question of what specific acts constitute terrorism, which acts of terrorism are political, which ones are simply crimes in terms of ordinary law have been difficult to define and to secure international consensus about, because of the differing perspectives and interests of different states. International consensus has been sought in order to prevent terrorists from seeking immunity in other states. The main obstacle to this has

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<sup>128</sup> Yonah Alexander: International Terrorism: Global, Regional and National Perspectives: New York-Washington: Preager Publishes, Page 157.

<sup>129</sup> League of Nations Official Journal, January (1938) 23.



been the view of those states that have considered wars of national liberation and violence of the suppressed or deprived as legitimate expression of the right to self determination, and therefore violence and terrorism that accompany such wars as legitimate<sup>130</sup>.

Sigmund Freud has argued that civilization, with its institutionalized restraints and repression of human nature guarantees discomfort. His vision of human conditions suggests that society must be continually prepared to accept change and expand human freedoms or must face many forms of resistance as an unavoidable reaction for its intransigence<sup>131</sup>. The agents of change, however, are often victimized by the society which tends to label them as traitors and treats their ideas and actions as dangerous threats to civilization itself. The most dangerous element in a situation of change is not that a resister is victimized or killed for his ideas or acts but that it is often done without recognizing it or saying so and is hidden behind the mask and strength of the "penal code<sup>132</sup>." Resistance and violence thus may well have begun with creation and may end even on judgement day.

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<sup>130</sup> Supra 1 Page 151.

<sup>131</sup> Yonah Alexander and Maxwell Fagen: Terrorism Interdisciplinary Perspectives. New York: Jona Jay Press: McGraw - HillBook Company U.K. ltd 1977, Page 5.

<sup>132</sup> Ibid.

David Fromlin in his book: The Strategy of Terrorism; had this to say about the reign of terror in France:

"Robespierre had coerced a nation of 27 million into accepting his dictatorship. His followers sent many thousands either to jail, to exile or to the graveyard. One scholar's estimate is 40,000 deaths and 30,000 arrests. Yet when retribution came and Robespierre and his group of supporters were executed it turned out that in all there were only 22 of them victimized<sup>133</sup>."

It is precisely because terrorists by definition follow systematic policy of terror that their acts are analogous to crimes. The very notion of crime, even in the most primitive legal systems implies the moral responsibility of individuals for their actions and hence any violation of penal code. We cannot make a general rule that terrorists are to be exempted from criminal responsibility unless we are either prepared to plead their responsibility on grounds of insanity or by allowing the whole legal order to be undermined by differing to the terrorists<sup>134</sup>.

#### TERRORISM AS AN INTERNATIONAL CRIME IN THE CONTEXT OF EXTRADITION

"One Man's terrorist is another man's freedom fighter". This much used and too greatly abused aphorism well illustrates the dilemma produced by militant self-determination proponents.

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<sup>133</sup> David Fromlin: The Strategy of Terrorism and Foreign Affairs: VOL. 53, No. 4, July 1975 at 684-885.

<sup>134</sup> Paul Wilkinson: Terrorism and Liberal States, London: MacMillan Series, 1977 at page 65.

The credo is that the end justifies the means. On numerous occasions during recent decades the end result has been the downfall of existing regimes and the establishment of new national entities. Small wonder then that one senior American official directly concerned with the subject has bluntly observed: terrorism works<sup>135</sup>."

According to Fratz Fanon, the bitter political philosopher of Algerian Independence Movement, national liberation, national renaissance, the restoration of nationhood for the people ... is always a violent phenomenon. The issue simply put is whether terror-violence used as political weapon whenever or whenever a dissident group is unable to achieve its separatist objectives by any legitimized means is permissible within the framework of international law. Despite the claims of radical ideologies, revisionist historians and lefts, violence is not automatically a form of public protest when directed against particular political systems and established governments. When victims comprise civilian populations, murder is murder regardless of what slogans are piously shouted or what justifications are ingenuously conceived<sup>136</sup>.

In the recent years, the world has been pre-occupied with terrorism in different forms and provisions affecting asylum are found in some recent conventions dealing with aspects of

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<sup>135</sup> W. Res Int. Law 381-382 Case, Volume 131 1981.

<sup>136</sup> Ibid.



"A contracting state in whose territory a person suspected is found and which has received a request for extradition ... shall if it does not extradite that person, submit the case without exception whatsoever and without undue delay to its competent authorities for the purpose of prosecution<sup>141</sup>."

The contracting parties reaffirmed the principle that it is the duty of every state to refrain from any act designed to encourage terrorist's activities against another state and to prevent acts in which such activities take shape, and undertake to prevent and punish activities of this nature and to collaborate for this purpose<sup>142</sup>.

Some success has been achieved in reaching international accord on specific types of terrorist conduct - aircraft hijacking, attacks on diplomats, and most recently hostage taking but these measures have proved to be narrow and lack adequate sanctions<sup>143</sup>.

The November 1979 seizure of American Embassy and subsequent holding of its staff as hostages in Iran demonstrates the limitation of all international codes: they are effective only to the extent that sovereigns are willing to abide by them. Although more than 40 nations have ratified the Diplomatic

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<sup>141</sup> Ibid.

<sup>142</sup> League of Nations Official Journal; January (1938) 23.

<sup>143</sup> Ch. Bassouni; Ideologically Motivated Offenses and Political Exception in Extradition: Proposed Judicial Standard for Unruly Problem; 19 Depaul Rev. 28 (1969).

terrorism, such as the Hague Convention for the Suppression of Unlawful Seizure of Aircraft<sup>137</sup>. Under the terms of the abortive convention for the prevention and punishment of terrorism, 1937, the contracting parties would have been obliged not to tolerate acts of terrorism in their territory and in given cases to extradite terrorists<sup>138</sup>.

In this regard, the period from 1970 onwards, witnessed the world become pre-occupied with terrorism and a number of conventions relating to aspects of terrorism have come into being, of particular importance are the Montreal Convention for the Suppression of Unlawful seizure of aircraft and other unlawful acts against the safety of civil aviation, 1970 and 1971; the United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1964 and the European Convention on the Suppression of Terrorism, 1971<sup>139</sup>.

All these post war conventions laid down the rule; "Extradite or punish<sup>140</sup>" or to use the words of Article 7 of the European Convention on the Suppression of Terrorism of 1971:

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<sup>137</sup> International Legal Materials (1971) 10 Annex G.G: Crah/Madsen: Int. Law and Asylum: Sijthoff: Oceana Publication Page 5.

<sup>138</sup> Ibid page 17.

<sup>139</sup> European Convention on Suppression of Terrorism; 1971, Article 7.

<sup>140</sup> Ibid.

Convention, its single greatest weakness is that it contains no sanctions against countries such as Iran, that have signed the Convention but have refused to comply with it<sup>144</sup>.

Besides, the traditional Custioni<sup>145</sup> test for determining whether to grant extradition of "political offenders" is seriously outmoded in our violent and rapidly changing world; secondly, a court-room is an inappropriate forum in which to attempt an evaluation of the complex internal political struggles of foreign countries. As one noted commentator said:

"The relatively easy distinction made between "common crimes" and "political crimes" during the early part of this century is irrelevant in this decade. An era in which piracy of the air, symbolic bombing of public and private buildings, and the blatant rejection of almost all forms of public authority without any apparent link between the actual conduct of the perpetrator and the aim sought to be achieved requires immediate attention of this unruly problem<sup>146</sup>.

The beginning of the 1980s coming up to 1991 finds the problem of international terrorism no less pressing and no more soluble than of the beginning of the 1970s. Throughout the last decade, a fundamental philosophic dispute between the western nations and the third world over ends and means has paralysed

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<sup>144</sup> Ibid.

<sup>145</sup> 1891 I.q.B 149.

<sup>146</sup> Supra 16 page 218.



efforts by the United Nations to combat politically motivated violence throughout broad-reaching conventions<sup>147</sup>.

Although the U.S. proposed a draft convention on terrorism, in 1972, the United Nations has continually deferred action at the behest of third world and communist countries which insists that causes of terrorism must be examined before taking action against its effects<sup>148</sup>. Despite the response of the U.S. and other western nations; that political passion, however deeply rooted, cannot be a justification for criminal violence against innocent persons, the General Assembly has done nothing over the problem and calls for further studies<sup>149</sup>.

#### TERRORISM AND POLITICAL MOTIVE

The formal limit of political offence exception still constitutes a serious impediment to the further development of extradition. This is due to the fact that many among the crimes which are brought under international penal control like hijacking, war crimes, genocide and taking of hostages are politically "coloured" since they are often politically motivated and frequently situated within the framework of political

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<sup>147</sup> Columbia J. Transnational Law Volume 18, 1979-1980 Page 381.

<sup>148</sup> Hannay: International Terrorism: The Need for Fresh Perspective, 8 Int'L Law 268 (194).

<sup>149</sup> Ibid.

conflict situation. This problem is highlighted today as a consequence of the development of transnational delinquency with political overtones; the so called international "terrorism". The latter types of delinquency is the most important form of politically motivated criminality and qualitative perspective. There is a considerable increase in this type of politically motivated violence and its taking of new forms because, due to a number of technological developments over the past few decades, it was assumed international dimension and has increased its potential<sup>150</sup>.

The internationalization of politically motivated violence referred to under the label "terrorism", results in addition to the elements which have caused the internationalization of criminality in general, from the fact that it often occurs in the framework of political conflict situations which have a tendency to expand beyond the conflict area. By affecting the interests and the property of the individuals and states, which are not directly involved in the conflict, the conflict itself is partially exported to other states. This "export" of political problem situations to other countries which are not directly involved in the conflict directly contemplates both the creation of international publicity and mobilization of certain part of international public opinion, which could possibly result in

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<sup>150</sup> Dr. Christine Van den Wijngaert: Political Offence Exception in Extradition: Netherlands: Boston Publication, 1980, Page 22.

eventual international pressure on the target state. The electronic communication media is the pre-eminent means of achieving such purpose due to their world wide scope<sup>151</sup>. Thus, many acts of "terrorism" are specially synchronized for mass media in order to attract international public attention. In many cases, the mass media have psychologically involved almost the entire world population with the problem. An example in this regard are the million television viewers who witnessed the dramatic outcome of the action taken by the Black September Organization during the Olympic Games of Munich, 1972<sup>152</sup>.

As such this purely subjective factor, consisting of international dissemination of psychological impact of acts of terror violence by means of mass media has likewise contributed to the internationalization of the phenomenon of terrorism beyond real proportions. It is indeed true that injury caused until now by international terrorism is relatively small when compared with common criminality. According to recent study, the number of victims of acts of terrorism world wide between 1967-1975 totalled to 800 and 1,700 wounded; by contrast in the United States alone 19,000 murders were committed in the year 1976. The international psychological impact of acts of "terrorism" however, is greater than the impact of common crimes notwithstanding that the acts of terrorism are quantitatively much less important<sup>153</sup>.

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<sup>151</sup> Ibid.

<sup>152</sup> Time Magazine, October 31, 1977 Page 12.

<sup>153</sup> Supra 23 Page 22. 107



Besides, modern technology has created a number of new vulnerabilities which are easy targets to persons who want to attract public attention and extort political concession from governments. This phenomenon has increased the actual power of politically motivated offenders and as such has considerably "politilised" them. A classic example is the development of civil aviation which has made possible a totally new form of criminality: aircraft hijacking. Other vulnerabilities are the nuclear plants and supertankers. These will be attractive targets to terrorists in future. However, even now they are, although not extensively. As such the potential danger of politically motivated delinquency has strongly increased, not only in terms of material damage, but also because of actual position of the offenders with respect to the government from whom they want to obtain political concession<sup>154</sup>.

More and more individuals consider it an easy means to attract public attention or reach political goals, in the short run, because they can always hope to flee to potential political asylum. As such, political asylum constitutes a current and constant encouragement to "terrorism" and Beccaria's observation that:

"Impunity and asylum are more less the same  
... Asylum is a better invitation to crimes  
than punishment deferent is again confirmed  
by reality<sup>155</sup>"

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<sup>154</sup> Footnote 23 Page 23.

<sup>155</sup> Footnote 23 Page 8.

This problem referred to by Beccaria, however, arises in a different context today as political criminality has assumed international dimension and hence puts a completely different complexion on the political offence exception.

## CONCLUSION

Contemporarily, one of the most fundamental legal problem lies in the question as to whether acts of "terrorism" are to be considered as political crimes for the purpose of extradition. The answer to the question is difficult to discern because neither the term "political offence" nor the term "terrorism" are satisfactorily defined. The term terrorism does not correspond to a well defined legal concept and is only a collective noun indicating a number of delinquent behaviour which are characterized by the tautological conscious causing of panic and fear within the population. Many others are skeptical as to the desirability of defining the term "terrorism". As observed by Baxter: "We have cause to regret that a legal concept of terrorism was ever inflicted upon us". The term is imprecise; it is ambiguous and above all it serves no operative legal purpose.

From the broad, sociological perspective, most of these acts of terror can be considered as political offenses, because they are usually politically motivated and in the majority of cases directed to ultimately against the state or sub-division thereof. For this, they are political offenses in "*toto sensu*", the inherent seriousness of most acts of terrorism and purpose pursued by the "terrorists" do not affect these political crimes. The problem, however, arises from that and according to legal criteria developed in the nineteenth and twentieth centuries in the extradition of acts of "terrorism" can be interpreted in a



restrictive manner; according to some of those criteria, certain acts of terrorism can be excepted from political asylum, by not considering them as political crimes for the purpose of extradition. As such discrepancy emerges between the legal and the sociological meaning of the term "political crime", because the legal criteria were conceived to "political crime" in the function of extradition, whereas the sociological criteria lacked this meaning.

## CHAPTER FIVE

### RIGHTS OF THE REQUESTED PERSON AND THE PROCEDURE OF EXTRADITION

As regards the question of extradition the grant or refusal is a matter of life and death, and it is therefore important the rights of the requested person be safeguarded and the decision be made in the proper way. However, as administrative and judicial systems differ from country to country it is difficult to draw up rules which will be adequate or indeed applicable everywhere. In accordance with above view, the legal interests of the individual should consist of and at the same time be restricted to his right not to be returned to a state where he is liable to be subjected to persecution.<sup>1</sup>

This protection differs from the classic political offence exception, in that it is in part broader and in part limited. It is broader in that it protects the individual against being "returned", this includes not only extradition but also alternative procedures used to obtain the same results: expulsion, deportation and abduction. Likewise it is broad in that it not only protects political offenders but also common offenders who may be unfairly tried in the requesting state. On the other hand the proposed protection is narrower because it does not only apply to all political offenders but only to those

who risk being subjected to unfair criminal justice in their own countries.<sup>2</sup>

Judicial control over extradition is a matter of municipal law which may dispute it and leave extradition to the executive. This was the case in France in 1927. Like the French system under the law of that year, the Anglo-American law is described as "facultative", that is the court must decide if there is a good claim for extradition. The usual procedure is for communication to be addressed through the diplomatic agencies of the requesting state to the Ministry of justice of the requisitioned state. This is called requisition and identifies the person claimed, records that a warrant of arrest or equivalent document has been issued, states the act for which the prosecution will be taken, and is supported by authenticated copies of relevant documents. The requisitioned state then takes the necessary steps to apprehend the offenders.<sup>3</sup> Halshbury takes the view that there is power to admit bail after commitment for extradition. However, there is no authority for this submission.

Depending on municipal law extradition may be exclusively an executive function or may require judicial hearing of evidence against the Fugitive. Article 9 of the 1931 Extradition Treaty between the United states and Great Britain states that;

" Extradition shall take place only if, the evidence be found sufficient according to the laws of contracting party. If on such a hearing the judge deems the evidence sufficient to sustain the charge order, the provision of the treaty or convention, he shall certify the same, together with a copy of all testimonies taken before him,



to the secretary of state ..... The secretary of state then may grant or refuse extradition".<sup>4</sup>

The function of judicial hearings is to permit the fugitive to ensure that the proceedings comply with the applicable statutes and treaties. He may produce evidence that he did not commit the offence or object the offence was political. The decision of the committing magistrate on the sufficiency of evidence is not subject to corrections by Appeal. However, the fugitive may petition for a writ of Habeas corpus to challenge the legality of his detention and may urge upon the secretary of state that his extradition may not be granted.<sup>5</sup>

The practice in Argentinean court was illustrated by the case of Re cardino de pepe, <sup>6</sup>. In this case Italy sought the extradition of Re Cardino de pepe. In thi case Italy sought the extradition of Rosa Cordino de pepe on charges of Felonious Homicide in connection with the deaths of her husband, of a priest and of complicity in concealment of the corpses, the latter being a criminal offence according to Article 141 of the penal code. The petitioner appealed from a decision of a lower federal court which had granted extradition request. In his report to the supreme court the procurator general recommended that the extradition request be denied for two reasons:

" that the authorities had submitted insufficient evidence in support of the surrender request and that the offence on which the second charge was based did not appear among those listed in Article 6 of the extradition treaty of 1886 between Italy and Argentina, nor was it known in Argentina penal law"<sup>7</sup>

The practice in Anglo American system of requiring the requisitioning country to make out a prima facie case creates difficulties for the requesting state that will satisfy the court that there is a case, and since the exigencies of proof vary enormously from country to another the authorities of requisition state are put to the burden of preparing their case to satisfy the requirements of foreign system as depicted in Re waskerz <sup>8</sup>. In this case the United states government found out that in obtaining extradition from Greece it had to prepare a conclusive and not merely a prima facie case. In Re Solano <sup>9</sup>, Columbia supreme court held that;

" Extradition may take effect only by virtue of fulfilment of a certain requirements of substantive and procedural nature."

Among the former are those set forth in international treaties or in the penal codes and which determine or specify the class of crime for which extradition may be granted. The treaties or penal laws also lay down the exceptions which must be present to give the offence the character of a crime and provides for detention and delivery of the person for whom request has been made. As to the procedural requirement each state determines the procedure to be followed in order that the person whose extradition is sought may be able to defend himself before the decision ordering or refusing extradition is made.

This has been authoritatively stated by courts; that where an extradition treaty exists, the issues pertinent thereto, must be applied in extradition process. In the "Re Chacor"<sup>10</sup>, this came out.

Salim Chocur sought to avoid extradition on ground that the requesting state had not complied with the requirements of the treaty concerning international penal law, concluded at Montevideo, 1889. The court ruled in his favour. It stated categorically that extradition must be refused. Where extradition treaty is enforced between parties, the extradition process must conform to the provisions of the treaty. The court proceeded to say;

" In the case subjudice the requesting states had not complied with formalities provided for by Article 30 of the treaty of extradition concluded at Montevideo in 1889. The supporting documents submitted with extradition request do not include an authenticated copy of the penal law applicable to the offence charged; as required in paragraph one of the Article, nor certified sureties as required by paragraph 3 of Article 19. It is established jurisprudence of this court that where an extradition treaty is in existence, extradition process must conform with the provision of the treaty."

Harvard Draft sought to overthrow this type of problem by requiring production only of a requisition copy of a warrant of arrest and a copy of foreign law under which the charge is laid. This dispenses altogether with the problem of evidence,<sup>11</sup> and



this limits judicial control of extradition to such general matters as identification and extraditable character of the offence.<sup>12</sup>

Another procedural matter is the so called nonbis in Idem rule, that is, that extradition should not be granted if the person claimed has already been prosecuted by requisitioning state for the same act for which his extradition is now sought and has been acquitted or convicted, unless it is sought for the purpose of execution of an unexpired sentence. This rule is ofcourse a reflection of the doctrine of autrefois acquit and autrefois convict, and is supported by a large number of treaties which refer to the question in one form or another.<sup>13</sup> It is within the province of this dissertation and particularly this chapter to also consider as a procedural aspect, the extradition of nationals, the rule of double criminality and the rule or doctrine of speciality. This are crucial because they are taken to form the base for the surrender of individuals to the requesting state, which surrender is deemed to be or ought to be procedural.

## THE SURRENDER OF NATIONALS

The majority of extradition treaties contain provisions exempting nationals of asylum state from extradition. The usual provision is that neither party shall be obligated to surrender nationals, thus leaving the matter in the discretion of the asylum state.<sup>14</sup> This policy which is most commonly reflected in the civil law jurisdictions apparently stems from a feeling that individuals should not be withdrawn from jurisdiction of their own courts. However, the courts in many civil law countries, have broad jurisdictions to try and punish their own nationals. The United States, are however, said to surrender nationals, unless exempted by treaty as a matter of obligation, even in the absence of reciprocity.<sup>15</sup>

Multilateral extradition conventions which recognize the principle of non extradition of nationals generally provide that if the asylum state refuses to extradite a national, it shall itself prosecute the person claimed. In Re Rojas <sup>16</sup> the court in a memorandum decision advised the executive to refuse the request of Nicaragua for the extradition of a Costa Rican accused of Swindling in Nicaragua.

By Article 4 of the central American Extradition convention,<sup>17</sup> signed in Washington in February 7th 1923, central American countries were obligated ~~not~~ to surrender their own nationals but ~~must~~ prosecute them for infractions of the penal law. The Franco-Italian treaty of extradition is also supportive as far as

the principle of non extradition of nationals of contrasting parties is concerned.<sup>18</sup> This treaty although old was again brought into force as from February 10, 1948.

In Re Arevalo, <sup>19</sup>, the prisoner, a colombian was accused of killing a venezuelan. He fled to Columbia where he was held at Cucuta, pending the proceedings in connection with the request by Venezuela of his extradition. It was held that,

" Extradition must be denied. There was no doubt that the accused was a columbian, nor the crime of homicide was within the extradition agreement signed by Columbia, Venezuela, Bolivia Ecuador and peru at Carracas"

The reason for prohibiting the extradition of nationals on request of another state is obvious the court said. It is due to the risk of possible grave dangers in trial abroad. In columbia the prohibition rests **on** the basis that such a possible risks are unnecessary, since this Republic with the intention of internationalizing penal law and with the laudable purpose of beginning to make effective the solidarity of nations in the repression of delinquency as adopted in Article 7 of the code of 1936.<sup>20</sup>



## THE RULE OF DOUBLE CRIMINALITY

Since most substances of extradition arise under bilateral or multilateral treaties many of the problems raised by the treaty are questions of treaty interpretation. Most of the bilateral treaties contain a list of acts for which a fugitive may be extradited. Multilateral and some bilateral treaties stipulate merely that;

" The act for which extradition is sought be a crime both in the asylum and requisitioning state, punishable by a merely minimum penalty and usually for at least one year<sup>2 1</sup>

Difficult problem arise under the treaties on extraditable crimes when the act committed by the fugitive is punishable in the requisitioning state and listed in the treaty, but not punishable in the asylum state because the law of the latter defines the law differently. In the Eister Extradition case<sup>2 2</sup> it was stated that:

" If the asylum state applies its own laws to define the crime it may violate the obligation under the treaty. If the asylum state applies the law of the requesting state it would be extraditing the fugitive for an act which was not an offence under its own laws"

The solution to the problem may be found in the requirement for double criminality<sup>2 3</sup>, that is that, extradition is available when the act is punishable under the law of both states. The name of the offence that make it criminal need not be precisely

the same proving that the fugitive could be punished for the act in both states. Under the requirement of double criminality the act must be characterized as a crime by the law of the asylum state.

However, in Factor V Laubenheimer <sup>24</sup>, the court approved extradition to Great Britain for the crime of receiving money knowing it to have been fraudulently obtained although the law of Illiones, where the fugitive was found did not make such an act criminal, the court was of the view that:

"Extradition treaty between the United states and Britain did not require double criminality for the popular offence," and stressed the fact that the offence was criminal under the law of several states.

That notwithstanding, the principle of double criminality would also require that the act be criminal in both states when it was committed. In Re Artons(ii)<sup>25</sup>, it was stated by Lord Russel. J. that:

" the conditions for extradition are that the imputed crime must be a crime against the laws of the country demanding extradition and that the asylum state must also consider it criminal" <sup>26</sup>.

In Disteffano V Moore <sup>27</sup>, the United states brought a proceeding to secure the release of an Italian on a charge of attempt to commit murder. It was urged that the offence with which the petitioner was charged was not a crime by the penal law of the state of New York, since the latter only covered assault in the first degree. The court while holding the sufficiency of

the evidence of criminality was governed by the law of the state of New York, relied on Collins V Loisel <sup>28</sup> in affirming that:

" The law doesn't require the name by which the crime is described in two countries be the same nor that the scope of the liability shall be co-extensive or the other respects be the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions".

The petitioner was remanded in custody of the United States Marshall and the writ of Habeas corpus dismissed.

Double criminality in effect is a reciprocity requirement which is intended to insure each of the respective states, that it can rely on corresponding treatment and that no state shall use its process to surrender a person of conduct which it does not characterize as criminal. The requirement of double criminality does of course benefit the relator insofar as he or she can evade the process of justice of the state in which the conduct was allegedly committed if the same conduct is not also deemed criminal in the requested state, however, it all depends on the available interpretative formula <sup>29</sup>.

There are three approaches to determine whether the offence charged even though criminal in both states falls within the meaning of double criminality:

- . whether the acts are chargeable as offenses regardless of their prosecutability.
- . whether the acts are chargeable and also prosecutable; and
- . whether the acts are chargeable, prosecutable and could also result in conviction.



The requirement of "double criminality" is found in treaties. It is in the municipal laws and judicial practice of most states and is therefore deemed part of the customary international law. Those states such as the United States, which do not recognize extradition as part of customary international law will apply the requirement wherever its existence can be derived from a treaty. Thus, wherever a state adheres to the treaty obligations, the absence of any explicit or implicit language to that effect may jeopardize the applicability of this requirement <sup>30</sup>

The doctrine of double criminality used above is the object of several definitional approaches and depending, upon the choice of definitional theory it will be more or less identified with extraditable offenses. Similarly, because of the various approaches to defining extraditable offenses the likelihood for the confusion between these two requirements exist.

## THE PRINCIPLE OF SPECIALITY

According to this principle a state to which a person has been extradited may not without the consent of requisitioned state try a person extradited save for the offence for which he was extradited, many extradition treaties embody, this rule and the question arises as to whether it is one of international law or not. The Germany parliament in 1921, held it was so, that;

" even where the relevant extradition treaty was silent on that point, an accused person could be prosecuted in Germany only for the offence for which he was extradited"<sup>31</sup>.

The United states supreme court while not placing the rule on the high plane of international law did in fact arrive at alike conclusion in the case of United States V Rauscher <sup>32</sup>. The accused had been extradited under the Anglo-United states treaty of 1842, upon a charge of murder, but had been vindicated for and convicted of inflicting cruel and unusual punishment. The supreme court denied the jurisdiction of the trial court even though the treaty did not stipulate that there should be no trial. It said:

" the right of authority and of sound principle are in favour of the proposition that a person who has been brought within jurisdiction of the court by virtue of a proceeding under an extradition treaty can only be tried for the offence described in the treaty and for the offence with which he is charged in the proceedings for his extradition until reasonable time opportunity has been given him, after his release or trial upon a charge to return to the country

from whose asylum he had been forcibly taken under those proceedings."

The decision rests on municipal law grounds much more than upon international law. The limitation with respect to the trial was found in the manifest scope and object of the treaty itself, which read with the relevant statute contemplated trial only for the offence for which extradition was granted. Justice Gray, found in his separate opinion that the will of the political department had been manifested in favour of the principle that:

" a person should be tried only for the specific offence and should be allowed time to depart before he could be arrested and tried for some other offence <sup>33</sup>. If the treaty actually provides for the opportunity to leave then of course this is a matter of law"; that the principle of speciality is excluded by the treaty.

As a result of the common wealth conference 1966, a new scheme of Common-wealth extradition was devised which the United Kingdom embodied in the fugitive offence Act of 1967. This provides for rendition to commonwealth countries which designated by the order in council, or to the United Kingdom dependencies, of persons accused of convicted therein of a scheduled offence, the scheduled offence being comparable with those listed in the extradition conventions. Rendition shall not be ordered if it appears to the secretary of state or to the relevant court that the offence is of a political character, or that the accused might be prejudiced or be punished for political offenses; nor in



the absence of a provision in the law of requisitioning country, that a surrendered person shall only be committed for the offence in respect of which the secretary of state approved to being so dealt with, the Act embodies reciprocal provision in section 14. The Act extends to the British Islands and is extended by order of council to other United Kingdom dependencies. The heart of the question is one of international law whether or not the trial for another offence can proceed with the consent of the extraditory state.

The principle of speciality was embodied in the extradition treaty and had always been accepted in practice in extradition between Italy and Switzerland had always been accepted in practice in extradition between Italy and Switzerland. The court stated,

" the extradition of persons who have been sentenced or are being prosecuted for criminal offenses is, as regards relations between Italy and Switzerland governed by the treaty of July, 22, 1968. Requests for extradition made by Italian authorities must accordingly be decided on the terms of treaty, and not on the basis of federal law, concerning extradition of January 22, 1892. The provisions of the law are only exceptionally applicable to fill the gap, in the treaty in a manner corresponding to its spirit.

The court must, examine ex-official whether the conditions for extradition are satisfied. It must accordingly consider not only the arguments raised by the appellant, but also questions raised by the circumstances which fall within its competence. <sup>34</sup>

In the Austrian Extradition case,<sup>35</sup> the appellant was serving a prison sentence in Austria, he escaped from prison and thereafter committed non-indictable offenses in Austria. About a week later he escaped to the federal Republic of German. The German authorities granted the Austrian request for his extradition for the purpose that he might serve the remainder of his prison sentence in Austria notwithstanding the limited purpose of the extradition so granted, the appellant was tried for and convicted of non-indictable offenses which he had committed after his escape from prison and before crossing the German frontiers. It was contended on his behalf that the convictions must be quashed on the ground that they violated the rule of speciality and that the Austrian law did not permit extradition of non-indictable offenses, reciprocity required that Austrian courts should not claim the right to try an extradited person for such offenses. It was held that both conditions of the appellant must be upheld and convictions quashed. The principle of speciality doesn't, however, apply to offenses committed after extradition In Re Alband,<sup>36</sup>. The petitioner was extradited to France from Belgium on charges of fraud. He was then prosecuted on a separate charge allegedly committed during his detention in France while awaiting trial. Alband contended that his prosecution on this charge infringed the principle of speciality in Franco-Belgium Treaty. It was ruled by the court that the principle of speciality does not apply to the offence committed after extradition.

This doctrine often referred to as the principle stands for the proposition that the requesting state, which secures the surrender of a person can prosecute that person only for the offence for which he or she was surrendered by the requested state or else allow the person an opportunity to leave the prosecuting state to which he or she had been surrendered. <sup>37</sup>

The rationale for the doctrine of speciality rests on the following factors;

- . The requested state could have refused extradition if it knew that the relator would be prosecuted or punished for an offence other than the one for which it granted extradition.
- . The requesting state did not have in personam jurisdiction over the relator, if not for the requested state's surrender of that person.
- . The requested state could not have prosecuted the offender, other than in absentia, nor could it punish him or her without securing that person's surrender from the requested state.
- . The requested state would be abusing a formal process to secure the surrender of the person it seeks by relying on the requested state who will use its process to effectuate the surrender.
- . The requested state would be using its processes in reliance upon the representations made by requesting state.<sup>38</sup>

By reason of these factors the requesting state is bound to prosecute or punish (or both) the surrendered person in accordance with the reasons for which the processes of the requested state were set in motion. Otherwise, the requested



state's processes would have been set in motion under false pretence.<sup>39</sup>

The doctrine of speciality is designed to ensure against such contingency. It developed because extradition is subject to certain requirements such as the type of offence, for which it shall be granted as between the respective states. Without the doctrine of speciality the surrendering states will not in effect determine whether the substantive requirements of extraditable offenses and double criminality have been fulfilled. The doctrine is, therefore, a concomitant of a requested state's right to determine extraditability of the persons sought for the offence specified. Implicitly, it protects the relator from unexpected prosecution, even though it is principally advanced as a means of protecting the requested state from abuse of its processes. It is for this reason that the doctrine does not apply to cases where the person who may be otherwise sought for formal extradition was delivered to the requesting state through another method than extradition.<sup>40</sup>

SOME COMPARATIVE ASPECTS

In almost all countries procedural rules in extradition process emanate from one or more of the following three sources: treaty; specific extradition legislations and general criminal law and procedure legislations; which procedural legislations are applicable to extradition by analogy. Treaties are probably the most characteristic sources because extradition is most frequently practiced by international agreements. However, treaties seldom, if ever prescribe international procedural rules, consequently many states have enacted specific legislations relating to extradition procedures. In the United States where extradition treaties are deemed self-executing, the United States code direct the judicial officer and the secretary of state to act, according to the stipulation of treaty or convention."<sup>41</sup>

By comparison in England, where treaties are not self-executing, but require implementing legislation in all cases, where private rights may be created or affected, the provisions of the applicable treaty are incorporated by reference into municipal legislations. Such legislation is then applied to each new treaty<sup>42</sup> by means of an order in council which must recite the applicability of the Acts subject to the limitations and qualifications contained in the new treaty <sup>43</sup>. In England if

the scope of the treaty is broader than municipal law, the latter prevails, while in the United states' treaty provisions supersede municipal law. The reason for this divergence in these two common law systems is that the United States constitution provides for the supremacy of treaties while England has no constitution.

Some national extradition laws apply only in the absence of treaties; where extradition is granted on comity or on the basis of reciprocity. Such is the case in the French law of 1927 which provides that: "in the absence of a treaty, the conditions, the procedure and effects of extradition are determined by the provisions of the present law. The present law applies as well to matters not regulated by treaties.

In the now prevalent treaty practice of most states, municipal laws set forth the conditions under which an extradition request will be considered in the absence of a treaty and in all cases establish the basis for the mechanics of seizure of the relator and his or her surrender of the requesting state.

General municipal laws are comparatively less important than the three other sources of procedural norms governing extradition because they would only apply by analogy whenever such analogy is permissible. In such cases, the interpretation of general



statutes will be subject to the same considerations applicable to special extradition legislations. Special extradition legislations will usually exclude the application of other laws by analogy.<sup>44</sup> In the United States, the federal rules on criminal procedure on admissibility of evidence are inapplicable to extradition proceedings; nor do dispositions need to conform to the ordinary rules of admissibility. But on occasion courts will resort to general municipal laws applicable to criminal proceedings to fill the gaps and aid in judicial interpretation.<sup>45</sup> This approach to judicial interpretation is more akin to the jurisprudence of common law countries than to civil law countries. In this respect however, the United States supreme court warned against judicially inspired innovations in federal procedures with respect to extradition proceedings because these are amply regulated by the United States' statutes.<sup>46</sup> The extradition magistrate, however, may develop by analogy situations which make it essential for the determination of the particular case.<sup>47</sup>

Treaties are generally silent as to the designation of organs competent to handle extradition proceedings. Apart from the almost standard recourse to diplomatic channels in the representation of the requisition and supporting documents, the requested state determines under its laws, all other questions arising under the treaty. The requested state may choose to deal with extradition matters entirely at the executive level or to assign them exclusively or partially to its judicial organs.

This issue may conceivably become a question of international interest if in order to advance the rule of law and the protection of fundamental human rights, extradition is to become a wholly judicial matter. Indeed, it is arguable that judicial bodies are more appropriate to decide questions affecting individual liberties than those which are designed to carry out governmental policy. This was not always the case, since until the nineteenth century exclusive control was with the executive. France, for example, surrendered fugitive criminals under its treaties without any reference to the courts, until 1875. In the United States, exclusive executive control was maintained from 1794 until 1842. The surrender of one Robbins to Great Britain under the Jay Treaty was bitterly attacked at the time because of the denial of judicial hearing, but the action was legally sustained.<sup>48</sup> Until 1815, the same view was held in Great Britain as the prerogative of the King to expel aliens was held to exclude even the requirement of treaty.<sup>49</sup> The denial of the existence of this prerogative came after 1815.<sup>50</sup> It was followed by the conclusion of Webster-Ashburton Treaty of 1842 in which both Britain and the United States committed themselves to the policy of making a judicial hearing an essential part of extradition process.<sup>51</sup> But countries such as Ecuador and Portugal retain a system of exclusive executive control.

Belgium was the first state to introduce a measure of judicial control in extradition proceedings in a law promulgated in 1833 which required that all extradition cases be submitted for judicial consideration. It did not however, make the judicial determination conclusive either for or against extradition.

The system established by this legislation has remained in effect and consequently the executive is empowered to decide requests for extradition on its own after seeking only an advisory opinion from Chambre desmises en accusation, of the court of appeal since the courts opinion is not binding, whether it favours extradition or not, there is, therefore no right of appeal from it.<sup>52</sup> A similar nature of non-binding judicial direction prevails in some other countries Japan; Mexico, Netherlands and Peru.

Judicial control assumed a different role in Anglo-American system. Instead of making the judicial functions purely advisory, legislation has had the effect of making judicial determinations conclusive as to refusal of extradition and advisory as to concession. Where the court rules that extradition is admissible, the executive may nonetheless refuse surrender because that becomes a matter of foreign policy which is within its prerogatives. This approach was first adopted by Great Britain in legislations implementing the treaties of 1848.<sup>53</sup>



For only does this system give adequate opportunity to the fugitive to contest extradition before the ordinary courts, but in effect it gives him or her a further opportunity of making representation to the executive in the event of adverse judicial determination. This may be of special significance in the case of political offenses.

France which had adopted the Belgian judicial advisory system in 1875, moved in its laws of 1927 to judicial, somewhat similar to the Anglo-American pattern.<sup>54</sup> Other states including Argentina and Austria employ the same system. In the case of Brazil, it is possible for the courts to attach certain judicial conditions to the surrender of a person with at least the same tacit consent of the executive.<sup>55</sup> This falls under the doctrine of speciality. Such conditions are implicit in the doctrine and are prevalent with respect to restrictions on the death penalty by several states such as Italy.<sup>56</sup>

Germany stands at opposite end of the spectrum in assigning exclusive competence in all extradition matters to its judicial authorities.<sup>57</sup> Although it follows that the fugitive is thereby deprived of a last resort approach to the executive, which is a feature in Anglo-American system, it is nonetheless true that German law since 1949 offers a wider scope for judicial inquiry than the laws of any other country, other than the United States.<sup>58</sup>

In most countries of the world, there are two processes in extradition matters and, therefore, two sets of procedures applicable to the executive and the judiciary. These two levels of authoritative decision making process are separate processes operating within a single system. It is almost a foregone conclusion that procedures governing both of these levels should differ from state to state as sharply as do the contrasting legal systems of the world. There are, however, remarkable similarities. For example almost all states initiate a request or requisition through their executive branch and those requests are received by the executive branch of other states. The executive of the requisitioned state sets in motion or allows the requisitioning state to set in motion the judicial machinery to adjudicate the surrender of a person sought after. Thereafter the executive proceeds with the actual surrender of the person. The differences between states arise in great variety within these stages. The most significant difference arise in respect to the quantum of evidence required by the requested state and other judicial formalities required to adjudicate the surrender of the relator. All other questions are in comparison of these questions of limited significance.

The practice of states as to the required documents, proof of guilt and all the concomitant evidentiary questions are as may be expected drastically different between common law and civil law inspired systems. This is due to the fact that

extradition proceedings are essentially penal and criminal processes of these two legal systems are contrasting in scope and means as one is inquisitorial and the other accusatorial. Consequently, the requirement of proof of guilt, its substantive content and procedural methods differ sharply. Basically, the civil law inspired systems do inquire into proof of guilty while the common law inspired systems do not do so.

The rationale for the civil law inspired systems is that extradition is a tool of judicial co-operation in penal matters, hence no inquiry is made into the issue of guilt not even prima facie one. The common law inspired systems consider that the use of their judicial processes must meet their threshold standards of criminal responsibility hence they inquire into the existence of "probable cause". To a large extent the requirements of these two systems are a reflection of their threshold standards of criminal responsibility applied to the prosecutability of the relator. Certainly the more a given system inquires into the guilt or innocence of the relator, the more the extradition process is likely to shift from the inquiry into extraditability to inquiry into punishability.

The contrast between the two types of systems can be seen through the following two decisions of the United States and Switzerland. The supreme court of the United States held in Benson Versus McMalion; the test as to whether such evidence of



criminality has been presented is the same as that of those preliminary examinations which take place every day in this country before an examination of committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceedings in which he shall be finally tried upon the charge made against him.<sup>59</sup>

It is in essence the same as the test of whether, there is probable cause to be committed and that the relator is the person believed to have committed it.<sup>60</sup>

In a case in which the Federal Republic of Germany sought extradition from Switzerland of a Pole national charged with the crime of forgery, the accused contended that the offence fell within the competence of American occupation authorities and that Germany was not competent to seek extradition. The Swiss Federal Court stated: "It is for the federal council to decide whether request for extradition complies in form with the tribunal requirement of treaty or law." The Federal Tribunal, therefore, does not have to deal with the question whether the present request has been made by competent authority or whether the warrant attached to it was issued by a competent organ. Similarly, it is not for the Federal Tribunal to examine whether the court before which the person extradited is to be tried has

jurisdiction under the law of the requesting state; the only argument which could be taken into consideration would be that the court was a tribunal with special powers ... extradition for trial by a special court being prohibited by the Swiss law. The federal tribunal is also not competent to decide the question of guilt. Extradition is granted on the basis of the facts alleged in the indictment attached to the request for extradition ...<sup>61</sup> The civil law inspired systems do not inquire into the issue of, "probable cause", with few exceptions and accept the formal requirements of a prima facie evidence sufficient to grant extradition without more than the fulfillment of those formal obligations embodied in the treaty.<sup>62</sup> This is usually limited to; proof of identity of the relator and conformity of the requisition to treaty requirements.

Proof of such requirements are found in the requisition and accompanying documents such as the indictment or its counterpart charging document or a court's validated judgement and are not subject to review by the authorities of the requested state.

## UNITED STATES OF AMERICA: CASE STUDY

The power to extradite in the United States is vested in the national authorities. The extradition process is therefore initiated by the Federal government. This power requires that there be an extradition treaty before it can be exercised.<sup>63</sup> Extradition procedures as prescribed by the federal statutes may be summarized briefly as follows:<sup>64</sup> extradition proceedings must be initiated by the competent authorities of the requesting state that will present a requisition to the department of state in accordance with the treaty stipulations, then proceed to file a verified complaint in the Federal District court wherein the relator is found charging him or her with an offence under the terms of the treaty and in accordance with treaty stipulations, the procedural laws of the United States and the substantive laws of the State wherein the Federal District Court is located.

The process operates at two levels, the executive and judiciary, each independently of the other, though both are interrelated and indispensable to the system.<sup>65</sup> There can be no extradition until both levels, executive and judicial agree to it.<sup>66</sup> However, a finding of a judge of insufficient evidence of criminality and the subsequent discharge of the relator terminates extradition proceedings.<sup>67</sup> The converse, however, is not true because after a judge commits a relator for extradition,



the secretary of state can refuse to surrender the relator to the requesting state.<sup>68</sup>

### THE INITIAL EXECUTIVE PROCESS

At the executive level the requisition is a formal diplomatic request,<sup>69</sup> even though there is no specific form to it, except that it must be addressed to the secretary of state by the competent authorities of the requesting state.<sup>70</sup> Treaties differ as to the substantive requirements of requisition but these questions are of limited significance because the diplomacy note embodying the requisition can always be amended or supplemented because the critical stage is the judicial hearing. Even substantive errors in the requisition are not fatal to the case of the requesting state since it is possible to submit more than one requisition even after its denial and that concludes an adverse judicial hearing.<sup>71</sup> The United States supreme court held that double jeopardy did not attach to such a case.<sup>72</sup>

There is no time limit required for the submission of the requisition to the secretary of state and can, therefore, be before, during or after the judicial proceedings. It must however be submitted before the Department of State can certify the surrender of the relator.<sup>73</sup> This of course is subject to specific treaty stipulations and most treaties require that it be filed not later than two calendar months after the relator has

been arrested and confined on the extradition warrant. The supreme court held that after this lapse of time, the relator is to be released and the surrender warrant quashed.<sup>74</sup>

In the event that requisition are received from two countries for the same accused, priority may be given by treaties either to the first request received,<sup>75</sup> or to the request which alleges the most serious crime.<sup>76</sup> The secretary of state upon request by the request state, may issue a preliminary mandate to the judge who will conduct the judicial hearing on that motion. This is not, however, the usual practice and such preliminary mandate is not a determination of the issue of extraditability nor is it a prerequisite for the initiation of the judicial proceedings. The practice is for the requesting state to initiate such proceedings on its own motion.<sup>77</sup>

#### THE JUDICIAL PROCESS

Judicial proceedings are initiated by an authorized representative of the requesting government. It is not necessary that the representative be a consular or diplomatic officer, so long as the person making the complaint is authorized to do so by the requesting state. In the United States ex rel Capeto V Kelly,<sup>78</sup> the second circuit court held that: extradition proceedings must be prosecuted by the foreign government in the public interest and may not be used by a private party for private vengeance or personal purposes; but if in fact the

foreign government initiates the proceedings, no reason is apparent why it may authorise any person to make oath to the complaint on its behalf.<sup>79</sup>

An order for provisional arrest of the relator may be made but must be issued by a competent judicial officer subject to constitutional limitation.<sup>80</sup> The court must have in personam jurisdiction before proceedings with the hearing.<sup>81</sup>

The complaint which must be sworn or affirmed to,<sup>82</sup> is akin to an indictment or information,<sup>83</sup> and as such it must inform the relator of the charges brought against him or her to allow the preparation for the defence.<sup>84</sup> The complaint should set forth the following facts: but it can be amended to comply with those requirements or any other order by the court for further information. These are:

- . The name of the relator;
- . Existence of a treaty in force;<sup>85</sup>
- . Allege the commission of an extraditable offence under the treaty;<sup>86</sup>
- . The offence constitutes a crime under the laws of the state wherein the Federal Court is located;<sup>87</sup>
- . Attached thereto a certified copy of the indictment (or its counter part) or conviction of the relator in the requesting state by its competent authorities showing the offence charged;<sup>88</sup>



- . Accompanying affidavits, documents and evidence providing the foreign law and facts alleged thereunder.<sup>89</sup>

Upon the filing of such a complaint, the magistrate will issue a warrant for the arrest of the relator. That a warrant is valid anywhere in the United States and any authorized judicial office can hear the case even if he did not issue the warrant.<sup>90</sup> The relator is not entitled to bail, but can be released on bond at the discretion of the magistrate.<sup>91</sup>

As pertains to the hearing, the scope of the hearing is not to determine guilt or innocence but to determine that:

- . The relator is the person sought after;
- . The offence charged is extraditable;
- . The offence charged is a crime under the laws of that state wherein the "hearing is held;
- . There is 'a probable cause' to believe the relator committed the offence charged.

What a requesting state has to come forth with is stated by Whiteman in these terms: the requirement regarding documents must be submitted by a requesting state in support of its extradition request, vary depending on whether the person sought has already been tried and convicted in the courts or the requesting state, and then ascaped or whether he is merely charged with an offence but has not yet been brought to trial. Further, in the case of one merely charged with an offence, the documentation required varies, depending on whether requesting

state must, under the law of the requested state or the applicable treaty establish a prima facie case of the guilt of the accused in order to obtain his extradition. Under the laws and treaties of many states, it is sufficient merely to show that the person sought is charged in the requesting state, and a warrant of arrest or similar document issued by the authorities of that state is sufficient evidence in so far as possible guilt is concerned to warrant extradition. In the case of other countries, notably the United States, Canada and Great Britain, it is necessary to submit some further evidence of the person's guilty.<sup>92</sup>

Under United States law, it is stated that the extradition magistrate hears and considers the "evidence of criminality" and commits the accused for surrender if 'he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention. The extradition treaties and conventions to which the United States is party provide that extradition shall take place only if the evidence against the fugitive is sufficient to justify commitment for trial had the offence been committed in the requesting state. The supreme court of the United States in Benson Versus MacMahon stated:

"We are of the opinion that the proceedings before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him but rather the character of those preliminary examination which take place everyday in this country before an examining or committing

magistrate, for the purpose of determining whether the case is made out which will justify the holding of the accused."<sup>93</sup>

Further more Justice Holmes in Glucksman V Henkel <sup>94</sup> said:  
"It is common in extradition cases to attempt to bring to bear all factitious niceties of criminal trial at common law. But it is a waste of time for while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. We are bound by the existence of treaty to assure that the trial will be fair." The evidence in this case seems to us sufficient to require us to affirm the judgement of the circuit court.

The question of evidence is also a matter to be borne in mind. However, the question of sufficiency of evidence, has variably been a difficult one since it relates not only to the structure of the "probable course" in United States law but also because it depends on the offence charged on its elements under the law of the state whose substantive law is being applied. In the land mark case, Collins V Loisel, <sup>95</sup> the supreme court held: The function of the committing magistrate is to determine to justify holding the accused to await trial and not to determine whether evidence is sufficient to justify conviction.



## C O N C L U S I O N

The surrender on request of fugitives from justice by one independent nation to another is based either on international comity or on the provisions of a treaty between the nations. In the United States, the duty to surrender a fugitive from justice to a foreign country exists only where created by a treaty, and the procedure for international extradition is prescribed by statute.

When a foreign government demands the return of an alleged offender, an arrest warrant based on the foreign complaint may be issued, after which hearing before a judge or magistrate must be held to examine the evidence or criminality on the part of the person charged. If the evidence is deemed sufficient to sustain the charge, the presiding magistrate must certify this fact to the secretary of state and issue a warrant for the commitment of the accused until he is surrendered upon requisition of the foreign government.

International extradition proceedings have the character of a preliminary examination before a committing magistrate testing probable cause or rather than that of criminal trial. Although the accused has no right to introduce evidence at the extradition hearing which merely contradicts the demanding country's proof or which only poses conflicts of credibility, he does have the right

to introduce evidence which is "explanatory." In ad  
evidence, the intention is to afford an accus  
opportunity to present reasonably clear-cut proof which will be  
of limited scope and have some reasonable chance of negating the  
showing of probable cause, but the accused will not be allowed to  
turn an extradition hearing into a full trial on the merits.

Collateral issues raised by an accused seeking to resist  
extradition may not be addressed to the court in an extradition  
hearing. An accused may claim that he would not be afforded a  
fair trial in the country seeking extradition, or that the  
request is motivated by politics and not by true law enforcement  
considerations, but such claim must be made to the secretary of  
state, who has the primary responsibility for determining whether  
treaties with foreign countries are being properly respected and  
carried out. In addition, the secretary of state has discretion  
to deny extradition on humanitarian grounds, if it should appear  
that it would be unsafe to surrender an accused to foreign  
authorities, for example, where an accused claims that he faces  
grave bodily harm from assassination or torture upon return to  
the requesting country.

C H A P T E R   S I X

GENERAL OBSERVATIONS  
CONCLUSION  
RECOMMENDATIONS



(i) OBSERVATIONS:

The suppression of Revolutions in 1820s in Europe drove the most enthusiastic Nationals and Liberals underground or to exile. It inaugurated an age of secret societies and conspiracies of which the epidermics of the Revolutions of 1830s were the direct consequences. During this era revolutions liberal or democratic oriented were detested by monolithic regimes of Europe. Metternich the most salient repressionist of the time is known to have proudly remarked; "we don't want young people thinking unless we know what they are thinking about".

Governments wanted "good" citizens, not scholarship which bred revolutionary mentality. Notable during this time was the idea of treating advocacy for liberal government as political crimes. To the dictators of Europe, like Metternich, Democracy was a superfluous concept and a tool that could change "broad daylight" to "darkest night."

In due process, however, liberalism spread like wild fire during the drought period, throughout Europe. Belgium in 1833, became the first European country to enact a law that political offenders should not be extradited to the requesting authorities. This marked a total departure from the traditional practice. Prior to that enactment extradition of political offenders was the order of the day.

Meanwhile, Sigmund Freud has, argued that civilization with its institutionalised restraints and repression of Human nature guarantees discomfort. His vision of human conditions suggests that society must be continually prepared to accept change and expand human freedoms or must face many forms of resistnace as an unavoidable reaction for its intransingence. The agents of change however, are often victimised by the society which tends to label them as traitors and treats their ideas and actions as dangerous threats to civilization itself. Resistance and violence thus may well have begain with creation and may end even on the judgement day.

Machiavelli is known to have said that politics is a secular science; that the state is absolute and an end in itself. The state has asserted its sovereignty in present times as it never had done before. It is submitted that this is due to many reasons; the perpetual danger of war; economic and political necessities have caused the state to assume centralised and uncontrolled powers. But such a state of affairs is not to last long. The sovereignty is to suffer from both sides - internally and externally.

International law "has become indispensable without becoming effective". In the near future it will become effective also.

No significant number of states can provide themselves as upholding the democratic tenets and the pertinent rule of law. Infact within the United Nations framework the number of democratic states is limited. Torture of political prisoners has

taken place in the past or is currently being utilized and it may not be abandoned tomorrow. Many states are said to have institutionalized this practice. The question then is whether the term "political offence" has the same meaning as its prior times. Does it make any sense to grant asylum to persons, who in the defence of whatever political idea have violated fundamental human rights and freedoms through their acts? Does it on the other hand make sense to send the same offenders to a country which has systematically violated fundamental human rights and freedoms?

Courts all over the world have invariably experienced difficulty in arriving at a workable definition, of, what constitutes a political. The political offence is a double edged sword, while it is intended to protect individual rights and personal freedoms, it imposes national standards and values on other states. More significantly, however, it can for self-serving interests deny extradition because the presence of the fugitive in the requested state serves its political purposes. The fugitive may well have committed an extraditable offence but his sudden opposition to a foreign regime may render him so desirable to requested state that his extradition will be denied on political offence exception grounds when under similar circumstances another fugitive may be surrendered to a friendly state.



It is observed that historical , philosophical and jurisprudential considerations may prevent states from pinning down a concrete and a universally binding province of the concept of "political offence". The defence of political offence exception is therefore not a settled matter. Its a morph as nature hampers those interested in the "unadulterated" application of the concept. It is because of the same state of affairs that it has been stretched to encompass acts of international terrorism. This has compounded one problem; instead of contributing towards diminishing the occurrence of international terrorism, it has instead aggravated the same state of affairs; which ugly state of affairs can be curtailed by selective elimination of offenses from this category in absolute terms; that is without exception.

The period 1970 - 1990 marked a conspicuous use of violence for political means. During this era, "the mighty is always right" was the state of affairs, and infact the "Motto". Even today, as I am writing this dissertation political violence has become the means of expressing political opinion by certain pressure groups. The "status quo" governments, register a very poor record of respect to the fundamental human rights like freedom of conscience and the right to expression. This has always met opposition from interested pressure groups. The paradox is that some of the violent acts are calculated to enforce the internationally celebrated human rights.

The processes of extradition are cumbersome and need to be streamlined. The political offence exception is the most serious impediment to the effectiveness of the process of extradition and a limitation thereto has to be developed. Judicial and other terms of cooperation in penal matters though employed to this end, are varied and sometimes of no-consequence uniformity as a solution is the recommended position. This is the only way harmony can be reached in an endeavour to apply this most ambiguous concept.

To be sure expression such as, "extradition shall not be granted", and a fugitive offender shall not be surrendered" are when viewed in isolation clearly capable of construction to the effect that the requested state is duty bound to refuse extradition. But irrespective of the merits of the words chosen it must be borne in mind that in the case of bipartite treaty arrangements for extradition or non-extradition or offenders, the only subject of international law which may protest against a violation of the treaty as such is the other contracting state; the very state requesting extradition other than the person concerned. In some parts of the world where today's presidents may be tomorrow's asylum seekers, and today's refugee tomorrow's Head of State, it is certainly possible to envisage that governments may wish to try to prohibit absolutely the surrender of the alleged political offenders. Also it is thinkable that a new government will resent it if a foreign state had surrendered one of its promoters to the former regime. But even if the

clause prohibiting the surrender of political refugees and offenders be worded extremely strongly indeed, and would include a clause to the effect that it could not be abrogated, it would be very doubtful, to say the least, if it could give occasion to any successful action in the case of non-compliance.

Indeed it is difficult to see how it would be possible for a government to bind a foreign state not to extradite persons of certain categories either to itself or to its possible successor in government. It must be remembered that in international law, every recognized, in fact every effective government represents the state in question absolutely, irrespective of whether it may be considered lawful or not by the standards of its predecessor; the former governments should it request the extradition of a political offender or refugee, and should the request be granted an international tort may hardly be said to have been committed if there is no third party possessing international locus standi in the matter.

The major problem with multipartite treaties is that they are drafted in a very permissive form leaving it to the discretion of the requested state to grant extradition or decline to do so. However, with respect to this there are states other than the requesting and the requested having the locus standi should there be a violation of the provisions of the convention. In such case, therefore, the relevant provisions of the treaty are decisive. The proposed Article 5 of the Harvard Draft convention on extradition attests the permissive characteristic



of the multipartite convention, which states inter-alia that : a requested state may decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offence if it appears to the requested state that extradition is sought in order that the person claimed may be prosecuted or punished for a political offence.

If extradition would have the effect of subjecting the person concerned to an unfair trial or of prejudicing his position for reasons of race, religion, nationality, membership of a particular social group or political opinion, it would always be denied regardless of the crimes committed even if those crimes are very serious or of international character. In the existing treaties of substantive international criminal law, the requested person is not protected against this risk; the protection only exists insofar as it is provided by the domestic law of the requested states, because the treaties in question do not contain the political offence exception and subject extradition to domestic law of each statute.

Ideally, the thrust of an International "duty" to extradite in the absence of prosecution of those who commit international crimes should not allow such unbridled limitations, particularly the political offence exception. This latter limitation is the main impediment to the effective fulfillment of the relevant Treaty obligations and to the customary duty to extradite violators of international criminal law so that they may stand trial for their conduct. To that extent there is a conflict

between the duty to extradite such offenders and the right of the requested state to refuse to do so on grounds of political offence exception. A question then arises, therefore, as to whether the duty to extradite in the case of international crimes does not limit a state's right to deny extradition on the ground of "political offence exception". Such a norm would derive from the doctrine of "exception to the exception". Which holds that international crimes should not benefit from being characterized as political offence, but should be the object of mandatory extradition for prosecution in the requesting state. While there is a growing international trend towards this end it is debatable whether this doctrine has incorporated targets and persons.

Multilateral regional treaty arrangements have also been tried, but no single collective treaty has yet wiped out the slate clean of pre-existing bilateral treaty. Commitments so far to give procedural as well as substantive cohesion to the extradition law and practice of given regions.

Extradition is of declining importance in the world. Many extradition treaties were terminated by the outbreak of the first or second world wars and have not been renewed, subsequently it is uncertain whether extradition treaties made by the colonial powers remain binding on the former colonies. Surviving extradition treaties are often out of date, for example they contain a list which does not include new offenses like Narcotic offenses, which are real an international menace, and a few extradition treaties have been made in the recent years. Another

noticeable feature is that extradition takes place principally between countries with common land boundaries.

Further, policy consideration can be a substantial bar for extradition where a treaty exists and diplomatic relations obtain between the parties. Extradition may be denied on the ostensible ground that the charge against the accused is political in nature or that extradition formalities have been abused, whereas the denial may be in the Byzantine permutation of daily relations between the requested and the requesting states.

Hugo Grotius, maintained that the admittance of individual migrants and consequently the granting of asylum is not contrary to friendship between states. The very same thought has been expressed by the United Nations in its preamble to declaration on territorial asylum, 1967. In this preamble the General assembly recognized that the grant of asylum by a state to persons entitled to invoke Article 14 of rights is a peaceful and Humanitarian act and that as such, it cannot be regarded as unfriendly by any other state.

There would seem to exist persuasive reasons counselling unification and clarification of the law of extradition within the general task of extradition. The law of extradition has petitionally served two purposes, the importance and urgency of which have tended to increase rather than diminish. In the first instance, the law of extradition is an instrument of international cooperation for the suppression of crimes. Its



increased importance is so obvious at the time of rapid development of communication enabling offenders to leave the scene of crime; the country where the crime was committed. Secondly some aspects of international law of extradition have served to afford a measure of protection of persons accused of crimes. In this regard the rule of specialty has been crucial .

As part of the observatory remarks, I am persuaded to believe that the dictum of Lord Simon in the case of Glaisdale Cheng V Governor of pentonville prison is pertinent. This case exerts alot of gravity as far as the issues of extradition and political offence stand in a liberal democratic state. He is known to have remarked in this case;"

"It is unlikely that the world will ever be free of political crimes. Subjects will always tend to feel grievance against their governors, there will always be conflict of ideology and some people seem to have a natural propensity to express themselves violently. But there is the less exercise for and therefore will be the less public condonation of political violence if there is institutional power to influence the decisions of government and if substantial freedom is safeguarded by law. This country prides itself on it tradition of constitutional government and freedom under the law. Our tradition of asylum for political criminals is closely associated with our cherishing of our rights.

He went on to say "I am naturally conscious that this instant appeal takes place at a time when horrifying acts of political terrorism are much in public mind. Although it is perhaps more acute today, the problem of how to reconcile a policy of asylum for political criminals with the curbing of terrorism is not new as seen by Wheaton and Oppenheim, it has so far defied generally acceptable solution. Oppenheim himself proposed the way of dealing with the matter. Openhein a distinguished editor had this to say of the proposed convention against terrorism, consequently upon the assassination of the King Alexander of Yugoslavia;

" It is doubtful whether states wedded by the law and tradition to the principle of non extradition of political offenders will acquiesce in any conventional regulation impairing the asylum hitherto granted to political offenders. Such acquescence on their part is unlikely at a time when the suppression of individual freedom and the ruthless persecution of opponents in many countries tend to provoke violent reaction of treasonable character against the government concerned".

In this framework, the political offence exception was and still is considered as the embodiment of Great Democratic tradition of hospitality and tolerance towards political offenders from other states.

(ii) OVERALL CONCLUSION

In Chapter One, endeavours were made to define the terms extradition and its political offence exception under international law. In this regard great reliance was based on statutory provisions and judicial pronouncements. The rationale for political offence exception, too, was stated in this chapter. We then proceeded to trace the historical profile and analysis of extradition as a concept under international law. This continued to the point of change in extradition trend and the contemporary practice in the community of nations. Consequent upon this is the era of the "laboratory" of political Liberalism when extradition as a concept was put into vigorous test. In this gravity the supreme court of Ireland is known to have remarked in 1950: the study of history of extradition shows that change has come about in the attitude of states towards it. Grotious and other know writers took the view that according to the laws and usage of civilized nations, state are obliged to grant extradition freely and without restrictions. In the views of other jurists of high authority, extradition was almost a duty of imperfect obligation. The first clear condemnation of asylum came from Cesare Beccaria who in his book Dei Delitti Delle Pene" wrote: impunity and asylum are more less the same... Asylum is invitation to crimes than punishment deterrent. Although Beccaria theoretically advocated extradition as a means to prevent criminality, he nevertheless opposed a general



application of extradition as long as repressive regimes existed to which persons could be subjected through the process of extradition.

Beccaria did not however elaborate the general theory on political crimes.

Chapter two, Discusses, political offenses under extradition law. Political offenses were depicted as exceptions thereof. Most states it is noted refuse to extradite political offenders. The reason is that the governments that demands their return persecute rather than prosecute them. History has shown that political offenders are escorted to court to confess their "sins", not to be tried by an impartial tribunal. Although the judges sit ostensibly as a neutral umpires, the reality of the matter rules otherwise. Indeed, the state has partisan interests and as the judge carries the state's ideology- the position of the state in the court is that of a prosecutor, a judge and hangman. Thus in the tradition of Re castioni political offenders shall not be extradited to the requesting authority. This is the crux of the message echoed in the entire spectrum of this chapter as far as endeavours made to articulate the political offence exception under international law are concerned. A liberal interpretation of treason as one of the political offenses was given by a British secretary of state Jafferson in 1873. He is known to have averred that most codes extend their definition of treason to acts not really against one's state country. They do not distinguish between acts

against the government and between acts against the oppression of the government. The latter he said, are virtues yet they have banished more victims to the executioner than the former. Unsuccessful strugglers against tyranny have been the chief martyrs of treason law in all countries... However, it is noteworthy that the term political offence is very amorphous and no concrete and universally binding definition has been evolved. Cherrif Bassouni in his book calls it a label of doubtful accuracy.

The Third Chapter, explained the issues of political offence exceptions with profound emphasis on the sanctity of non-extradition clauses. In the same vein the political offence was qualitatively analyzed. This led us to the unresolved ambiguity of the concept-political offence. In the same gravity the intensity of the international obligation to extradite or not to extradite political offenders was also evaluated with a view of getting prevailing position in practice.

Chapter four featured international terrorism as a concept. It was defined and the practice of the same explored. Its acceptability as one of the political international problems was explained. However, it was noted that the political character of terrorism can be developed in a restrictive manner. The problematic aspect of this position is that the term "terrorism" cannot be satisfactorily defined. It is only a collective noun indicating a number of delinquent behaviors which are characterized by tautological characteristic "terror", that is

the conscious causing of panic and fear within the population. Baxter argues that the term is imprecise; it is ambiguous and above all it serves no operative legal purpose.

Chapter five, showed concern for the rights of the requested person and the pertinent procedures in extradition law. The position of the surrender of nationals was tackled. The question of the rule of double criminality as a requirement before extradition also emerged for consideration. Pertinently the principle of speciality shot up in due process. The same chapter also considered the contents of procedural rules: a comparative study of the same was done. This led to the United States of America case study.

Finally, it is pertinent to note that chapter six, set and made general observation on nature of government systems that lead to Commission of political offenses. In making the said observation the state of affairs in Europe during the 1830 revolutions was readily explained. After that, salient issues arising out of the topic on chapter basis was made. To concretise the whole system therefore it is perfectly legitimate to give recommendations as hereunder.



PROPOSED RECOMMENDATION AS FAR AS EXTRADITION  
AND POLITICAL OFFENSES ARE CONCERNED:

A universal extradition convention is regarded as an ideal if yet unrealizable form of international arrangement for extradition. Meanwhile bilateral treaty arrangements form the basis of international practice. Actually the only possibility to ensure absolute respect to "non-extradition clause" in bipartite treaty would be seen to be the creation of an independent international body to whom both states delegated the power to press claims for reparation, should in any case, extradition take place in violation of its decision. But ofcourse the contracting states would have in it their power to agree to discontinue such a body or curtail its competence at any time.

The "meanwhile" bilateral (bipartite) treaties are not sufficient in number and those that are there are not kept upto date. The present system of bilateral treaties is therefore far from being effective. The gap in almost every country's treaty networks is loose and full of loopholes. States should not be reluctant to enter into new bilateral treaties and if possible make supplementary treaties for the existing ones. Above all legal doubts surround the effect of state succession on extradition treaties, especially in the former most common present day succession of former colonies, protectorates and trust territories some successor states, however, have clarified their attitude towards the pre-existing treaties by entering into

inheritance agreements with the predecessor or by making a unilateral declaration on the continuity.

It has been recommended that multipartite convention should be drafted in a manner that is permissive and therefore, offering facilities for the exercise of discretion. There is however, no guarantee that discretionary powers can be used within the limits if utmost sincerity and in good faith. They are more often than not vulnerable to abuse. The absolute individual right of the requested person in the clarion motto of the civilized mind of the international community. This ought to be absolute to guarantee that a requested person is not surrendered in any manner whatsoever to the state where he could be liable to persecution than prosecution within the parameters of the law. This will bring comfort to the would be sufferers on account of political convictions, among others.

Extradition would, but is not required to be refused for political offenders. It is recommended in crystal-clear terms that a state which refuses extradition would always be bound to undertake legal proceedings against the person concerned before its own courts. The state which refuses extradition would always be bound to prosecute and eventually punish the person whose extradition has been denied according to the principle, "that the criminal responsibility of the person concerned would always be determined by a judge and this will mean that one of the drawbacks of the political offence exceptions would be avoided.

Emphatically put, the automatic impunity of the person concerned would no longer exist.

It is also a recommendation in this dissertation, that extradition for political offenders be made possible. This should be so, so long as the rights of the affected individuals are respected. This ought to be the case when the political offence alleged is very serious and when the crime is of international danger. It constitutes a departure from the present system where such can only be granted either through restrictive interpretation of the term "political offence" or by means of formulation of special exception to the political offence exception. In addition the drafting of treaties to lay down such exceptions would be needless and redundant since extradition would be possible in any case. Extradition could likewise be granted if the requesting state is not the target state of the crime and hence neutral with respect to the conflict between the political offender and the latter state.

It is also germane in the endeavour to wind up this dissertation to recommend that extradition for political crimes would be possible between states with strong identity of interests on the condition that the rights of the requested person are respected. For many years now, scholars have repeatedly advocated the idea of rendering extradition of political offenders possible among states whose political institutions are so similar that attacks against the institutions of one state likewise affects the other.



The conceptual approach to the problem of political offence exceptions would thus be avoided because the characterization of the facts would no longer be the decisive criterion to determine their liability to extradition. Criteria such as the seriousness of the crime committed, the risk of unfair trial in the requesting state, could directly be used in order to determine the extraditability of the crime for which extradition is requested, whereas under the present system, such criteria remains implicit because they are used to determine the nature of facts that go into political offenses and so too is to common offenses.

The study of contemporary policy and practice of states with respect to the use of extradition, exclusion and expulsion of international terrorists should be undertaken under private or government auspices. The study should determine the extent of use of each method as a means of international rendition of such offender to states where they are wanted for prosecution and the reason why extradition appears to be used less frequently than exclusion and expulsion as a means of international rendition. A clearing house of information about instances of extradition of political offenders should be established. A suggested location would be the criminal justice division of the department of justice.

A multilateral convention should establish a common standard regarding the use of exclusion and expulsion for purpose of international rendition with procedural safeguards for the

interests of the offender as well as those of the states involved. Once such a common standard has been established lawful return should be substituted for "extradition", in the treaty injunction, "extradite or submit" for prosecuting.

Where extradition is not possible because of the lack of a treaty or for some other reason, or where extradition is not feasible because of the time and expenses involved states may resort to other methods of surrendering or recovering fugitives. If the fugitive is not a national of the asylum state it may deport him as undesirable alien or exclude him: that is deny him permission to enter the country. In either case the fugitive may be returned over directly to the state that desires to prosecute him or may be sent to a third state from which extradition is possible. The United States and Canada have always resorted to exclusion or deportation in order to deliver fugitives to each other without going through the process of rendition.

It has been suggested and indeed seen in practice that states may also acquire custody of the fugitives by kidnapping or through the failure of police officials to observe the procedures governing extradition, deportation or exclusion. In this case the practice in the United States courts has been that they may assume jurisdiction over the fugitive inspite of the illegal manner in which he may have been brought into the country. However, ~~if~~ capture and abduction to the United States was not only illegal, but violent, brutal and inhuman, the prosecution may not proceed. The writer of this dissertation concurs with

these views in entirety; this ought to be the practice of States in the global village.

States that are party to the anti-terrorist conventions are under international obligation to prosecute the offenders, whether prosecution follows lawful return or takes place in the State where the offender was found. A clearing house of information regarding instances of prosecution of International terrorists, should be established with a view of determining the extent to which such prosecution takes place and the reasons for the discrepancies in bringing offender to trial and sentencing. A proposed location would be the criminal Division of the department of justice.

It should be recognized that the defence of "political offence" is historically, philosophically and jurisprudentially accepted by many states. The need to circumscribe "political offence" by stated elimination of offence from this category; terms without exception should be emphasized. Finally the formula extradite or submit to prosecution should be amended to recognize that prosecution is a separate act from the grant of political asylum to an offender after he has been prosecuted.

#### DRAWBACKS OF THE PROPOSED SYSTEM:

It is not automatic that the advanced proposals will provide a panacea to the problematic question of political offence exception in extradition cases under international law. To a certain extent, it has been noted, the system proposed amounts to



shifting of the problem, since the vague, undefinable and bare manageable concept of "political offence" is replaced by another Criterion which refers to the similarly difficult determination of a "discriminatory" or "unfair" treatment in the requesting state, moreover, the practical application of such principle can entail a number of problems of political nature; the finding, that a crime will not give rise to extradition because the person concerned may be subjected to unfair trial in the requesting state constitutes a very delicate and politically highly loaded declaration. In addition it may be extremely difficult to evaluate the criminal justice system in the requesting state.

The drawbacks, however, can be avoided if extradition procedure would be internationalized by means of an integration of existing human rights machineries into the domestic decision making process. The intervention of such international machineries could be operative on the two levels of domestic decision making process in respect to extradition; on judicial level; by determining in a particular case whether or not the requested person may bear the risk of persecution in the requesting state and; on the political administration level by serving as a neutral justification of the ultimate decision vis-avis the requesting state. Consequently, the proposed system is predicated upon an adoption of extradition procedure to the extent that the domestic decision making process would be supplemented by international elements.

The alternative principle of "aut dedere aut judicare" which deals with the determination of criminal responsibility contains a number of unresolved problems of both theoretical and practical nature, including the problem of jurisdiction, the applicable law, the absolute or subsidiary duty to prosecute the fugitive. The bare existence of such difficult should not lead us to avoidance of the solution . In the present system, these problems are only approached on an ad hoc basis. Substantive international criminal law treaties usually establish a duty either to extradite or to prosecute with respect to the crime they bring under international control without, however, dealing with it from a global perspective.

The proposed system, besides raise the question of what finally remain of the democratic institution of political asylum. The answer to this is that political asylum is reduced to its most basic rationale and is also restricted to it, that is the protection of the requested person not to be extradited to a country where they may be subjected to persecution. It should nevertheless be re-emphasized that the proposed system starts from the premise that this Right can only be effectively guaranteed if domestic decision making processes would to a certain extent be internationalized.

The benefits of luring foreign defectors and offering them asylum may sometimes be commendable interms of human rights or explainable interms of modern politics but highly explosive interms of global strategy for minimum world order when the

defector happens to have committed common crimes or international crimes to which the (political) human rights aspect is only tenuously related. This is particularly true in respect to certain acts of terrorism.



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