

**University of Newcastle upon Tyne**



**Global Co-operation and Extradition, a  
Comparative Study of Saudi Arabian and  
British Judicial and Quasi-Judicial  
Processes Employed in Extradition of  
Alleged Offenders**

by

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## **Declaration**

I certify that all material in this thesis which is not my own work has been identified and that no material is included for which a degree has previously been conferred upon me.

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## Abstract

Is it possible for the United Kingdom and Saudi Arabia to have an extradition treaty or an arrangement whereby they can mutually secure the return of fugitives? This paper argues that such an agreement between these two strikingly different legal systems is possible. In answering this question, this paper also examines whether they can adjust their extradition systems to accommodate the emerging norms of international law and concerns about human rights. The possibility of a U.K.-Saudi Arabia extradition treaty would signal hope to the international community and could be a giant step toward an international extradition convention. The larger argument in this paper, thus, is that there is a dire need for the international community to forge an international extradition convention.<sup>1</sup> By working with and improving the existing United Nations Model Extradition Treaty,<sup>2</sup> such an international extradition convention is possible as demonstrated by the very specific case study between the U.K. and Saudi Arabia.

Increasing global threats have led to the increased need for international co-operation and effort, regardless of differences between nations. Extradition, for one, is recognised as an effective way of combating international crime. This study looks at how extradition can be used to enhance global co-operation to fight crimes of an international nature, using Saudi Arabia and the U.K. as an example. In doing so, it addresses the questions of whether the extradition systems of these two countries are functioning effectively, whether failure in either of these systems are related to its intrinsic nature, whether extradition arrangements are possible between an Islamic and a non-Muslim country, how both systems can benefit from each other's experience, in what way they can be effective to tackle organised crime at an international level, and, finally, how extradition systems can be used as a means for global co-operation against international crime, including terrorism. Throughout, the available literature is examined to look at major issues in the field of

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<sup>1</sup> Another possibility as proposed by Plachta is to identify specific "core fair trial rights" applicable to the extradition context. Plachta, however, disregards what this paper elaborates, that some extradition systems (i.e. administrative systems) may not even provide a trial or hearing, but simply an administrative proceeding, as discussed further in this paper. Plachta's suggestion, however, is helpful in setting out what minimum rights should be included in an international extradition convention. See generally M. Plachta, 'Contemporary Problems of Extradition: Human Rights, Grounds for Refusal and the Principle of Aut Dedere Aut Judicare,' (2007) 114<sup>th</sup> Int'l Training Course Visiting Experts' Paper, Resource Material Series No. 57, 64-70.

<sup>2</sup> United Nations General Assembly, Model Treaty on Extradition, 68th plenary meeting, UN Doc A/RES/45/116, (1990). (Hereafter 'UN Model Treaty').

extradition practice and procedures, touching on new norms and trends in international law as well as human rights standards.

The historical evolution of extradition is presented, but note is also made of the historical origins of extradition in Islam. This paper argues that the historical development of extradition parallels the development of human rights protection in international law. Formal arrangements such as treaties, however, are important to achieve common aims and to reconcile differing approaches, especially to balance the aims of extradition and the protection of human rights.

An important component of this study is a description of the essence of extradition, in theory and in practice. Definitions of extradition, in both the Western and Islamic worlds are examined, with the former laying some stress on the idea of reciprocity, particularly as international law lays no obligation at all on countries to extradite. Extradition as an activity is a process, and because of the different processes employed by nations, different types of extradition system have developed. This paper then proposes a definition for extradition that takes into account human rights obligations, and the adoption of a dual judicial-administrative extradition system, which would also encourage the protection of human rights.

Additionally, the paper looks at the relationship between extradition and international law with a primary focus on the shortcomings of the current international extradition system,<sup>3</sup> especially toward the protection of human rights.<sup>4</sup> An increasingly important aspect of international law is human rights. Accordingly, this paper discusses the Universal Declaration of Human Rights, the European Human Rights Convention, and related human rights obligations. Some of the international and regional bodies involved with extradition are examined. The paper discusses a disturbing international trend toward the increasing use of alternatives to extradition and the

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<sup>3</sup> It should be noted at the outset that this paper does not look at an extradition request from an international court like the ICC, seeking assistance from states for the prosecution of crimes under the ICC's jurisdiction. Instead, this thesis looks at extradition requests between or among states in the context of international crimes committed in those states, and that would be prosecuted by those states and not an international court. For a discussion of extradition and the ICC, see G. Sluiter, 'The Surrender of War Criminals to the International Criminal Court', (2003) 25 *Loy. L.A. Int'l & Comp. L. Rev.* 605 at 613.

<sup>4</sup> See J. Dugard and C. Van den Wyngaert, 'Reconciling Extradition with Human Rights,' (ASIL 1998) 92 *AJIL* 187-212 (stating that there is an inevitable tension between the protection of human rights in extradition and the need to curtail crime).

increasing erosion of exceptions to extraditions. These trends are the symptoms of an international extradition system in need of immediate repair at the expense of individual rights.

This paper is hopeful that an international extradition convention is possible. The international community can begin with existing templates like the United Nations Model Extradition Treaty.<sup>5</sup> Issues like jurisdiction could be used to create initial consensus through the recognition of a universal extradition, following the universality theory. Jurisdiction is a complex issue, so a number of relevant concepts are analysed in theory and in reality as they not only impact the possibility of an international extradition conventions, but also the case study between the U.K. and Saudi Arabia.

For purposes of a case study that could work as a model for creating consensus toward an international extradition convention, this paper examines the U.K. and Saudi Arabian extradition systems in detail. The overriding importance of Islam in the latter is at length, as it has a profound effect, which cannot be over-stated, on how Saudi Arabia creates and amends its laws. A comparison of the British and Saudi systems demonstrates the differences, in systems and in perceptions, but also some of the surprising similarities. Using the UN Model Treaty on Extradition as a benchmark, this paper assesses to what extent each system measures up to modern international law obligations and how well they function.

Ultimately, this paper leads to an examination of whether a treaty between Saudi Arabia and the U.K. is possible, and whether the two countries have anything to learn from each other. A formal treaty between an Islamic country (Saudi Arabia) and the U.K. (a Western power) has significant importance for global co-operation. The analysis presented in this study concludes that despite flaws and limitations in their current practices, a formal extradition treaty is very possible between Saudi Arabia and the U.K., and that such a treaty could have a profound positive effect on global co-operation in the fight against international crime and terrorism.

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<sup>5</sup> UN Model Treaty, n.2.

# **Chapter One**

## **Introduction**

The development and transformation of fragmented feudal societies into the modern-day nation states occurred partly through the introduction of more sophisticated systems of governance. Of course, this has only been possible because of the implementation of complex legal concepts, rules, principles, and practices, and the establishment of institutions for resolving conflicts between individuals and between individuals and the state.

Conflicts between states, however, require appropriate legal rules, procedures, practices, and other mechanisms to facilitate peaceful resolution of disputes. Although in principle, in the presence of such rules and procedures, a peaceful environment should prevail in which international commercial activity can flourish; in practice, this is not the case, as is all too obvious from the conflicts that occur between states, often culminating in war.

On the other hand, despite implementing divergent legal systems, states do co-operate for mutual benefits and common interests, as illustrated by the treaties and agreements signed on a range of issues, including extradition and drug trafficking. International bodies like the United Nations have even been instituted to create a forum in which states are able to co-operate and collaborate with each other.

The means of communication that have developed, like information technology, have also turned the world into a global village. But while modern globalisation has opened up new opportunities for international co-operation in the exchange of resources and technical know-how, it has also created a new set of challenges. Globalisation has facilitated movement and instantaneous communication throughout the world, but it has simultaneously created opportunities for organised criminal activities at an international level. Crimes such as money laundering, Internet fraud, terrorism, and human trafficking no longer recognise international boundaries. Knowledge and facilities intended for the benefit of humanity have been harnessed as instruments of violence and international criminal activities.

The 9/11 and 7/7 incidents have comprehensively shown how modern technical knowledge can be recruited to cause destruction and misery. It is becoming evident how the international network of negative forces can link to commit or repeat terrorist attacks of this magnitude. These incidents in particular, point to the kind of challenges that confront the world today and the level of co-operation and co-ordinated efforts required among governments at an international level to meet the challenge head-on before it assumes even greater abominable proportions. There is scarcely anywhere which is safe from this threat.

Although modern globalisation allows different states to take advantage of modern developments and share resources for the greater benefit of humanity, they are also required to pool their efforts for the prevention and curtailment of crime at a global level.<sup>6</sup> Therefore, just as an effective judicial mechanism is required for smooth and harmonious internal social interactions, it is now accepted that an equally effective legal mechanism is required for international dealings. Shaw, for example, notes an “assumption of an analogy between the national system and the international order.”<sup>7</sup>

As noted above, increased mobility and developments in communication have facilitated organised crime at an international level. Consequently, this threat requires a response on a matching scale. No one nation can fight the unparalleled magnitude of the menace single-handedly. Regardless of the deep differences among nations in terms of history, values, culture, and philosophy, the control of international offenders worldwide requires international co-operation and collaboration to co-ordinate efforts and counter organised crime internationally.

Perhaps, a true international criminal justice system is overdue. This paper, however, only proposes a modest measure, though very relevant to contemporary practice.<sup>8</sup> Given the lack of

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<sup>6</sup> For a discussion of international criminal organizations, see generally C. Guymon, ‘International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention,’ (2000) 18 Berkeley J. Int’l L. 53.

<sup>7</sup> M. Shaw, *International Law*, 4<sup>th</sup> ed. (Cambridge: Grotius, CUP, 1997), at 3.

<sup>8</sup> See M. Plachta, note 1, at 72, explaining the importance of this type of paper in contemporary international law because it could help “convince both the government officials and the politicians, most notably the members of the national parliaments, that, possibly, the time has come to change their approach to and their way of thinking about extradition and the grounds for refusal thereof. Most importantly, such a study should contribute to the common understanding that the so-called traditional grounds for refusal, based on the rationale which itself is rooted in the ‘old days’ concepts and notions, may be preserved and accommodated insofar as they are compatible with the modern approach to extradition.”

enforcement power and limited jurisdictional scope of international criminal courts, international criminal justice must rely on the legal assistance of states.<sup>9</sup> In this regard, extradition may arguably be the one type of *legal* assistance that is of utmost importance to create a more effective international criminal justice system.<sup>10</sup> This thesis adds to the contemporary debates surrounding the need to revisit the international extradition system, especially in light of human rights.

This paper generally argues that extradition treaties are essential to combating modern international criminals. Yet, countries should adhere to their international obligations when extraditing individuals. The extradition system today is insufficient to safeguard individual rights within the framework of international law. This paper argues that there is a need for the international community to enter into a convention that addresses the needed balance<sup>11</sup> among protecting individual rights, fighting international criminals, and safeguarding state sovereignty. The European Court of Human Rights expressed this need for a balance in *Soering v. United Kingdom*, where the court explained that the growing internationalization of crime requires “a search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>12</sup>

There are, however, numerous challenges in crafting an international convention on extradition able to maintain this balance. To highlight the challenges that countries face in arriving at an extradition agreement, despite their well intentioned desire to co-operate in the face of globalising criminal enterprises, this paper specifically compares two countries with contrasting legal traditions and extradition systems as a case study: the U.K. and Saudi Arabia. The possibility of an extradition treaty between the U.K. and Saudi Arabia would spark hope for a multilateral extradition treaty between Arab countries and the West, and later for an international extradition convention. This paper examines the possibility of a U.K.-Saudi extradition treaty within the framework of their international obligations, primarily focusing on human rights obligations, which may arguably be one of the more prominent and politically charged obstacles

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<sup>9</sup> See J. Godinho, ‘The Surrender Agreements Between the U.S. and the ICTY and ICTR: A Critical View’, [2003] ICJ 1.2 (502).

<sup>10</sup> *Ibid.*

<sup>11</sup> See Dugard, n. 4, at 187 (stating that “it is necessary to strike a balance between the two so as to establish a system in which crime is suppressed and human rights are respected.”).

<sup>12</sup> *Soering v. United Kingdom* (1989) 161 E.C.H.R. (ser. A), at para. 89.

to such an extradition agreement. Some international obligations like human rights may trump the national interests of these two countries. Customary international law may also impose a duty on both countries to extradite, limited however by a higher international obligation to protect human rights.

In the end, this paper concludes that it would be possible for the U.K. and Saudi Arabia to reach an extradition treaty because both countries can overcome human rights, religious, and procedural hurdles within the framework of international law. Both countries should craft the extradition treaty considering their international human rights obligations, especially in light of various types of alternatives to extradition that violate international law and individual rights. Despite common misconceptions, both countries' normative principles do recognise the protection of human rights and the necessity of an extradition system. Instead, the primary obstacle in both countries entering into an extradition treaty is the Islamic rule prohibiting the extradition of Muslims to non-Muslim states and vice versa. This paper argues that there is support in Islamic law for an exception to this prohibition, specifically if Saudi Arabia, or other Islamic countries, enters into extradition agreements like an international extradition convention.

### **1.1 Extradition treaties are essential to combating international criminals.**

Extradition is a formal legal process where one nation surrenders an individual to another nation, usually for criminal prosecution.<sup>13</sup> International law, however, does not oblige a state to surrender an alleged criminal to a foreign state. One principle of sovereignty is that every state has legal authority over the people within its borders.<sup>14</sup> Under customary international law, a state has no obligation to extradite a person to a requesting state unless an extradition treaty

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<sup>13</sup> “The process of extradition can be defined simply as the surrendering of a criminal or accused criminal by one sovereign to another.” J. Soma, T. Muther, and H. Brissette, ‘Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?’, (1997) 34 Harv. J. on Legis. 317. For further discussion see M. Bassiouni, *International Extradition and World Public Order* (New York: Oceana Pub., 1974), at 1; see E. Martin and J. Law (ed.) *Oxford Dictionary of Law* (Oxford: OUP 2006), from Oxford Reference Online, available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t49.e1503> (last accessed 21 March 2010); see K.B. Weissman, ‘Extraterritorial Abduction: The Endangerment of Future Peace,’ (1994) 27 U.C. Davis L. Rev. 459, 467; see Y. Zilbershats, ‘Extraditing Israeli Citizens to the United States – Extradition and Citizenship Dilemmas,’ (2000) 21 Mich. J. Int'l L. 297, 298-299, citing Restatement (Third) of Foreign Relations Law (1986) at 475 and introductory note, at 556-557; *Terlinden v. Ames*, (1902) 184 U.S. 270, 289 (U.S. Supreme Court); *Draft Convention on Extradition* (Supp. 1935) 29 Am. J. Int'l L. 66.

<sup>14</sup> See Bassiouni, n. 13, at 204.



exists between states.<sup>15</sup> Thus, extradition primarily occurs through a bilateral agreement<sup>16</sup> between states. While there are multilateral treaties, and attempts have been made at creating a comprehensive convention on extradition, many factors such as differing legal systems and conflicting political goals have frustrated past efforts.<sup>17</sup>

In 1990, the United Nations under its obligations to create model laws, adopted the United Nations Model Extradition Treaty and urged Members states to either adopt it or to improve its extradition laws in light of the model treaty.<sup>18</sup> This Model Treaty, however, is only a model and is not legally binding on any U.N. member, including the U.K. and Saudi Arabia.<sup>19</sup> In other words, each U.N. member would have to adopt the Model Treaty, or any of its parts, and use it as a bilateral or multilateral treaty with other countries. Thus, there is yet no comprehensive convention on extradition.

It is also important to note that no country in the world has an extradition treaty with all other countries. For example, Bassiouni listed 113 bilateral treaties between the U.S. and other countries in 2007.<sup>20</sup> This still leaves a significant number of countries without a bilateral extradition treaty with the U.S. - the People's Republic of China and North Korea, for example.

This paper later describes in more detail the history of extradition and its developments for a better understanding of the challenges that face countries when adopting a bilateral or multilateral extradition treaty, much less an international convention on extradition. The history of extradition will then be helpful in analyzing the obstacles countries like the U.K. and Saudi Arabia may face when entering into an extradition treaty.

Two measures of international co-operation are necessary for the effective combating of international crime. The first is to put in place machinery for the extradition<sup>21</sup> of criminals who commit a crime in one territory and escape to another, and concomitantly to rid the extradition

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<sup>15</sup> See K. Rebane, 'Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights', (1996) 19 Fordham Int'l L. J. 1636.

<sup>16</sup> Most extradition treaties are bilateral.

<sup>17</sup> See Rebane, n. 15, at 1649.

<sup>18</sup> UN Model Treaty, n.2.

<sup>19</sup> See generally, *ibid.*

<sup>20</sup> See M. Bassiouni, *International Extradition: United States Law and Practice*, 4<sup>th</sup> ed. (New York: Oceana, 2002), at 985-981.

<sup>21</sup> The history of extradition and its processes are discussed in some detail in Chapter 2.

process of unnecessary procedural hurdles to achieve a speedy extradition of fugitives. The second is the re-aligning of extradition systems into a standardised form which results in the greater success of legitimate requests. The importance of extradition in reducing crime<sup>22</sup> has been accepted and recognised in the literature, and is a containment solution for international terrorism.<sup>23</sup> One of the determinants that led to the creation of the United Nations Model Extradition Treaty<sup>24</sup> was the conviction that bilateral and multilateral extradition arrangements would greatly contribute to the development of more effective international co-operation for the control of crime. Adoption of the United Nations Model Treaty recognises extradition as an instrument for dealing effectively with the complex aspects and serious consequences of crime, especially in its new forms and dimensions.

With regard to current developments, however, especially after the 9/11 attack in the U.S. and the 7/7 bombings in the U.K. (indicative of international crime and terrorism), the existing extradition treaties or the U.N. Model Extradition Treaty did not help to prevent or reduce crimes internationally. Such prevention or reduction primarily requires common will, genuine co-operation, and co-ordination among sovereign states. Unfortunately, under the current world system, widespread co-operation is still not possible.

Interestingly, world-shocking events often create solidarity, regardless of ideological differences. Good illustrative examples in this context are the 9/11 attacks on the U.S., the London bombings of July 2007, and the Mumbai massacres in 2009. Similarly, extradition as a form of request to seek the return of a fugitive criminal reflects the willingness of states to engage in co-operative efforts aimed at the suppression of crime.<sup>25</sup> Few countries want to become a place of refuge for another state's criminals,<sup>26</sup> but countries without an enforced extradition treaty with another country find themselves unable to extradite offenders and criminals. Countries that do not have

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<sup>22</sup> C. Blakesley, *Terrorism, Drugs, International Law and the Protection of Human Liberty* 171 (New York: Transnational Publishers 1992). He cites the eighteenth-century Italian jurist, Beccaria, who believed extradition could play an important role in diminishing crime but was concerned about the uneven distribution of justice. Blakesley argues that the spread of international crime and terrorism increases states' motivation to join in international crime control agreements and thus leads to an increased volume of extradition.

<sup>23</sup> K. Wellington, 'Extradition: A Fair and Effective Weapon in the War on Terrorism,' (1990) 51 *Ohio St. L. J.* 1447-1460.

<sup>24</sup> UN Model Treaty, n.2.

<sup>25</sup> I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon 1998), at 318.

<sup>26</sup> G. La Forest, *Extradition To and From Canada*, 2nd ed. (Toronto: Canada Law Books 1977), at 182.

any such agreements<sup>27</sup> would automatically become a safe refuge for genuine international criminals.

Yet, even despite the willingness of countries to co-operate for a more effective international justice system, there are numerous legal, cultural, and political obstacles to complete co-operation. Even between two particular states who want to co-operate for purposes of extradition, there might be a number of constraints (legal, administrative, or both), which pose barriers to securing prompt extradition. Such barriers can be varied and numerous. They may derive from the basic constitutional or statutory provisions governing extradition, or the legal processes involved in extradition, but sometimes a country may simply refuse the request of another country, or do so in order to put pressure on the latter. The U.K. still refuses to return the Algerian fugitive Al Khalifa to Algeria (for the alleged embezzlement of public funds), in an attempt to make Algeria provide more information on suspected Al Qaeda operatives in London and Europe.<sup>28</sup> Likewise, Egypt refused to extradite a suspect involved in the London bombings, especially in the absence of an extradition treaty between Egypt and the U.K.<sup>29</sup>

## **1.2 Using the framework of the United Nations Model Extradition Treaty, the U.K. and Saudi Arabia should enter into an extradition treaty that balances the concerns of both nations.**

After discussing the importance of extradition treaties in combating international criminal activities, it becomes relevant to consider and compare the procedures and regulations for extradition in two relevant countries: Saudi Arabia and the U.K. So far there exists no formal bilateral treaty between these latter two countries for extradition arrangements. They have only

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<sup>27</sup> P. Barkham, 'What is Extradition?', *The Guardian* (London 5 Jan 2000), available at <http://www.guardian.co.uk/world/2000/jan/05/pinochet/chile> (accessed 20 March 2010) ("According to a 1998 Foreign Office survey covering 138 countries, The U.K. has extradition agreements with 105 countries, including the 33 signatories of the European Convention on Extradition. There are 33 countries with which The U.K. does not have an extradition agreement: Afghanistan, Armenia, Azerbaijan, Bahrain, Belarus, Bhutan, Cameroon, China, Dominican Republic, Egypt, Ethiopia, Georgia, Iran, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Madagascar, Mongolia, Namibia, Oman, Pakistan, Qatar, Russia, Saudi Arabia, South Korea, Tajikistan, Turkmenistan, UAE, Ukraine, Uzbekistan, Venezuela and Yemen are all potential havens for British criminals.")

<sup>28</sup> M. Bazzi, 'Egypt refusing to extradite suspect,' *Newsday* (New York 18 July 2005), available at <http://www.baltimoresun.com/ny-wonash18434864jul18.0.7116593story?> (last accessed 20 March 2010) ("Before the Sept. 11, 2001, attacks, the British had also rebuffed extradition requests from Algeria, Saudi Arabia and Yemen.").

<sup>29</sup> *Ibid.*

signed a Memorandum of Understanding,<sup>30</sup> which has been drawn up in very general terms. It does not address the specific extradition processes to be followed. It is very important to note here that a U.K.-Saudi Arabia extradition treaty is impossible in the absence of any genuine agreement with flexible administrative and legal procedures and a strong will to implement them. This paper argues that it would be possible for the U.K. and Saudi Arabia to reach an extradition treaty executed within the framework of the United Nations Model Extradition Treaty if both countries overcome crucial hurdles.

This paper will discuss the crucial obstacles to a U.K.-Saudi Arabia bilateral extradition treaty. Many of these constraints need to be removed before a bilateral arrangement can be put in place. These two countries may have inconsistent constitutional and procedural paradigms for extradition. Other difficulties may stem from the fact that the two countries derive their legal systems from different sources and backgrounds. For instance, the Kingdom of Saudi Arabia, being an Islamic country, derives its constitution from the *Shari'a*,<sup>31</sup> discussed in more detail in Chapter 5. In contrast, the U.K. is a non-Muslim country. Its legal system stems from a combination of common law, and governed by statutory provisions enacted by Parliament. “Traditionalists claim that the U.K. constitution is a happy and pragmatic outcome of an evolution towards democracy ordered by benevolent customs.”<sup>32</sup>

One of the most complex obstacles, and one that requires a more complex comparison, are the legal systems and traditions of Saudi Arabia and the U.K. In the context of comparing Saudi Arabia and the U.K., it becomes necessary to consider the history, religion, and monarchy of both countries.

Bearing in mind its history, one should view Saudi Arabia as a newly-formed nation-state whose constitution is still not fully settled. With a long history and born after the Ottoman collapse in the Arabian peninsula, Saudi Arabia is today, as its state and royal decree documents reveal, an Arab and Islamic state.<sup>33</sup> The country, under the King, fully adheres to the tenets of Islamic *Shari'a* law and rules. Whether this monarchical system is strictly in keeping with the spirit of

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<sup>30</sup> It was, further, signed by the two countries on April 12, 1989. See Bazzi, *ibid*.

<sup>31</sup> Chapter 5 examines *Shari'a* and how it governs the constitution of the Kingdom.

<sup>32</sup> J. Alder, *Constitutional and Administrative Law*, 6<sup>th</sup> ed. (London: Macmillan, 2007), at 67.

<sup>33</sup> Kingdom of Saudi Arabia, ‘The Basic Law of Governance’, art. 1, 17 (Translation of Saudi Laws, Series II), (Riyadh: Bureau of Experts at the Council of Ministers, 2003).

true *Shari'a* is perhaps debatable, and a number of Muslim critics like Osama bin Laden and Al-Qaeda members do not entirely accept the legitimacy of the Saudi Kingdom.<sup>34</sup> Nonetheless, according to its regulations and the amended Basic Law of 1982, the Saudi Kingdom sees itself as a Muslim country and its' King as servant and saviour in respect of the two holy shrines Mecca and Medina. The King's role is discussed in detail in the next chapter, but in accordance with the Islamic spirit, he rules by royal decree and in close consultation with the *ulema*, or religious scholars, who also have considerable influence in most areas. This system, from a Western perspective, looks like a theoretical power endorsed by an overdose of royal supremacy. Closer scrutiny especially of the process of this rule, however, reveals that neither the King nor the *ulema* would overrule or contradict the *Shari'a* law and Islamic spirit. One might grasp these two powers as being the sole bodies entitled to interpret *Shari'a*, but the reality in Islamic tradition is that mutual consultation, *shura*, and the diversity of religious interpretation are respected. If it were not so then the situation would become politicised and possibly partisan.

In contrast, the U.K. was a colonial, imperial, island power with but few competitors whose empire faded away. The emergence of the industrial revolution and the amalgam of fast development with its important secular legacy ensured that religion has no formal rule in law-making or supremacy, "neither Christianity nor any other religion is part of the law as such."<sup>35</sup> Further, the monarchy is represented in the person of the Queen but she does not rule ("she cannot make law except as required by Parliament"<sup>36</sup>) – unlike the case of Saudi Arabia. Despite its traditional power and influence, royalty in the U.K. today is more representative of national patrimony, pride, and heritage than of supremacy.

Within this framework, the differences and disparities between the U.K. and Saudi Arabia, as well as their distinctions and peculiarities, raise a number of interesting questions. These questions form an integral part of the main hypothesis in this modest research paper. The above mentioned issues suggest a number of other assumptions. For instance, if the two countries are so

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<sup>34</sup> A. Mayer, 'Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition,' (2002) 1 UCLA J. Islamic & Near E.L. 183 (explaining that "[d]espite efforts to position the Saudi royal family as the guardian of Islam and Islamic law, Islamist dissidents emerged who were determined to overthrow the monarchy. The most spectacular incident was the violent takeover of the Holy Mosque at Mecca on November 1979 by an Islamist group called the Ikhwan.")

<sup>35</sup> See Alder, n. 32, at 103.

<sup>36</sup> *Ibid* at 85.

diametrically different in their legal systems and their administrative procedures, then their approach to extradition, their judicial heritage, and legal regulations must also be diverse and different from each other. Would it be possible, therefore, to reach an understanding?

Such theoretical assumptions suggest that different entities may not enjoy a close relationship and mutual interests, owing to their differing objectives, but when an emergency situation requires it, protocols may become flexible to the point of abandonment of principles. Recent threats to both Saudi Arabia<sup>37</sup> and the U.K. illustrate this. Whether the threats were real or imaginary, both countries (with no previous formal agreement) quickly intensified their diplomatic efforts to confront international terrorism. The U.K. and Saudi Arabia may be willing, for example, to share intelligence on terrorism investigations.<sup>38</sup>

Different sovereign entities may not wish to compromise their ideas, especially if these are of national interest or character. Nonetheless, under the fast-growing movement of peoples and goods marked by aggressive economic globalisation and the technological media revolution, the world of individual states has come closer to being one global village, breaching a number of obstacles, national taboos, and some religious practices that were once very uncompromising. The fact is that diversity and change killed rigid conformity to national ideals. For instance, traditional concepts of state paternalism (prevalent in third world countries) have retreated in the face of a growing private and market economy.

It is reasonable to assume that differences between countries can also cause obstacles in better understanding despite the fact of existing common will. One illustration of the problem would be the statutory force of British extradition law whereby a fugitive may not be returned to a state where the death penalty is imposed.<sup>39</sup> Like many other places around the world, such as some U.S. states or Pakistan, the death penalty is sanctioned in Saudi Arabia by virtue of the state's

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<sup>37</sup> For example, the Khobar shootings in Saudi Arabia. See O. Bowcott, 'They killed two security guards then shot at the school van,' *The Guardian* (London 8 May 2004), available at <http://www.guardian.co.uk/world/2004/may/31/saudi-arabia.oil2>, and O. Bowcott, 'The London tube and bus bombings: The horror,' *The Observer* (London 10 July 2005), available at <http://www.guardian.co.uk/uk/2005/jul/10/july7.uksecurity13> (both last accessed 20 March 2010).

<sup>38</sup> See J. Straw, 'Global Response to Global Terrorism,' *Voltairenet* (16 January 2006), available at <http://www.voltairenet.org/article134148.html?var> (last accessed 20 March 2010).

<sup>39</sup> Extradition Act 2003, s.94 (1) and (2).

constitution.<sup>40</sup> British law could therefore prove to be an insurmountable barrier to securing the extradition of a fugitive Saudi national from the U.K., and thus an impediment to these two countries entering into a viable bilateral arrangement.

For the U.K., the issue of the death penalty as it relates to extradition is also an issue of human rights and international law obligations. Would the U.K. violate its international obligations if it extradited a person to Saudi Arabia, and who later received the death penalty? The U.K. has obligations under the European Conventions on Human Rights<sup>41</sup> (“ECHR”) and the International Covenant on Civil and Political Rights<sup>42</sup> (“ICCPR”), and for which Saudi Arabia does not have a comparable international obligation because it is not a signatory to these conventions. Since Saudi Arabia, however, is also a signatory to some international conventions like the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>43</sup> and under the Universal Declaration of Human Rights,<sup>44</sup> as a U.N. Member; there may be a way to arrive at an agreement.

Aside from the death penalty, it is also worth noting that the legal punishment for the infringement of a particular criminal law in one state may seem to be reasonable and justified, whereas in another state it may be considered to be draconian and inappropriate. For example, in the United Kingdom the maximum sentence for theft that can be imposed on a criminal is seven years imprisonment.<sup>45</sup> In Saudi Arabia, however, theft is punished by the amputation of the offender’s hand. Punishment too, then, raises human rights and international obligation concerns.

As a corollary, the extradition practices and procedures of the two countries are also different from each other. A preliminary comparison of the extradition systems practised in both countries reveals some striking differences. For example, Saudi Arabia has adopted the administrative type

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<sup>40</sup> Article 1 of the Basic Law of Kingdom of Saudi Arabia states that the Kingdom is an Islamic country. Within the corpus of Islamic doctrine that allows the death penalty, Chapter 5 verse 32 of the Qur’an is one such supporting source.

<sup>41</sup> The European Convention on Human Rights, 4 Nov. 1950, E.T.S. No. 005 (ECHR50).

<sup>42</sup> The International Convention on Civil and Political Rights, 23 Mar. 1966, 999 UNTS 171 (ICCPR66).

<sup>43</sup> United Nations, *Treaty Series*, vol. 1465, at 85 (1987), available at United Nations Treaty Collections, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (accessed 20 March 2010).

<sup>44</sup> Universal Declaration on Human Rights, UNGA Res. 217A (III), UN doc. A/810 at 71 (1948). [hereinafter UDHR48].

<sup>45</sup> The Theft Act 1968, s.7.

of extradition system, whereas the U.K. now has a purely judicial system, although it originally began as administrative.<sup>46</sup>

Given this scenario, it would be interesting to see if, despite the differences in sources and legal processes, it is possible for the two countries to have an extradition treaty or an arrangement whereby they can mutually secure the return of fugitives and equally importantly, if they can adjust their extradition machineries to accommodate the emerging norms of international law and concerns about human rights.

In order to answer this question, it will be crucial to research a number of related issues which constitute the core of the current hypothesis. The necessity for an extradition treaty would therefore be a pre-condition for any effective management of alleged international offenders, not only between the U.K. and Saudi Arabia, but also between other nations. To fulfil this task, it is necessary to discuss in detail the core questions of what an extradition system is, its implementation in Saudi Arabia and the U.K., how the two countries perceive suspects and human rights, and the main questions and administrative challenges that confront the two countries through their extradition processes and related procedures.

### **1.3 Objectives of the Study**

To develop and establish the hypothesis in this paper, this paper will attempt to address the following questions:

- (a) Judged from the perspective of their performance, are the extradition systems in the two countries, one founded on a theological basis, the other secular, functioning effectively?
- (b) Are failures in either of the systems, if any, attributable to their foundation?
- (c) Are extradition arrangements possible between an Islamic and a non-Muslim country?
- (d) How can both systems benefit from each other's experiences and in what ways can they be turned into a more effective tool for the curtailment and prevention of organised crime at an international level?

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<sup>46</sup> For a more detailed discussion of the judicial and administrative extradition systems see ch. 2, section 2.9.



- (e) How can extradition systems be used as a means of enhancing global co-operation against international crimes, particularly with reference to global terrorism and human rights protection?

In order to develop these questions, they must be discussed individually and collectively. For instance, question (a) looks into whether one system is working better than the other simply because it is based on religion, or if the other system is more efficient because it has a secular basis. A thorough investigation of the processes involved in each system would be illuminating for the legal systems prevalent in both countries. Question (b) is related to question (a) and addresses whether the shortcomings characterising each system, if any, stem from the fact that they have different origins and are based on different philosophies and approaches.

Question (c) is geared towards exploring the possibility of whether extradition agreements or treaties between a Muslim and a non-Muslim state are allowable. In particular, it would be of considerable significance for Islamic states if the study were able to establish an answer in the affirmative. It may open up new avenues for international co-operation between Islamic and non-Islamic states.

Question (d) aims to examine how both systems, founded on very different philosophies and approaches, can learn from each other's experience. This is the over-riding concern of this study. Numerous insights are expected to arise from this comparison as the countries follow different extradition frameworks. The outcome would be of greater benefit to Saudi Arabia, as the U.K. is a much more experienced country as far as extradition is concerned.

The question in (e) seeks to learn how global co-operation in fighting international organised crimes can be attained. Perhaps the biggest benefit would be to investigate how the extradition system can be made an effective instrument for the prevention of organised crime and how concerted efforts could be made by both countries to contribute towards securing peace and security at the international level. Should the study be able to suggest a route for close co-ordination between the two countries, other Islamic states could follow suit.

This last question is important in the context of a growing trend where states are urged to conform to emerging international norms and standards. In this context, the United Nations has

produced a United Nations Model Treaty on Extradition, the only instrument recognised and accepted so far as a universal standard for extradition.<sup>47</sup> The United Nations Model Treaty places a great deal of emphasis on the protection of human rights and promoting a uniform practice of extradition. This study adopts the United Nations Model Treaty of Extradition as a basic criterion for judging the extradition systems of Saudi Arabia and the U.K.

#### **1.4 Research Methodology**

The larger hypothesis of this paper on extradition and human rights is steeped in both comparative and international law.<sup>48</sup> It is of comparative law because the thesis looks at the current international paradigm of unifying and harmonizing<sup>49</sup> the international extradition system vis-à-vis the United Nations Model Extradition Treaty. The thesis is also comparative because it compares two legal systems' extradition laws (the U.K. and Saudi Arabia), the solutions offered by each system toward extradition, the obstacles faced by both systems in creating an extradition treaty, the causal relationships between the two legal system's extradition paradigm, and the legal evolution and current stage of extradition in each system.<sup>50</sup> Finally, while previous scholars avoided a comprehensive comparison of particular legal systems,<sup>51</sup> this thesis uses a methodology of comparative law analysis based on testing a hypothesis through the comparison of two legal systems because this author believes that a specific comparison of two legal systems like Saudi Arabia and the United Kingdom is has now become ripe<sup>52</sup> and can contribute to contemporary discourse on this topic.

At the same time, the thesis is steeped in international law methodology. While the thesis does not delve into customary international law, except tangentially in the historical portion, the paper aims to frame the methodology within the framework of the realist approach by examining

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<sup>47</sup> See UN Model Treaty on Extradition, n.2.

<sup>48</sup> Using both international and comparative law to examine the relationship between extradition and human rights is not unique. See Dugard, n. 4, at 188 (examining extradition and human rights "from the perspectives of international and comparative law.").

<sup>49</sup> P. DeCruz, *Comparative Law in a Changing World* (London: Cavendish, 1995).

<sup>50</sup> *Ibid.*

<sup>51</sup> See Dugard, n.4, at 188 (explaining that the "comparative dimension" of the article "examines judicial decisions in various legal systems but makes no attempt to provide a comprehensive picture of any particular system. Comparative trends are more important than national detail at this stage of evolution of this subject.").

<sup>52</sup> *Ibid.*

international codification through bilateral and multilateral agreements.<sup>53</sup> This choice was made in light of the current stage of extradition laws, still limited by the positivist approach. The paper aims to move the dialogue towards the trend of a Universalist approach to extradition, where an international extradition system would thrive.

In order to achieve the goals set out above, the following steps have been taken:

- (a) A survey has been made of the published literature, legal journals and academic works, and descriptions of the origins and developments in the field of extradition. The focus is on characterising the various extradition practices and procedures prevalent in world administrative or judicial systems. Other types of alternative means for returning accused fugitives, such as rendition and abduction are also examined. These alternatives to extradition often violate international obligations to protect human rights. In light of the views of various experts and writers on the subject, each system's strengths and weaknesses are outlined. As discussed subsequently, the abundance of material from the U.K. and other Western sources is in stark contrast to a marked shortage of materials for Saudi Arabia.
- (b) From the available literature, after the origins and important landmarks have been traced, major issues in extradition practice and procedures are described, including the issue of jurisdiction and exceptions for political offences. This paper examines the debates and various theories of jurisdiction surrounding these issues. It is also necessary to discuss the different judicial views and approaches to extradition in general and other concepts related to extradition *vis-à-vis* the political offence exception. This review is undertaken in order to determine what kind of approaches to jurisdiction the U.K. and Saudi Arabia follow. The literature is also studied from the perspective of identifying emerging norms and trends in international law and human rights standards. For this purpose, the existing principles of international law are highlighted and human rights protection enshrined in various conventions and other instruments of extradition is summarised and discussed subsequently.

An analysis of the United Nations Model Treaty on Extradition is also undertaken, with a view to finding an instrument, or document, which can be recognised and accepted as a

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<sup>53</sup> See generally R. Macdonald and D. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (The Hague: Martinus Nijhoff 1983), at 763-770.

standard to be incorporated by all states in bilateral and multilateral extradition arrangements, including conventions and treaties. The focus is on what the United Nations Model Treaty requires states to adopt as obligations and what kind of exceptions should be observed. The United Nations Model Treaty is vital for this current study, as it is used as a criterion for comparing and contrasting the British and Saudi extradition systems, and particularly for ascertaining which is closer to the criteria laid down by the United Nations. The investigation also serves to show how far the two countries have accommodated principles of international law and human rights protection in their respective extradition systems.

It is also crucial to compare the legal systems of both the U.K. and Saudi Arabia, including their basic sources of law. To this end, the United Nations Model Treaty is used as a standard to see which of the systems adheres to the principles of international law and human rights more stringently, and how they compare and contrast with each other in this respect.

- (c) The study moves on to investigate the U.K. extradition system with a focus on the U.K. Extradition Law of 2003. Various stages of extradition proceedings in light of the statutory provisions of the U.K. Extradition Law of 2003 are then analysed. The issues of human rights as embedded in the U.K. Extradition Law are discussed.
- (d) Discussion is dedicated to Saudi Arabia's Basic Law, although it must be noted that this law is very brief and does not furnish any details with regard to the procedures and proceedings of extradition. Within this context, the treaties and bilateral and multi-lateral extradition arrangements between Saudi Arabia and other countries in the region, including other Islamic countries with which Saudi Arabia has a similar arrangement, are also examined. It is important to note that the Saudi Basic Law provides for concluding treaties and extradition arrangements with other countries and does not make a distinction between Islamic and non-Islamic countries in this respect.

Focusing on Saudi Arabia's Basic Law, the chapter analyses various treaties and security agreements to which Saudi Arabia is a signatory, and investigates what kind of extradition arrangements have been concluded between the member states. The focus is also on how

extradition applications are processed by the Saudi Arabian Government and which offices are involved in the process.

- (e) Finally, a comparative study deals with the British and Saudi extradition law(s) starting first with the common ground between the two countries with regard to extradition practices and procedures. Attention is paid, however, to the differences between the two. The commonalities and differences of the two systems having been laid bare, discussion of the earlier questions takes place. The United Nations Model Treaty Extradition is used as a point of reference for judging which of the two countries is closer to the ideal. From the findings, an answer is attempted to the question of whether the two countries could conclude an extradition arrangement between them, and whether there are any religious or political hurdles which need to be tackled in order to accomplish what would be an unprecedented arrangement. An answer is also provided as to how extradition arrangements between these countries, both of which occupy very important positions in their regions, can lead to enhanced, global co-operation in combating organised crime at a regional, and international level. In order to understand and answer all these questions, the core concept of extradition itself must be examined. One of the immediate questions is to define extradition. This prompts investigation of its historical meanings, its development, its distinction from other similar terms like “deportation,” and its modern use and practical application by nations and sovereign states.

## Chapter Two

### The Extradition Framework

#### 2.1 Introduction

It is necessary to consider the historical and definitional evolution of extradition to get a full grasp of the complexity of forging modern extradition agreements. In other words, this chapter traces the historical and definitional developments of extradition law within the context of the strengthening of individual rights in the international law system. After the Second World War, the naturalist theory<sup>54</sup> of individual rights, which recognized a universal natural set of rights for individuals, replaced the positivist theory,<sup>55</sup> which recognized individual rights only when explicitly set out in treaties or rules of nations, as the dominant view.<sup>56</sup> In parallel to the developments of extradition agreements, the protection of individual rights through international agreements gradually increased.<sup>57</sup> Therefore, “as extradition law developed, international law recognized the importance of individual rights.”<sup>58</sup>

Historically, extraterritoriality, which recognized the right of nations to regulate activities within its territory, was the key rule of international law, within which extradition agreements were framed.<sup>59</sup> It is the rule of extraterritoriality, for example, that renders the use of abduction illegal under international law.<sup>60</sup> Recent covert use by the U.S., in co-operation with the agents of some European governments, of abduction and illegal irregular rendition drew severe criticism and

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<sup>54</sup> D. Sylvester, ‘Customary International Law, Forcible Abduction, And America’s Return to the “Savage State”’, (1994) 42 Buffalo L. Rev. 608.

<sup>55</sup> *Ibid* at 608.

<sup>56</sup> See Rebane, n.15, at 1639-1643.

<sup>57</sup> Arguably, the focus in international law on individual rights in the context of extradition remained strong at least until 9/11, when the concern for individual rights became secondary to the war on terrorism. See Plachta, n. 1, at 64, stating that “[t]he growth and expansion of the human rights concept have inevitably led it to cover the vast area of international co-operation in criminal matters whose most renowned form, extradition, has been for centuries dominated by considerations and concerns deeply rooted in state interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances, etc. Human rights have been granted protection only in so far as that would correspond with these stated priorities. The human rights movement with its unequivocal emphasis on their protection as such, has changed that perspective.”

<sup>58</sup> See Rebane, n. 15, at 1638. See also L. Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather Than States,’ (1982) 32 Am. U. L. Rev. 1, at 11.

<sup>59</sup> See Rebane, n.15, at 1646-1651.

<sup>60</sup> *Ibid* at 1647; J. Shen, ‘Responsibilities and Jurisdiction Subsequent to Extraterritorial Apprehension,’ (1994) 23 Denver J. of Int’l L. and Pol’y 44 (arguing that abduction violates international law).

even led to the prosecution of CIA operatives engaged in these illegal renditions by an Italian court.<sup>61</sup> Under international law, a violation of the rule of extraterritoriality is much more intolerable than the criminal conduct of an individual.<sup>62</sup>

The post-9/11 era, however, ushered a complex rearrangement and interplay among extraterritoriality, individual rights, and extradition. It is, thus, necessary to revisit where the concept of extradition came from and how it evolved through its three thousand years of history. More specifically, it is important to examine the roots of extradition generally, the roots of extradition in Islamic law, the roots of extradition in the U.K. and/or England, and the evolution of the purpose and use of extradition. Tracing the history of extradition, this paper, through this chapter, argues that extradition evolved from the practice of state co-operation into a legally formalised set of agreements, increasingly concerned with individual rights.<sup>63</sup> This argument, based on an historical analysis, paves the way for a suggestion that the possibility of a U.K.-Saudi Arabia extradition treaty, or any other extradition treaty between or among countries for that matter, must strike a balance between the modern aims of extradition (combating international criminals) and contemporary international law concerns like human rights. Any country looking to engage in an extradition treaty must recognize that the law of extradition evolved side by side with the laws protecting individual rights.

This is often a difficult balancing act for states. One could view the process of balancing all the interests involved as a doubled layer analysis.<sup>64</sup> First, one must balance the need to protect human rights against the needs of law enforcement and international co-operation.<sup>65</sup> Second, one must also balance the human rights of the alleged fugitive against the human rights of others and society.<sup>66</sup> This chapter and this thesis in general only focus the analysis on the first layer: balancing the need to protect human rights, and the need for a more effective international extradition system. It is important to note, however, that “the incremental and casuistic response

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<sup>61</sup> J. Hooper, ‘Italian court finds CIA agents guilty of kidnapping terrorism suspect’ (1994) *The Guardian*, available at <http://www.guardian.co.uk/world/2009/nov/04/cia-guilty-rendition-abu-omar> (accessed on 20 March 2010).

<sup>62</sup> See generally Rebane, n.15.

<sup>63</sup> See Plachta, n. 1, at 64.

<sup>64</sup> *Ibid* at 65.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

of extradition law”<sup>67</sup> to the parallel development of human rights protection has made it difficult to create a proper legal framework where the international community can properly strike a balance between human rights and combating international crimes.

This chapter also looks at the definitional problem for extradition, and how this definitional problem raises concerns for achieving an international extradition treaty, or bilateral treaties between countries like the U.K. and Saudi Arabia, that ought to strike a balance between the goals of extradition and protecting individual rights under international obligations. This chapter proposes a definition for extradition that takes into account this balance.

Finally, this chapter argues that the international community ought to adopt a hybrid judicial-administrative extraditions system, otherwise called a dual system, in order to create flexibility for countries to adopt an international extradition treaty. More importantly, this dual system would reconcile the goals of extradition while adhering to international obligations to individual rights.

## **2.2 The History of Extradition**

The historical development of extradition law has been haphazard, often influenced by politics and the needs of the states. The first ever recorded extradition agreement in the world dates from around 1280 B.C.<sup>68</sup> An agreement, providing for the return of prisoners, war refugees, and criminals who had fled from one part of a territory to another, was made within a peace treaty document between Rameses II of Egypt and the Hittite King Hattusili III.<sup>69</sup> One important feature of this agreement was that extradition was only part of a larger document, designated for wider purposes, which is “characteristic of most early examples of extradition, or rendition agreements.”<sup>70</sup>

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<sup>67</sup> See Dugard, n. 4, at 187.

<sup>68</sup> I. Shearer, *Extradition in International Law* (Manchester: Manchester: University Press 1971), at 27-31. See also Bassiouni, n. 13, at 3.

<sup>69</sup> *Ibid.*

<sup>70</sup> C. Blakesley, ‘Autumn of the Patriarch: the Pinochet Extradition Debacle and Beyond – Human Rights Clauses Compared to Traditional Derivative Protections such as Double Criminality’, (2001) 91 J. of Crim. L. and Criminology 17-25.



Extradition seems to have been a universal phenomenon. It occurred in all religions and all parts of the world. According to Gilbert, extradition occurred among the Romans up to about 100 BC.<sup>71</sup> The Hindu Code of Manu provided for the return of criminal fugitives.<sup>72</sup> Scholars agree that earlier extraditions or renditions were “politically motivated” and linked to ancient laws of war and peace agreements.<sup>73</sup> It was uncommon to pursue fugitives who had committed criminal acts: “common criminals were the least sought after species of offenders.”<sup>74</sup> Banishment of criminals was viewed as a blessing as it meant the removal of unwanted elements from society and it was not considered worth the effort to seek the return of criminals.<sup>75</sup> Besides, common criminals were most frequently subject to private justice or individual reprisals.<sup>76</sup> Sometimes, wars were waged against criminals who had absconded and fled a jurisdiction. This is exemplified by the famous epic Greek story of the abduction of Helen by Paris, which led to the Trojan War in an attempt to retrieve her.<sup>77</sup>

### **2.3 The Early History of Extradition Under Islamic Law**

Much of the discussion in this chapter is about Western, particularly British, developments in extradition. It is not possible to describe parallel developments in the Middle East, particularly Saudi Arabia. As noted by Jones and Doobay for the student of the history of criminal law,<sup>78</sup> the student of history of Saudi Arabian criminal law will recognize the unrewarding character of the search for sources. It can be said that there are currently very few academic legal materials or writings in respect to the origins, evolution, application of extradition law and practice in Saudi Arabia. Any examination of extradition under Islamic law would have to begin and proceed through the sources of Islamic law like the Koran, and the speeches of the Holy Prophet Mohammad (hereinafter “Prophet Mohammad”).

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<sup>71</sup> J. Gilbert, *Trans National Fugitive Offenders in International Law: Extradition and Other Mechanisms* (New York: Martinus Nijhoff, 1998), at 3.

<sup>72</sup> *Ibid.*

<sup>73</sup> A. Alotaibi, *Current International Legal Problems in the Pursuit of Extradition Requests with Reference to the Practice of Saudi Arabia* (Bloomington: Author House, 2004), at 3.

<sup>74</sup> See Bassiouni, n.13, at 4.

<sup>75</sup> See Shearer, n.68, at 7.

<sup>76</sup> See Blakesley, n.22, at 177.

<sup>77</sup> Homer, *The Iliad* (London: Penguin 1998)

<sup>78</sup> See A. Jones and A. Doobay, *Jones and Doobay on Extradition and Mutual Assistance* (London: Sweet and Maxwell, 2004), 1-001, at 3.

The concept of extraditing individuals has historical roots in the Islamic context. For example, over fourteen centuries ago (in the sixth year of Hijra), the Prophet Mohammad [SAW]<sup>79</sup> made the Houdibiyah Pact<sup>80</sup> with the leaders of Mecca which stipulated that:

“There would be one-sided extradition – the Makkans taking refuge with the Prophet [in Madina] would be handed over on demand to the Quraish [the rulers of Makkah], but Muslims taking refuge in Makkah would not be handed over to the Prophet.”<sup>81</sup>

Another example is when, because of religious persecution, a small group of Muslims, on the advice of the Prophet, migrated to Abyssinia (now Ethiopia), the Makkans under the leadership of Amr Ibnul Aas and Abdullah Ibne Abu Rabi’ah unsuccessfully petitioned Negus, the Ethiopian King, for the extradition of migrated Muslims.<sup>82</sup>

Indeed, even in the Qur’an there are oblique references to the concept of refugee women, which can be interpreted as a form of extradition. The guidance on how to treat refugee women is contained in the following verses:

“... When come unto you believing women – refugees, then ye examine them; return ye not them onto the disbelievers, neither these women are not lawful for them [the disbelievers], nor are those [men] [the disbelievers] lawful for them ...”<sup>83</sup>

The reference to the refugees in the above quotation points to the fact that extradition, in one form or another, occurred and is, therefore, permitted under Islamic law because of the above historical precedent, albeit the historical precedents for extradition under Islamic law are focused primarily on religious persecution.

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<sup>79</sup> Short for *Sallallah wa aalehee was salum* ‘peace be upon Him [the prophet] and his companions’, a salutation compulsory for Muslims when using the Prophet’s name.

<sup>80</sup> It is variously referred to as the ‘Houdibiya Reconciliation’, ‘Houdibiya Agreement’ or ‘Houdibiya Pact’. For this study the term Houdibiya Pact has been used consistently to avoid confusion.

<sup>81</sup> G. Sarwar, *Islam: Beliefs and Teachings*, 4<sup>th</sup> ed. (London: Muslim Educational Trust, 1989).

<sup>82</sup> M. Shafiq and M. Abu-Nimer, *Interfaith Dialogue* (New York: International Institute of Islamic Thought, 2007), at 67

<sup>83</sup> Qur’an, Sourah 60 *Al Muntahanah* ‘The Examined One’. Reference to the Qur’an are from M. Al-Hilali and M. Khan, *The Translation of the Meanings of the Noble Qur’an in the English Language* (Medina, KSA: King Fahd Complex for the Printing of the Holy Qur’an).

## 2.4 The Early History of Extradition Under English Law

Historically, the position adopted by, for instance, early English jurists was that extradition was not compatible with the common law. It was noted in this respect that

“It is held, and hath been so resolved, that divided kingdoms under several kings in league one with another are sanctuaries for servants or subjects flying for safety from one kingdom to another, and upon demand made by them, are not by the laws and liberties of kingdoms to be delivered: and this (some hold) is grounded upon the law of Deuteronomy. *Non trades servum domine suo, qui ad te configuerit.*”<sup>84</sup>

It was also noted that “English courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or (2) founded on an act of state.”<sup>85</sup>

According to Jones and Doobay, “the executive surrender of criminals to and by foreign jurisdictions may have been more common and less controversial in earlier times than the common lawyers acknowledged.”<sup>86</sup> To some degree, this view is not always the case. Some variation is inevitable, because countries, influenced by pragmatism and social pressures, as well as by administrative and judicial constraints, do not easily let go.

Therefore, the usefulness of the earlier approach should not be underestimated. Easy extradition of alleged criminals from one country to another and without any obstacles is an ideal for any requesting country that is still tracking down wanted offenders. There is some evidence that the U.K. has sought to develop such arguments in the courts, along with other common law jurisdictions like the U.S.<sup>87</sup> It is submitted that the problem with such an approach being meaningful, effective, and fair is that (a) it undermines the very foundation, purpose, and safeguards built into extradition treaties; (b) such treaties enjoy the authority of Parliament in the

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<sup>84</sup> See Jones and Doobay, n.78, at 3-4.

<sup>85</sup> A. Dicey and J. Morris, *The Conflict of Laws*, 13<sup>th</sup> ed. (London: Sweet and Maxwell, 1999), at 89.

<sup>86</sup> See Jones and Doobay, n.78, 1-002, at 4.

<sup>87</sup> For example, *U.S. v. Machain*, (1992) 504 U.S. 655 (U.S. Supreme Court) and *R v. Department of Trade and Industry Ex parte Levitt*, (Oct. 31 1997) CO/3811/97, unreported.

U.K., a western democratic state making efforts towards greater transparency and accountability; and (c) it blurs certainty of legal conduct at an international level for alleged criminals and states.

Jones and Doobay<sup>88</sup> refer to the treaty of 1174 between Henry II of England and William of Scotland allowing for the exchange of criminals fleeing from one country to another, with an alternative of such criminals being arrested and tried within the other country. This approach, it is submitted, can only effectively work when the relevant ‘extradition’ crimes are the same in substance (as well as being recognised by both states as being the same in substance as distinct from the label or description of the crime), and the rules of evidence and procedure in criminal matters, even if different, ensure equivalent safeguards for such suspected or actual criminals. Otherwise, there is a danger of fundamental unfairness by states between themselves exchanging such persons, as well as fundamental unfairness to the individual. Therefore, what might be a crime in one state may not be in another, or even if they are, the approach to the standard and quality of evidence and procedure may be substantially different, so that extraditing would be fundamentally unfair or unsafe to the person concerned and unfair or unsafe between states.

Other English treaties included the treaty of 1303 between Edward I and France; the “Intercusus” between Henry VII and the Flemings of 1497; treaties with Portugal in 1373, France in 1498; Spain in 1499; France in 1559; and Spain in 1630.<sup>89</sup> Shearer has suggested that these did not represent a systematic international effort to suppress crime but were rather a reflection of gestures of international friendship and co-operation.<sup>90</sup> It is submitted that this is significant and relevant to the modern debate too, in that extradition treaties which do exist demonstrate perhaps a willingness to create workable treaties motivated by economic and political friendship between states, for example, which do not have a common law tradition in parallel with the U.K., but have an inquisitorial tradition like France, Spain, and indeed Saudi Arabia.

However rare the extradition of common criminals was, history suggests that it occurred within formalised frameworks, such as treaties – mostly subsumed under a larger political or religious agreement - and this practice lingered through the Middle Ages. Extradition as part of a formal

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<sup>88</sup> See Jones and Doobay, n.78, 1-002, at 5.

<sup>89</sup> E. Clarke, *Treatise Upon the Law of Extradition*, 2<sup>nd</sup>. ed. (London: Stevens, 1876), at 19.

<sup>90</sup> See Shearer, n.68, at 6.

arrangement became a more common, if still infrequent, practice.<sup>91</sup> As indicated by the Treaty of 1174 between Henry II of England and William of Scotland and the 1303 Treaty of Paris between Edward II of England and Philippe the Fair of France, earlier extradition treaties focused solely on political offenders.<sup>92</sup> The treaty between Charles the Wise, King of France, and the Count of Savoy in 1376 marks a break from the general trend of limiting to political offenders, in that it provided “the reciprocal rendition of ‘malefactors promptly upon the first request’ specifying that the perpetrators of common crimes would be delivered up.”<sup>93</sup> This could be taken to be the first arrangement dealing with the ‘common’ crimes of murder, rape and theft.

The basic objectives of extradition, thus, were to maintain internal order of the respective states; “international co-operation for the preservation of world societal interest”<sup>94</sup> was not the main concern at this stage – a notion that would emerge between the sixteenth and eighteenth centuries. On this view, “the law of extradition evolved from the perception that an affront to the gods, or to the leader’s authority, had to be avenged, to the desire to promote international co-operation to combat crime.”<sup>95</sup>

## **2.5 Extradition Evolved From Ad-Hoc State Co-operation Over Political Offences to the Extradition of Criminals by Statute or Treaty**

During the eighteenth and nineteenth centuries, there was a shift away from an “exclusive focus on the extradition of political offenders”<sup>96</sup> towards a new focus on the extradition of common criminals. Prior to the eighteenth century, as discussed earlier, extradition consisted of ad-hoc state agreements of courtesy. From the eighteenth century to the nineteenth century, with a growing shift towards extraditing common criminals and not for political offences, extradition grew to be based more on formalised bilateral and multilateral treaties.<sup>97</sup> These treaties became ever more concerned with protecting individual rights, in step with the increased interest and

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<sup>91</sup> See Blakesley, n.22, at 178-179.

<sup>92</sup> See Gilbert, n.71, at 18.

<sup>93</sup> See Blakesley, n.22, at 180.

<sup>94</sup> See Bassiouni, n.13, at 34.

<sup>95</sup> See Blakesley, n.70, at 184.

<sup>96</sup> See Alotaibi, n.73, at 4.

<sup>97</sup> See Rebane, n. 15, at 1648. These treaties increasingly listed crimes that were extraditable and crimes that would be exempted. Most of the resulting treaties emerged among contiguous European states (with France leading the way) as they were frequently at war with each other.

theoretical shift in international law toward the recognition of natural and individual human rights. In Europe alone, more than ninety treaties stipulating the reciprocal surrender of offenders were signed between 1718 and 1830.<sup>98</sup> For example, the treaty between France and Wurttemberg in 1759 was cited as the model for subsequent extradition treaties.

Blakesley noted that “rules and procedures of extradition established in these conventions endure in the law of extradition to this day. The rules required extradition requests to be made through the diplomatic channel or at least through specific frontier authorities. Exact reciprocity was demanded.”<sup>99</sup> All these provision survive partly or wholly to the present day. The 1759 treaty in this sense is seminal, and lays the foundation of contemporary extradition procedures.

Generally, extradition with all its forms and patterns witnessed an impressive historical development. For instance, Parry heavily criticised Coke’s suggestion that from earliest times, (based on the English treaties of 1661-1662 with Denmark and Holland for the recovery of English regicides) extradition originated as a device for the punishment of treason and rebellion (i.e. in modern terms what are considered to be political offences or crimes).<sup>100</sup> This idea was further discussed by Jones and Doobay,<sup>101</sup> who argued that many recorded surrenders, or unsuccessful requests, appeared to have involved what were recognised in later legislation as political offences. Finally, this idea was weakened as they suggested, and was therefore removed from later legislation. Early examples included the Earl of Suffolk being surrendered from Spain to Henry VII and then executed; the King of Scotland refusing to surrender Perkin Warbeck “The Pretender” to Henry VII; Queen Elizabeth I promising the Scots that she would either surrender Boswell, or send him into exile; the States-General of Holland surrendering some alleged regicides/political offenders without treaty (although one was later agreed in 1662);<sup>102</sup> and in 1792, the Senate of Hamburg surrendering the Irish nationalist, Napper Tandy to the British Government, who was tried and then acquitted.<sup>103</sup>

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<sup>98</sup> See Shearer, n.68, at 8, citing the Russian scholar de Martens.

<sup>99</sup> See Blakesley, n.22, at 182-183.

<sup>100</sup> Cited by Jones and Doobay, n.78, 1-002, at 5.

<sup>101</sup> *Ibid.*

<sup>102</sup> A. Holdworth, *History of English Law Volume V* (London: Methuen, 1927), at 50.

<sup>103</sup> See Jones and Doobay, n.78, 1-004, at 7.

For example, in the case of *East India Co. v. Campell and Murev Kay*, Jones and Doobay, quoting Chitty On Criminal Law (1826), noted that “an English magistrate may also cause to be arrested, and committed for trial, an offender against the Irish law or accused of having perpetrated a crime in a foreign country” and also “if a prisoner, having committed a felony in a foreign country, come into England, he may be arrested here and conveyed and given up to the magistrate of the country against the laws of which the offence was committed.”<sup>104</sup> It is important to note here that the English legal approach to extradition moved from the exercise of executive powers and prerogatives to extradition statutes.<sup>105</sup> However, it was apparent that this move to statutory authority was not a condition of establishing a treaty with another state, regardless of whether or not this latter approached the subject in the same way. Shearer, on the other hand, referred to 92 treaties concluded internationally from 1718 to 1830. These treaties provided for the surrender of criminals, mostly between neighbouring states in Europe. He compared these to the more complex procedural approach of common law systems, which was cumbersome. He suggested that it was geographical isolation as an island nation that had led to a jealous protection of traditions of asylum/sanctuary in what became the U.K.<sup>106</sup>

Jones and Doobay<sup>107</sup> argued that the first modern British treaty was the Jay Treaty (1794-1807) that provided for the mutual exchange of offenders between the U.S. and Great Britain (especially in British Colonies). However, in practice, only a few fugitives were surrendered under the said treaty, but extraditions still took place afterwards. This suggests that either the treaty was largely ineffective, or it happened that there were very few cases warranting extradition. This was further argued by Jones and Doobay, who noted that the Jay Treaty was an instrument of ‘Amity, Commerce and Navigation’ and that Article 27 embodied a recognisably modern requirement to produce *prima facie* evidence of guilt.<sup>108</sup>

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<sup>104</sup> *Ibid* at 7.

<sup>105</sup> See *Barton v. The Commonwealth of Australia* (1974) 131 CLR 477, 494.

<sup>106</sup> See Shearer, n.68, at 8-9.

<sup>107</sup> See Jones and Doobay, n.78, 1-006, at 8.

<sup>108</sup> *Ibid* at 9. Article 27 states: “It is further agreed that His Majesty and the United States on mutual requisitions ... will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the futures of war persons so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive.”

Historically, by 1802 Great Britain and other signatories to the Peace of Amiens, that is France, Spain and Holland, agreed to the mutual surrender of offenders for particular offences, these being murder, forgery, or fraudulent bankruptcy.

Jones and Doobay<sup>109</sup> argued that the British law of extradition can be said to date from the bilateral extradition statutes of 1843. Initially, from 1824 to 1828, attempts were made to negotiate a new treaty between the United Kingdom and the United States, but it failed because of the unwillingness of the United Kingdom to undertake the return of runaway slaves.<sup>110</sup> This incident confirms that the existence of a mutual co-operation, amity and commerce treaty or understanding between two nations is not a guarantee of success. In the British and American case, the United Kingdom's moral and legal position on the issue of runaway slaves was contrary to the United States' position and practice. The different attitudes as well as definitions and defining concepts of offences remained the main obstacle for nation-states to reach an agreement.

In the absence of any agreement or treaty, the situation would undoubtedly be rather difficult, as suggested by Clarke<sup>111</sup> when studying the British-American case but generally, as noted earlier, countries do sometimes exchange or extradite criminals on the basis of an existing friendly agreement, even if it lacks an explicit extradition provision.

Clarke revealed important problems in treating the *Creole* case.<sup>112</sup> When a number of slaves revolted on an American ship, murdered a slave master, injured the captain and the crew, then took the ship to the Bahamas (a British possession), the British governor refused to surrender them to the American authorities; and this was again due to an absence of a treaty between the two countries. This led to an interesting debate in the House of Lords.<sup>113</sup>

It was the unanimous view of the House of Lords that extradition without an order of Parliament was unlawful. This appears to suggest that criminals from one country are able to escape from

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<sup>109</sup> See Jones and Doobay, n.78, 1-006.

<sup>110</sup> J. Moore, *A Treatise on Extradition and Interstate Rendition Volume 1* (Boston: Boston Book Co., 1891), at 90-92.

<sup>111</sup> See Clarke, n.89, at 127.

<sup>112</sup> *Ibid.*

<sup>113</sup> See Jones and Doobay, n.78, 1-007, at 10.



justice when they commit an offence in another country. The problem with handing over such criminals in the absence of a treaty is that the rule of law is not upheld. It was Lord Brougham who emphasised that when laws exist giving powers to both sides to a treaty it is provided under “...due regulation and safeguards.”<sup>114</sup>

Jones and Doobay<sup>115</sup> argued that these statutes were largely ineffective since extraditing courts would often not allow extradition to occur, on the basis that they were not satisfied by the *prima facie* case.

It was the case of *In re Winsor*,<sup>116</sup> which demonstrated the limitations of the types of crime for which extradition was available under the Ashburton Treaty. The Court of the Queen’s Bench held that conduct defined as forgery in a statute of the State of New York, but not within the federal law of the United States, was not forgery in English law, although it amounted to the English offence of fraud. Extradition might be granted only for the listed offences against the law of England and the general law of the United States, and not for offences made criminal only by the laws of a particular state in the American union. In the relevant statute of the 1870 Act,

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<sup>114</sup> See Clarke, n.89, at 128. These Acts were replaced by the Extradition Act of 1870. They applied only to accused persons (not fugitive convicts who were immune); specific crimes of murder, attempted murder, forgery and fraudulent bankruptcy, piracy, arson, robbery. It required the establishing of a *prima facie* case according to the laws of the country where the crime had been committed. Upon the receipt of a “requisition”, the Secretary of State would issue a warrant requiring magistrates to arrest the fugitive and examine the evidence which may be in the form of copies authenticated depositions sent to the requesting state as well as hearing oral evidence by magistrates. That person could be detained for a period of two months longer than that would allow the Defendant to apply to a Judge for discharge of the magistrates “commitment.” This would be granted unless sufficient cause was shown why the Defendant should not be discharged by the requisitioning/extraditing country. The Act also never allowed for a political offence exception, or “speciality” that is the restriction imposed upon the requesting state to confine as prosecution to the crime for which surrender was made. Therefore, any country, or individual affected by an allegation of a criminal offence that may give rise to extradition can identify and understand how such matters are to be prosecuted and defended in a clear and transparent way. Therefore, it is submitted that this is to be preferred to the surrender of criminals outside of a treaty process. For example, in 1842, the bilateral treaty between the United Kingdom and the United States was established called the “Webster – Ashburton Treaty.” This was called “a Treaty to settle and define the boundaries Between the Territories of the United States and the positions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade and for the Giving Up of Criminals, Fugitive from Justice, in Certain Cases C.” Two other treaties were concluded with France and the U.S. where bilateral treaties were given effect by way of statutes in 1843 called “an act for giving effect to a Convention between Her Majesty, and the King of France for the Apprehension of Certain Offenders. And “an Act for giving effect to a treaty between Her Majesty and the U.S. for the Apprehension of certain offenders.” Jones and Doobay indicate that eleven years after slavery was abolished in Great Britain and the commonwealth, the British Parliament was considering whether to exclude slaves from the operation of the Act, but upon the advice of the Attorney General decided against such an exemption. This seems to suggest that even a moral/principled approach to the particular offence of slavery by the British Parliament was overridden in the interests of the treaty with the U.S.

<sup>115</sup> See Jones and Doobay, n.78, 1-008, at 11-12.

<sup>116</sup> [1965] 10 Cox CC118.

the comparison of offences, therefore, was not permitted.<sup>117</sup> This demonstrates that if an offence is to be eligible under the terms of an extradition treaty, the definitions must be agreed upon or accepted by each signatory nation, otherwise alleged offences may not properly be recognised by either party.

It is important to note, in the evolution of signatories to treaties, that between 1862 and 1866, key treaties were signed between Britain and two other European nations (with Denmark in 1862 and with Prussia in 1864). However, the agreements reached at that time were not fully a success. As Jones and Doobay argued,<sup>118</sup> the lack of success of extradition cases between Great Britain and other nations was affected by the physical insularity of the country, as opposed to physically neighbouring nations like the U.S. and Canada, where judges appeared to be more willing to co-operate with one another. However, they argued that there had always been an aversion to the surrender of political offenders or refugees, as debates and discussions upon the passing of the Extradition Act of 1870 made clear.<sup>119</sup>

Historical cases of the establishment of extradition treaties despite legal diversity between nations also occurred. An example to note here is when Great Britain established a treaty with China known as the Treaty of Nankin or as the Treaty of Bogue. This made provision for the return from Hong Kong to China of Chinese people who had committed offences against their own government “on proof, or admission of their guilt.”<sup>120</sup> The Treaty of Nankin demonstrates that Great Britain was perfectly capable of establishing a treaty with a country with a very different legal system.

## **2.6 Modern Day Extradition Agreements**

Political and economic forces are said to be the motivating factors in the development of modern extradition laws. The element of political force can be attributed to the emergence of the modern nation state and the early notions of the comity of nations. However, economic concerns seem to

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<sup>117</sup> *U.S. v. McCaffery* [1984] 1 Weekly L. Rep. 1WLR867HL and *R v. Governor of Holloway Prison EXP. ex-parte Jennings* [1984] 1AC624HL.

<sup>118</sup> See Jones and Doobay, n.78, 1-010, at 13.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

“have the most impact in driving states towards mutual co-operation on extradition.”<sup>121</sup> As argued by Bassiouni, extradition as a tool of international co-operation gained momentum “as part of the efforts of the world community to combat piracy.”<sup>122</sup> By the nineteenth century, economic and technological forces, including the development of new forms of transport (steamship and railway), the increasing cosmopolitan nature of cities, and the general increase in commerce between states and concomitant international mobility of populations had vastly increased the need for inter-state co-operation.<sup>123</sup> As noted by Shearer “if a state did not take effective measures against the incursion of foreign criminals it would quickly find itself a seething haven for the undesirables of other lands.”<sup>124</sup>

Extradition law flourished in the latter half of the nineteenth century. These laws were generally formulated through treaties, and also, through the passage of acts and statutes. The development took place in states with both civil law codes and common law codes. As noted above, the 1759 Treaty between France and Wurttemberg “represented the prototype for the modern extradition treaty.”<sup>125</sup> Other French treaties during the nineteenth century set the legal standard for subsequent extradition agreements and practices. French concepts were to shape future treaties and extradition practices where the French were setting the trends in this field.

While France was leading in the domain of executive aspects of extradition in civil law countries, the United States emerged as an early leader in the development of a substantial body of extradition jurisprudence. “Judicial decisions in the United States have been important in the early development of modern extradition law.”<sup>126</sup>

As Clarke noted:

“In the matter of extradition, the American law was, until 1870, better than that of any country in the world; and the decisions of the American judges are the best existing

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<sup>121</sup> See Alotaibi, n.73, at 5.

<sup>122</sup> See Bassiouni, n.20, at 29.

<sup>123</sup> See Alotaibi, n.73, at 5.

<sup>124</sup> See Shearer, n.68, at 12.

<sup>125</sup> See Alotaibi, n.73, at 7.

<sup>126</sup> See Blakesley, n.22, at 183.

expositions of the duty of extradition, in its relation at once to the judicial rights of nations and the general interests of the civilisation of the world.”<sup>127</sup>

A good degree of modern U.K. extradition law was based on the Extradition Act of 1870.<sup>128</sup> Jones and Doobay argued that the Act of 1870 was the first in the United Kingdom to actually use the term “extradition.”<sup>129</sup> According to Shearer,<sup>130</sup> the word is of French origin, first used in a decree of 1791, and used in official US contexts from 1848. Clive Parry however, cited several government papers between 1868 and 1901, which appeared to confine the use of the word ‘extradition’ to surrenders affected pursuant to formal treaties, whereas the word ‘surrender’, or ‘rendition’ were appropriate to the return of, for example, military deserters under particular military agreements.<sup>131</sup> Extradition was never used to apply to the return of fugitive offenders within the British Empire.<sup>132</sup> The Act of 1870 emphasised particular issues: that, for instance, treaties were recognised to allow flexibility in new treaties with other states without requiring a new Act of Parliament for each case.<sup>133</sup> It acknowledged that extradition was primarily a political act: that is, the surrender by one government to another of an alleged criminal. Thus, the Secretary of State was given discretion in every case whether to issue an order to proceed, under Section 7 of the Act. At the end of the court process, he would be given, by Section 11, further discretion for whether to surrender.

The 1870 Act recognised that arrest might be affected without an order from a Secretary of State, though he had the power to cancel such a warrant and to decline to order further proceedings.<sup>134</sup> The courts had a slightly different role. Their duty was to determine whether the evidence produced by a foreign state would be sufficient to justify committal for trial, if the alleged criminals’ conduct had been committed in England.<sup>135</sup> In determining this question, the courts

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<sup>127</sup> See Clarke, n.89, at 608.

<sup>128</sup> See Jones and Doobay, n.78, 1-012, at 15.

<sup>129</sup> *Ibid.* As well as the short title, the Extradition Act 1870, the full title also contains the word 'extradition': an Act for Amending the Law relating to the Extradition of Criminals.

<sup>130</sup> See Shearer, n.68, at 12.

<sup>131</sup> Cited by Jones and Doobay, n.78, 1-012, at 15.

<sup>132</sup> *Ibid.*

<sup>133</sup> Extradition Act 1870, s.2.

<sup>134</sup> *Ibid.*, s.7.

<sup>135</sup> *Ibid.*, s.10.

were given the same jurisdiction and powers as near as may be as if the Court were dealing with a defendant in ordinary committal for trial proceedings.

The Act also recognised the principle of double criminality in that the foreign crime alleged should be an extradition crime, or “a crime which if committed in England would be one of the crimes described in the first schedule to this Act.”<sup>136</sup>

The Act required that a magistrate must inform a fugitive, on committal, of his right to apply for a writ of *habeas corpus*, and that he would not be surrendered before the expiry of at least 15 days after committal to allow for such an application.<sup>137</sup> However, there was a restriction in respect of political offences. Extradition would not be applied for offences of a political character, or even if it were proved that “the requisition for his surrender has in fact, been made with a view to try, or punish the offender for an offence of a political character.”<sup>138</sup> Nor should a fugitive criminal be surrendered unless provisions were made by the law of the foreign state that he:

“shall not, until he has been restored to or had an opportunity of returning to Her Majesty’s Dominions, be detained or tried for any offence prior to his surrender other than the extradition crime proved by the facts on which his surrender was grounded.”<sup>139</sup>

Jones and Doobay argue that the English constitutional mind was offended by even the possibility that an autocratic foreign power might pursue a refugee and enlist the English courts for that purpose.<sup>140</sup> A detailed review of 19<sup>th</sup> century attitudes to the political offences exception appears in the speech of Lord Simon of Glaisdale in *Cheng v. Governor of Pentonville Prison*.<sup>141</sup> The Act itself failed to deal with delays and oppressive use. In contrast, the Fugitive Offenders Act of 1881 provided a wide power to the High Court to discharge a defendant committed by a magistrate, on the grounds that it would be unjust or oppressive to return him.<sup>142</sup>

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<sup>136</sup> Extradition Act 1870, s.10 and Schedule 1.

<sup>137</sup> *Ibid*, s.11.

<sup>138</sup> *Ibid*, s.3 (1).

<sup>139</sup> *Ibid*, s.3 (2).

<sup>140</sup> See Jones and Doobay, n.78, 1-015, at 17.

<sup>141</sup> *Cheng v. Governor of Pentonville Prison*, [1973] A.C.931, 947; see *infra* ch. 3, p.107 for a full explanation of the case.

<sup>142</sup> Fugitive Offenders Act 1881, s.10.

The importance of a treaty for extradition cannot be over-emphasised, as this may influence judges, as Jones and Doobay suggested. They argued that modern judges are not troubled in the absence of statutory encouragement by the dangers posed to political offenders by requests from a foreign power friendly enough to share common extradition arrangements with the U.K.<sup>143</sup> They might, however, be disposed to treat with more sympathy the problems of a fugitive who the requesting state had failed, through inefficiency, to pursue for many years, or who had, in other respects, been treated oppressively.

The Extradition Act of 1873 slightly amended the 1870 Act by adding indictable offences under the Malicious Damage Act, the Forgery Act, the Coinage Act, and the Offences Against the Person Act. It is notable that the Royal Commission of 1877 recommended that; “even if any State should fail to concede full Reciprocity, there is no principle which should make this country unwilling to surrender, and so get rid of, the fugitive subjects of other States, whose subjects have been guilty of crime and his surrender is asked for.”<sup>144</sup>

The concept of reciprocity is important in extradition, though it is not always essential.<sup>145</sup>

Reciprocity, as a principle, was formulated through the many international legal assistance treaties.<sup>146</sup> Generally, states will only give legal assistance to another state if there is reciprocity for such legal assistance.<sup>147</sup> Therefore, it was suggested that statutory powers should be given to the government to surrender fugitive criminals in the absence of treaties, whose purpose was to ensure reciprocity. Ultimately, this was not accepted.<sup>148</sup> The Commission was concerned with provisions in existing treaties, which forbade the extradition of a country’s own nationals to another. The reason for this restriction they said, was that a state fails in its duty to its subjects if it hands them over to a foreign jurisdiction; that unqualified confidence could not be placed in the capacity of foreign courts to try the subjects of other states; the subject would have to defend

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<sup>143</sup> See Jones and Doobay, n.78, 1-016, at 17-18, citing *T v. Home Secretary* [1996] AC 742.

<sup>144</sup> *Ibid* at 19.

<sup>145</sup> See H. Grützner, ‘International Judicial Assistance and Co-operation in Criminal Matters,’ in M. Bassiouni and V. Nanda (eds.), *A Treatise on International Criminal Law: Jurisdiction and Co-operation* (Springfield, Illinois: Thomas 1973), at 189, 230.

<sup>146</sup> See Sluiter, n.3, at 613.

<sup>147</sup> *Ibid*.

<sup>148</sup> See Jones and Doobay, n.78, 1-018, at 19.

himself where his language was not understood, and where he was unable to call character witnesses.<sup>149</sup>

The Commission's view was that this restriction should be omitted in subsequent treaties for as long as Parliament saw necessary.<sup>150</sup> It is submitted that such issues can easily be resolved in the modern environment by the use of interpreters, expert witnesses, and the allowance of character witness in respect of extradition crimes.

Great Britain's Extradition Act was enacted in 1870 and was of great importance. This, as it went along, put extradition practice onto a new footing and in the twentieth century it took new forms. The emergence of international and human rights laws influenced extradition in a meaningful way. Ultimately, the approach to convicted criminals was brought into line with the general law of extradition via the Fugitive Offenders Act of 1967. It incorporated aspects in relation to double criminality; the powers of the Secretary of State and the executive, the duties of magistrates and the judiciary, the political exception, and the particular rules of *habeas corpus*.<sup>151</sup>

After the adoption of human rights in the UN Assembly, it became an overarching effect, and human rights concerns have now to be accommodated by all statutes concerning extradition.<sup>152</sup> Also, enactments on extradition have to allow for the norms of international law. While these aspects gave depth to extradition practice, they also created a tension between sovereign rights and human rights. This relationship is discussed later (in Chapter 3, section 3.8) in order to thoroughly express its importance vis-à-vis extradited alleged offenders.

Modern law became consolidated in the form of the Extradition Act of 1989, which essentially brought together the Criminal Justice Act of 1988, the Fugitive Offenders Act of 1967, and the Extradition Act of 1870 (as amended). Ultimately, there were further legislative changes

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<sup>149</sup> See Jones and Doobay, n.78, 1-018, at 19.

<sup>150</sup> *Ibid.* There were further amending statutes of the Extradition Act, in 1895 and 1932. They added further crimes such as bribery and offences of dangerous drugs. By 1957 the U.K., signed the European Convention on Extradition and the provisions of the convention were enacted on in 1989. Drug trafficking and Terrorism (the Suppression of Terrorism Act, 1978), explosive substances, and Firearms Act Offences. Fugitive offenders, and convicted criminals were also subject to extradition by Section 16 of the Habeas Corpus Act, 1679 and other statutes in 1843 as well as of the Fugitive Offenders Act of 1881. However, what was notable about the 1881 Act was that there was no expressed political exception, or any speciality protection.

<sup>151</sup> *Ibid* at 30-31.

<sup>152</sup> UDHR, see n.44.

resulting in the Extradition Act of 2003 incorporating various changes to extradition law as approached by the European Union.

## **2.7 Extradition Exists Within National and International Frameworks**

Having discussed the historical background and the traditional evolutionary process of extradition on how it used to be approached in Europe and the US, it is now crucial to identify extradition as a concept. As shown by its historical development above, extradition inherently involves both national and international law.<sup>153</sup> However, because of diverse approaches to extradition by states, it was, and still is, a direct reflection of nation-states' national and legal interests. While treaties govern the extradition of alleged fugitives between states, domestic law ultimately decides whether or not to extradite an alleged fugitive.<sup>154</sup> Yet, extradition law from state to state "differ fundamentally in respect of a wide range of matters, including the incorporation of extradition treaties, the respective roles of the executive and the judiciary in the extradition process, the quantum of proof required for extradition, and the extradition of nationals."<sup>155</sup>

States may also have different human rights obligations under their respective constitutions or under international law, as interpreted and applied by states.<sup>156</sup> Further, as discussed in more detail below, some states like the U.K. treat extradition under its criminal law, while other states like Saudi Arabia treats extradition as part of its administrative law, a distinction that impacts the procedures for extradition and often the existence of safeguards to individual rights.

Within the framework of international law, extradition falls under international criminal law, meaning that it must also fall within the limits of international agreements and principles of international law, including human rights obligations.<sup>157</sup> Additionally, since international

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<sup>153</sup>See Dugard, n.4, at 188, stating that "[e]xtradition law is a blend of international and national law."

<sup>154</sup> *Ibid*, explaining that "[t]reaties may provide for the rendition of criminal fugitives between states, but it is for municipal law to determine whether the fugitive is to be surrendered in accordance to the extradition treaty."

<sup>155</sup> *Ibid*.

<sup>156</sup> *Ibid*, stating that "some states extradition laws may be subject to constitutional provisions guaranteeing human rights and to international human rights conventions incorporated into municipal, while in other states no such restraints apply."

<sup>157</sup> See Z. Deen-Racsmany, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court,' (2001) 95 AJIL 606, 611-612. See also E. Iglesias, 'Out of the Shadow: Marking Intersections in and between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory,' (1998) 40 B.C. L.



criminal law “addresses the content of international crimes,”<sup>158</sup> extradition is limited to extraditable crimes within the framework of an international agreement. Alternatively, however, extradition can be viewed as part of procedural international criminal law.<sup>159</sup> When viewed within the procedural framework of international criminal law, states may be able to justify the ad hoc use of extradition outside international obligations, and resort to alternatives to extradition such as irregular rendition. Viewing extradition as part of international criminal law and thus with the aim towards a unified body of law, moves closer to an international convention on extradition that can balance competing human rights obligations.

It is hopeful that with the current rising threat of a number of crimes of a trans-national character, such as international terrorism, human trafficking, money laundering, and the spread of organised crime, countries’ approaches to and definitions of extradition began to bridge their differences. Offences, which used to be individual, national concerns, have not only become international, but call for a global united response. The trend toward a more uniform view of extradition is reflected in a number of international and regional gatherings. One of these was the Global Response to Global Terrorism Conference held at the Royal United Services Institute, in which Mr. Jack Straw addressed the attendees (on January 16<sup>th</sup> 2006) by declaring that:

“this terrorism is global in another sense too – its overarching goal is to change the world in which we live. Guy Fawkes and the 19<sup>th</sup> Century revolutionaries justified their actions by saying that they wanted to bring down specific forms of government. The Irish Republican Army said that all they wanted was for Northern Ireland to be incorporated

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Rev 349, 378 (explaining that extradition is a third facet of international criminal law that “reflects the intersection of domestic norms and international legal processes as, for example, in the regimes of co-operation established through extradition, transfer of prisoners and/or Mutual Legal Assistance Treaties (‘MLATs’).”).

<sup>158</sup> A. Cole, ‘Reconceptualising Female Trafficking: The Inhuman Trade in Women,’ (2006) 12 *Cardozo J.L. & Gender* 789, 808, at n.151.

<sup>159</sup> B. Zagaris, ‘Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Co-operation in the Western Hemisphere,’ (2006) 37 *U. Miami Inter-Am. L. Rev.* 421, 425-426 (explaining that “[p]rocedural international criminal law refers to those matters of international criminal law that deal mainly with procedural matters, such as: gathering evidence (normally through unilateral measures, rogatory letters, and judicial and mutual assistance in criminal matters); obtaining custody of a person charged with a crime through extradition or alternatives thereto (including deportation, handing over, and forced or fraudulent kidnapping); transfer of proceedings; recognition and enforcement of criminal judgments; and transfer of prisoners. Substantive international criminal law embraces substantive crimes of particular international interest, such as: narcotics trafficking; smuggling of aliens, especially children and women; arms trafficking; terrorism; money laundering; securities and commodities futures crimes; customs crimes; thefts of airplanes and automobiles; and thefts of cultural property.”).

into the Irish Republic. In contrast, the aims of today's global terrorism go beyond such relatively narrow national or political objectives. We are seeing an attack on the international community as a whole – on our common values and on our shared future.

Today I want to set out how our response must match the scale and breadth of this attack. On the one hand, we need to co-operate at an international and multilateral level to share evidence and intelligence, to disrupt terrorists' networks, to cut off their sources of financing and to bring terrorists to justice.”<sup>160</sup>

So, a shared threat of this nature called for shared and mutual tasks and efforts. He added, in this respect that

“At the same time, we need a global effort to confront the propaganda of the terrorist, to address the sources of discontent which terrorists seek to exploit and to build a sense of common commitment to prosperity, peace and security based on freedom and the rule of law.”<sup>161</sup>

However, a shared threat, a common interest of this sort remains purely rhetorical if it does not translate into concrete deeds. The call and necessity for a formal agreement of some sort would form a good and legitimate venue for countries to claim and request the extradition and return of particular alleged offenders, as well as terrorists. However, as discussed earlier, nation-states still perceive and define concepts like extradition according to their own national laws and legal judicial systems. So, in order to better clarify this issue, it may perhaps be useful to define extradition and the types of extradition systems.

## **2.8 Traditional and contemporary definitions of the term extradition**

The concept of extradition has existed for over three thousand years, and originated from the Middle East.<sup>162</sup> The term extradition, however, was not well established until the mid to late nineteenth century. In Great Britain, the term was not commonly accepted until after the passing

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<sup>160</sup> See Straw, n.38, at 2.

<sup>161</sup> *Ibid.*

<sup>162</sup> See Rebane, n. 15, at 1636, 1645. The earliest recorded extraditions agreement was supposedly between Ramses II of Egypt and King Hattusli III of the Hittites in 1280 B.C.

of the Extradition Act of 1870.<sup>163</sup> The word extradition is derived from the Latin *extradere*, which means ‘forceful return of a person to his sovereign’. Bassiouni, on the other hand, speculated that the term is a contracted form of ‘extra-tradition’ referring to “the surrender of a person who has been granted the privilege of presence of the traditions of asylum and hospitality of the requesting state.”<sup>164</sup> However, Shearer maintained that extradition was a “term of art”<sup>165</sup> which was imported into England from France.

It is important to discuss first the history and development of the definition of extradition in both the West and under Islamic law. This section shows that regardless of its origins and the development of contemporary definitions of extradition, the international community still lacks a universal definition for a legal process that has such international dimensions. This lack of a universally accepted definition creates challenges when proposing an international extradition convention, or even an extradition treaty between the U.K. and Saudi Arabia. This section proposes a definition for extradition that takes into account individual rights and international obligations.

### **2.8.1 Common Definitions of Extradition**

The common definition of the word extradition is a formal legal process where one nation surrenders an individual to another nation, usually for criminal prosecution.<sup>166</sup> The above definition, however, is too general and simplistic and neither describes the circumstances or the purpose for which the person is to be handed over and returned. The United States Supreme Court in *Terlinden v. Ames* defined extradition as:

“the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of the other, which being competent to try and punish him, demands the surrender.”<sup>167</sup>

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<sup>163</sup> See Shearer, n.68, at 12.

<sup>164</sup> See Bassiouni, n.20, at 2.

<sup>165</sup> See Shearer, n.68, at 12.

<sup>166</sup> See generally n. 13.

<sup>167</sup> (1901) 184 U.S. 270, 289.

The U.S. Supreme Court definition, although useful, does not explain what kind of offences may be involved. It is the concept of “offenders” (with all the variety of specific offences that the term may include) that lends itself to disagreement about the return or extradition of alleged offenders. The U.S. Supreme Court definition is, thus, deficient because it fails to address, for example, the issue of reciprocity, an issue upon which modern extradition is based and often used as justification.

Generally, *Halsbury’s Laws of England* has provided a more comprehensive and inclusive definition of extradition. It covers all aspects of extradition, including that it is a formal process based on mutual arrangements between the countries involved, concerns an individual who has been accused of an extraditable crime, and is subject to trial under his own country’s law. He noted that:

“Extradition is the formal surrender by one country to another, based on reciprocal arrangements partly judicial and partly administrative, of an individual accused or convicted of a serious criminal offence committed outside the territory of the extraditing country and within the jurisdiction of the requesting country which, being competent by its own law to try and punish him, demands the fugitive’s surrender.”<sup>168</sup>

This definition is more appropriate and accurately, applicable to the practice used in common law countries such as Britain, Australia and New Zealand. On the other hand, Bassiouni defined extradition as involving “processes whereby one sovereign [state] surrenders to another sovereign [state] a person sought after, an accused criminal or a fugitive offender.”<sup>169</sup> This definition can be viewed as taking a more formal quality. Further, he saw that a “contemporary practice means a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, or comity.”<sup>170</sup> This definition places emphasis on the formal quality that characterises the contemporary extradition process.<sup>171</sup>

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<sup>168</sup> H. Halsbury, *Halsbury’s Laws of England Volume 18*, 4<sup>th</sup>. rev. ed. (London: Butterworth, 2005), at 74, para. 201.

<sup>169</sup> See Bassiouni, n.20, at 1.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid* at 2.

Blakesley, in contrast, stressed the judicial character of modern extradition practice, especially when he defined it as “the international judicial rendition of fugitives charged with an extraditable offence and sought for trial, or already convicted and sought for punishment.”<sup>172</sup>

In the U.K., the Home Office has put forward a clear definition: “the return of a wanted criminal from a country where he or she is accused of, or has been convicted of, a criminal offence.”<sup>173</sup>

Extradition prevents criminals escaping punishment by fleeing to another country. In the U.S., extradition also applies between states to stop criminals evading justice by crossing internal borders. Congress passed a law shortly after the Constitution was adopted, imposing upon the Governor of each state the duty to deliver up fugitives from justice found in that state.<sup>174</sup>

### **2.8.2 Definition of Extradition in Islamic law**

In the Islamic world, a number of definitions of the term ‘extradition’ have also been advanced. For example, Alfadil stated that extradition is “a procedure by which a particular state hands in a person, who is present within its jurisdiction, to another state in order to be tried for punishable acts or to carry out a court verdict against him.”<sup>175</sup>

According to this definition, which is commonly used in the Middle East, there are two kinds of criminals who might be subject to extradition. These are firstly persons who have committed a crime within the jurisdiction of state A, but have not been convicted and have escaped to state B. The second category includes people who have been convicted under the jurisdiction of state A, but have escaped to state B.

Abu Amir defined extradition as:

“[a] procedure, which involves one state requesting another state to hand in an accused or convicted person in order to serve his or her sentence or stand trial. Such a request is,

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<sup>172</sup> See Blakesley, n.22, at 120.

<sup>173</sup> See Barkham, n.27, at 30.

<sup>174</sup> Fugitive Slave Act 1793, 1 Stat. 302.

<sup>175</sup> M. Alfadil, *Muadrat fi tasleem atmugremeen* [Lecture notes on extradition], (Damascus: Arab League, Institute of Research and Arabic Studies, 1967), at 22.

usually, based on the grounds that the party which requests extradition has a full jurisdiction to try or sentence the individual concerned.”<sup>176</sup>

### **2.8.3 There exists no internationally recognized definition for extradition**

There is currently no internationally agreed upon definition for extradition.<sup>177</sup> The United Nations Model Extradition Treaty gives no definition to extradition.<sup>178</sup> To facilitate extradition, sovereign states enter into bilateral extradition treaties. Such treaties spell out the terms of any extradition and would include a list of all crimes for which a person can be extradited, or else covers them with more general descriptions, such as any crime punishable with three years’ imprisonment or some heavier penalty.

Internationally, thus, extradition may have numerous definitions depending on the treaty. This definitional problem creates difficulty when discussing the possibility of an international extradition convention or even an extradition treaty between the U.K. and Saudi Arabia. For example, whether the process is judicial or administrative, as discussed later, creates significant procedural challenges. Additionally, from the perspective of international law, these definitions do not usually take into account international obligations since they are entered into between two countries. Even more problematic is when countries do not have an extradition treaty to work from. It is, thus, imperative for the international community to arrive at an agreed upon definition for extradition.

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<sup>176</sup> M. Abu Amir, *Kanoon Alugoobat Allubnani* [Lebanese Criminal Law], (Beirut: 1981), at 69.

<sup>177</sup> There is even a difference in the definition of surrender, transfer, or extradition under the ICC, ICTR, and ICTY. See Sluiter, n.3, at 607-608. “The vital distinction between the two is that surrender applies to the ICC, and extradition refers to the prosecution or the enforcement of an individual’s sentence in another state. The purpose of this distinction is to ensure that traditional extradition law is not applicable, *mutatis mutandis*, to the special surrender regime. The application of traditional extradition law creates a number of obstacles to the effective and expeditious capture of war criminals. For this reason, the ICTY and ICTR statutes and rules consistently avoid the term ‘extradition,’ and instead use the word ‘transfer’ or ‘surrender.’ During the ICC Statute negotiations, the debate over the terms ‘surrender’ or ‘extradition’ symbolized the delegates’ divergent views regarding the nature of the ICC surrender or extradition regime. A few delegates strongly adhered to the use of the term extradition, because “their national laws pertaining to extradition prohibit them from handing over their nationals to the court, and the use of ‘extradition’ would support their national positions.”

<sup>178</sup> See generally Model Treaty on Extradition, n.2.

## **2.9 There are two types of extradition systems: judicial and administrative.**

The process of extradition will largely depend on the legal system of a country, as influenced by a number of factors like the system of government, constitutional law, and history among others.<sup>179</sup> In this regards, extradition developed primarily in two types of systems: judicial and administrative. This section shows that the distinction between a judicial and administrative system for extradition is significant in discussing the interplay among extraterritoriality, extradition, and individual rights. A country's extradition system exists within the framework of that country's legal system. The rule of extraterritoriality protects this sovereign choice. Yet, the judicial extradition system, for instance, may arguably be more conducive for protecting individual rights than the administrative system. The distinction, thus, affects how a country may reconcile its extradition system within its international obligations *vis-a-vis* its obligations to protect individual rights. This section explains each system, discusses its advantages and disadvantages, and proposes that the international community should adopt a hybrid judicial-administrative system that could be reconciled with various legal systems.

### **2.9.1 The judicial system**

Under this process, an extradition request would be submitted to the court with jurisdiction in the country where the fugitive criminal resides. The court studies the case and the evidence provided in the request. If the court is satisfied that the conditions of the extradition are met, it issues an arrest warrant against the individual and sets the date for a trial. The court subsequently holds a public session where the prosecution is required to provide all the evidence and documents submitted by the country requesting the extradition. The individual concerned would have an access to a lawyer who would conduct the defence on his behalf. Upon the completion of this process, the court decides whether to allow the extradition, or to reject the application. In both cases, it grants the right of appeal to both parties. However, if the court allows the extradition, it will not be able to oblige the government to carry it out. On the other hand, if it rejects the application, the government would not be able to proceed and extradite the individual. The judicial system is most commonly followed by the majority of developed and democratic

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<sup>179</sup> See Dugard, n.4, at 188.

countries, including the United Kingdom, Argentina, Brazil, Finland, Italy, Sweden, and Turkey.<sup>180</sup>

The judicial extradition mechanism evidently recognises the importance of due process. It is transparent and reflects the democratic values that support human rights. This process however, suffers from a few disadvantages. Firstly, it can take a long time to extradite someone. For example, if the country requesting the extradition has not completed its investigations regarding the person it seeks to extradite, it will not be able to provide solid evidence that would substantiate its request. In this case, the court in the country hosting the individual concerned might reject the extradition request. Secondly, the fact that judicial extradition requires the conduct of a fair trial might create an impression in the minds of the judges in the country requesting the extradition that the individual concerned is actually guilty, otherwise the extraditing country would not have handed him over. Thirdly, there may be instance where, despite the individual's guilt, he cannot be extradited, because of the absence of clear compelling evidence. The relevant evidence may not be available as the individual concerned may have left the country soon after committing the alleged crime, making the task of gathering evidence against him very difficult for the responsible authorities.

### **2.9.2 The administrative system**

By virtue of this system, extradition is perceived as an act of sovereignty on the part of the host country and accordingly, the executive branch in the state requesting the extradition would submit the extradition request to the country concerned. In turn, the country receiving it would refer it to the competent authorities, which under the administrative system is the executive branch of government. The process is carried out by diplomatic channels<sup>181</sup> through which the request is passed to the ministry concerned with justice. The ministry studies it and makes a decision. Whatever the outcome, it is communicated to the ministry dealing with foreign affairs, which informs the state requesting the extradition through its diplomatic mission.<sup>182</sup>

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<sup>180</sup> See Shearer, n.68, at 199.

<sup>181</sup> A. Beok, *Alqanoon Adawli Alaam* [Public International Law], (Cairo: Alitimad Publisher, 1924), at 364.

<sup>182</sup> See Alotaibi, n.73, at 273.



Thus, under this system, the judicial machinery is not involved in the extradition process even if it requires the arrest of the individual concerned, as the security agencies carry out such arrests. Furthermore, the individual concerned is not a party in this process and will not be notified until a final decision has been reached. The administrative system prevailed in France until 1927, when it was replaced by the judicial system. However, many countries still follow the administrative system. These include, for example, Saudi Arabia, Spain, Cuba, Portugal, Panama, Egypt, and numerous Eastern European countries. Extradition through the administrative system was also followed in the U.S. from 1794 to 1842.

Like other systems, the administrative mechanism has both advantages and disadvantages. Amongst the advantages it offers, it plays an important role in terms of improving relations between the country requesting the extradition and the recipient of the request, as the latter would expect that, should it submit an extradition request, its request would be treated in the same way. Another is the speediness of its process, because complex and lengthy judicious interventions are side-stepped.<sup>183</sup> The European Arrest Warrant (EAW) may be an example of this administrative mechanism that has made it easier to extradite an individual among countries with an EAW.<sup>184</sup>

As for its disadvantages, under an administrative system, the individual concerned might become a victim of injustice. This could happen when a particular country, coming under enormous political pressure, or seeking to enhance its relations with the country requesting the extradition, hands over an individual without being satisfied that all the conditions for the extradition are met. This is similar to the criticisms over the adoption of the EAW in the U.K., where the U.K. requirement for determining whether an arrest warrant has actually issued has been amended to allow an EAW arrest warrant if there is a likelihood that the arrest warrant would issue. Additionally, the requirement of double criminality, which requires that an act must constitute a crime in both countries for it to be an extraditable offence, has been abandoned in the EAW regime.<sup>185</sup> In other cases, the country requesting the extradition might, in order to secure the

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<sup>183</sup> In one case, Saudi Arabia complied with a Kuwaiti request to extradite a terrorist within 24 hours of his arrest and detention, for details see Alotaibi, n.73, at 300.

<sup>184</sup> See Chapter 4 for a more detailed discussion on the EAW.

<sup>185</sup> See Jones and Doobay, n. 78, at 47.

extradition of a particular individual, provide false accusations then sentence him for completely different reasons.<sup>186</sup>

Additionally, administrative extradition is often conducted by the executive branch of government, which does not have the legal competence to examine extradition request documents and to reach, accordingly, an informed, judicious, and sound decision. Moreover, it is always conducted with a total lack of transparency, thus excluding any form of accountability from the judicial and legislative authorities. It is, therefore, more likely that it would undermine human rights and democratic values. The decision may be driven more by politics than any compelling evidence.<sup>187</sup>

Personal contacts and connections might also play a role in administrative extradition. This, could occur when the individual concerned is well connected and can influence the decision of the host government.

### **2.9.3 The dual (judicial-administrative) system**

Because of the strong criticism of the administrative system due to its neglect of the rights of the accused, and the difficulty of extradition through the judicial system, which grants the accused legal guarantees that make extradition a difficult matter, the dual system came into existence to mitigate these shortcomings. The international community ought to adopt the dual system to give more flexibility for various countries with conflicting extradition systems. The dual system, for example, may be able to help reconcile differences between the U.K. and Saudi extradition system, and make it possible for both countries to arrive at an extradition treaty.

The dual system is also referred to as the Belgian system. It first appeared in 1927.<sup>188</sup> It is based on granting the judicial machinery the right to study extradition requests and gauge their legality. The role of the judicial authority, in this case, is an advisory one, as it leaves the final decision in the hands of the executive branch of government, because extradition is considered to be an act

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<sup>186</sup> United Nations General Assembly, 'International Covenant on Civil and Political Rights', Resolution 2200A (XXI) (16 December 1966), <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 15 March 2010). Article 17 is aimed at preventing these kinds of abuses.

<sup>187</sup> See Shearer, n.68, at 198.

<sup>188</sup> M. Alarousi, *Tasleem Almugreemeen* [Extraditing Criminals], (1951), PhD. research, Faculty of Law, Cairo University, p.149.

of sovereignty. The dual system seeks to strike a balance between two opposing interests: the interest of the country seeking the extradition, and the interests of the individual concerned. Thus, the judicial authorities examine the legality of the extradition request, while they leave the actual decision of extradition in the hands of the government.<sup>189</sup> The main advantage of this system is the flexibility of its procedures, while safeguarding the interests of the country requesting the extradition and the individual concerned.<sup>190</sup> This system is followed by a number of countries, including Italy, the Netherlands, Japan, Poland, and Belgium.<sup>191</sup>

This appears to be more efficient than purely judicial or administrative systems, as it seeks to achieve the following:

- Safeguard the interests of the individual concerned by giving him the right to defend himself. Access to due process and judicial mechanisms ensures that the individual's civil liberties can be protected.
- Safeguard the interests of the government by giving it the right to exercise its sovereignty. This is particularly important after 9/11 as it allows for a more expeditious process of extradition.

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<sup>189</sup> Alarousi, n.188, at 151.

<sup>190</sup> *Ibid* at 149.

<sup>191</sup> A. Abu Haif, *Alganoon Aldawil Elaam* [Public International Law], (Cairo: 1975), at 310.

## Chapter Three

### Towards an International Extradition Convention: Shortcomings and Obstacles

#### 3.1 Introduction

Attitudes towards extradition (in all its types and systems as well as related theories) differ from country to country, conforming to the particular national interests and legal and judicial legacy, as well as the cultural and religious values at play. Extradition, as a process, is essentially a national concern.<sup>192</sup> However, there are other aspects and dimensions to extradition. How does extradition fit within international law? How does extradition fit with human rights? What international bodies are involved in the process of extradition?

This chapter first frames the current international extradition system within the framework of international law, which does not impose any obligation on states to extradite individuals. Despite the broad acceptance of *jus cogens*<sup>193</sup> and the growing internationalisation of crimes, the current international extradition system remains unable to entice, much less obligate, large number of states to agree to an international extradition convention. Yet, steps must be taken toward an international extradition convention.

This chapter argues that the current United Nations Model Extradition Treaty, which does not oblige U.N. members as it is only a model treaty, is insufficient to address modern concerns over international extradition. This chapter argues that, in light of the historical development of extradition law and international law at large towards the protection of individual rights, United Nations Model Extradition Treaty lacks a necessary definition for extradition and fails to fully protect human rights. The international community, however, should still use United Nations Model Extradition Treaty as a starting point for an international extradition convention. This paper argues that countries may be able to agree to a set of universally extraditable crimes following universal jurisdiction jurisprudence.

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<sup>192</sup> See generally Dugard, n.4.

<sup>193</sup> G. Danilenko, 'International *Jus Cogens*: Issues of Law-Making', [2002] Eur. J. of Int'l L. 2, available at <http://www.ejil.org/journal/Vol2/No1/art3/btml> (accessed 20 March 2010).

Finally, this chapter argues that the current international extradition system simply fails in adequately protecting human rights. While many countries, including the U.K. and Saudi Arabia, has international obligations toward the protection of human rights by virtue of their membership in the U.N., numerous reasons exist for countries to loosen individual rights protection or circumvent extradition agreements to achieve their aims of extraditing individuals. The trend in the international extradition system has been to achieve the ends of extraditing individuals at the expense of human rights and international obligations. An examination of the increased use of alternatives to extradition and the erosion of the political offence and death penalty exceptions to extradition reveal a troubling trend away from protecting human rights. To create a more effective balance between the aims of extradition and human rights, the international community must act towards the creation of an international extradition convention.

### **3.2 Extradition and international law**

The idea that there should be a body of “higher law,” a *jus cogens*, within the international community has gained broad acceptance over the past few decades.<sup>194</sup> International law can “be characterized as a system of law regulating the interrelationship of sovereign states.”<sup>195</sup> The notion of the creation of a *jus cogens* was first articulated in the 1969 Vienna Convention on Law Treaties,<sup>196</sup> which states that a treaty is invalid if it conflicts with the norms of general international law. With regard to what is an international norm, a norm is what has been accepted and recognised by the international community of states as a whole from which no derogation is permitted.<sup>197</sup>

The status of international criminal law, however, is still in its infancy.<sup>198</sup> This view has been voiced by Gilbert, who holds that no clear consensus exists, and even when agreement is clear, it remains quite limited. He says that:

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<sup>194</sup> Danilenko, n.193..

<sup>195</sup> See Martin, n.13, at 201.

<sup>196</sup> Vienna Convention on the Law of Treaties, opened for signature May 2.3, 1969, 1155 UNTS 331 [hereinafter Vienna Convention].

<sup>197</sup> See Shaw, n.7, at 97.

<sup>198</sup> See Iglesias, n.157, at 377 (“To say that international criminal law constitutes a *field* is surely premature.”).

“Despite the efforts of many academic commentators over the years, there is still no universally recognized, comprehensive system of international criminal law. Whether an offence qualifies as an international crime is a matter of experience and empirical study...there are no hard and fast rules that are always followed by all states and the number of infractions given this ‘international status is very few.’”<sup>199</sup>

Similar fears have been expressed by Lord Slynn in the *Pinochet* case, in his emphasis on the still developing character of international criminal law. He held that:

“It has to be said, however, that at this stage of the development of international law that some of those statements read as aspirations, as embryonic. It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction...I am not satisfied that even now there would be universal acceptance of a definition of crimes against humanity.”<sup>200</sup>

International law is generally better developed than international criminal law, although most analysts would maintain that the former remains in a constant state of flux and development.<sup>201</sup>

International law, however, holds regard for the primacy of sovereign nations and in this role “remains subsidiary to the law of individual sovereign nations”<sup>202</sup> as affirmed in the *Lotus* case.<sup>203</sup> The rules of law binding upon states therefore issue from their own free will as confirmed by the International Court of Justice (ICJ) in the *Nicaragua* case. The ICJ clarified that “in international law there are no rules, other than such rules as may be accepted by the states concerned.”<sup>204</sup>

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<sup>199</sup> See Gilbert, n.71, at 87.

<sup>200</sup> *Pinochet*, (No 3) [2000] 1 AC 147.

<sup>201</sup> See Alotaibi, n.73, at 102.

<sup>202</sup> S. Bedi, *Extradition in International Law and Practice* (Rotterdam: Bronder-offest, 1996), at 15-33.

<sup>203</sup> *Lotus* (1927), PCIJ Rep. Series A, No. 10.

<sup>204</sup> *Nicaragua v. U.S.*, (1984) ICJ REP. 392.

As stated in Article 38 (1) of the Statute of the International Court of Justice,<sup>205</sup> there are four primary sources of international law, which emphasise the primacy of the sovereign state. These are:

- (a) International conventions establishing rules expressly recognised by the contesting states.
- (b) International customs, as evidence of a general practice accepted as law.
- (c) The general principles of law recognised by civilised nations.
- (d) Judicial decisions and teachings of the most highly qualified publicists of the various nations, as ‘subsidiary’ means for the determination of rules of law.

From these stipulations of the sources, it is obvious that the highest priority is accorded to the consent of the sovereign states, which serves as the primary source for international law. The recognition of state sovereignty “vests a state, in the absence of any other authority, with complete independence in action in its international external activities.”<sup>206</sup> This principle is the ‘oldest and best’ established principle of international law.<sup>207</sup> By virtue of this independence, a state has the right to refuse or to grant admission to a foreigner. By the same token, a state has independence with regard to making a decision whether to surrender or not an individual within its territory to another state.<sup>208</sup> It is not obliged unless it chooses to do so by its own volition. A sovereign state has no obligation to respond to another state’s demand for extradition. At the same time a state has the right to “place any limitation or restriction on its own sovereignty it chooses by entering into an agreement with another sovereign state.”<sup>209</sup> By virtue of this conferment of independence right, a state may choose to grant extradition even in the absence of a treaty.

“Customary international law imposes no obligation of surrender to fugitives accused of crimes *unless* it has contracted to do so. Moreover, the refusal to grant such request does not involve derogation from the sovereignty of the requesting state. It is a reasonable

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<sup>205</sup> Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute] (entered into force Oct. 24, 1945).

<sup>206</sup> See Bedi, n.202, at 27.

<sup>207</sup> *Ibid.*

<sup>208</sup> From its earliest usages, extradition has existed within the rubrics of both international law and diplomacy. See Shearer, n. 68, at 5.

<sup>209</sup> See Alotaibi, n.73, at 13.

exercise of its exclusive right of jurisdiction within its own domain, and a state is believed to violate no legal duty, in declining, in the absence of a treaty, to surrender a fugitive criminal found within its territory to any demanding state.”<sup>210</sup>

The point made is that whether to surrender a fugitive criminal to the requesting state is at the discretion of a sovereign state and this right is recognised and accepted by the norms of international law. Despite this discretionary power, a state also owes an obligation towards the international community. The ICJ draws a distinction between inter-state obligations on the one hand, and obligations towards the international community as a whole, on the other. The former is the concern of only the contracting parties while the latter is the “concern of all states.”<sup>211</sup>

Alotaibi notes that since currently “there is no broad-based multinational convention on extradition or any statutory body of criminal law which would confer an obligation to extradite,”<sup>212</sup> no legal obligation to extradite can incur outside of a treaty or other binding agreement. This principle has been well established through both extradition jurisprudence and extradition statutes.

Whether extradition can occur without a treaty was debated in the U.S. The positions taken were (a) that there was no obligation to extradite unless specified by a treaty, in *Holmes v Jennison and Factor v. Laubenheimer*,<sup>213</sup> and (b) that there was no obligation but the primacy of state sovereignty in extradition decisions.<sup>214</sup> The issue was finally settled in the case of *Valentine v. United States*<sup>215</sup>, when the U.S. Supreme Court took a stronger position, ruling that not only was there no obligation to extradite in the absence of a treaty, but also that there was no clear *authority* to extradite in the absence of a treaty or other legislative provision. The Court held that:

“[the] fundamental consideration is that the constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorised by

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<sup>210</sup> See Bedi, n.202, at 83.

<sup>211</sup> As noted by ICJ in the case concerning the *Barcelona Traction, Light and Power Company, Limited (Second Phase)*, ICJ Rep. 1970, 3 at 32.

<sup>212</sup> See Alotaibi, n.73, at 12.

<sup>213</sup> *Holmes v. Jennison*, (1840) 39 U.S. 540 (U.S. Supreme Court).

<sup>214</sup> *Factor v. Laubenheimer*, (1933) 290 U.S. 276 (U.S. Supreme Court).

<sup>215</sup> *Valentine v. U.S.*, (1936) 299 U.S. 5 (U.S. Supreme Court).



law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law...Legal authority does not exist, save as it is given by an act of Congress or by the terms of a treaty.”<sup>216</sup>

This does not mean that a lack of discretionary powers in extradition is absolute. Blakesley notes that:

“some fugitives may feel that they are protected from the long arm of US justice, when they have taken refuge in countries with which the United State has no extradition treaty or, if there is one, it does not clearly cover the offence charged. Although United States law will not allow a fugitive to be extradited from the United States, except pursuant to the terms of an extradition treaty, this does not mean, contrary to what many commentators have written, that the US government will not seek extradition from another state despite the absence of treaty coverage. In reality, extradition will be sought, as a matter of comity, despite lack of treaty coverage.”<sup>217</sup>

British law also accepted the need for a statutory basis. The genesis of a requirement of statutory backing lies with Lord Brougham, who argued that:

“the interests of good neighbourhood required, that in two countries bordering upon one another, as the United States and Canada, and even that in England, and in the European countries of France, Holland and Belgium, there ought to be laws on both sides giving power, under due regulation and safeguards, to each government to secure persons who have committed offences in the territory of the other.”<sup>218</sup>

Lord Brougham’s plea to enact statutes to legalise surrender was heeded and led to the most important development in the history of extradition when in 1841 the House of Lords took a unanimous view that undertaking extradition “without an Act of the Parliament was

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<sup>216</sup> *Valentine v. U.S.*, n.215, at 5.

<sup>217</sup> See Blakesley, n.22, at 190-191.

<sup>218</sup> See Jones and Doobay, n.78, 1-007, at 10.

unlawful.”<sup>219</sup> From then on all treaties were to be given effect by law before their provisions were implemented.

In sum, the general practice of states on extradition is based on the belief that while extradition is not an absolute international duty, yet if a state wishes to ensure that it secures the return of its own criminals it must enter into treaties with other states.<sup>220</sup>

Nonetheless, the necessity of a formal treaty remains, to some, as a pre-condition for success in extraditing genuine offenders and criminals. There are four reasons why nations may enter into bilateral extradition treaty arrangements:<sup>221</sup>

- Obtain reciprocal return of fugitive offenders.
- Facilitate the punishment of wrongful conduct, and thereby promote justice.
- Avoid harbouring within their border those who may commit offences similar to those of which they are accused in another jurisdiction.
- Avoid international tensions caused by one country’s refusal to return a particularly wanted person.

By contrast, courts in some South American states, including Venezuela, Brazil and Argentina surrender fugitives in the absence of extradition treaties on the rationale that such practice is “in conformity with the public law of nations.”<sup>222</sup> This seems a deviation from the broader perspective of international practice. A perfect example of extradition in the absence of a treaty or any other formal or informal extradition agreement was Libya’s surrender of two of its nationals to a Scottish Court based in the Netherlands in connection with the bombing in 1988 of Pam Am Flight 103 over Lockerbie, Scotland. This was not a perfect extradition case as there was no extradition treaty between Libya and the U.S. or between Libya and the U.K.<sup>223</sup> This is

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<sup>219</sup> See Jones and Doobay, n.78, 1-007, at 10.

<sup>220</sup> See Shearer, n.68, at 27.

<sup>221</sup> C. Pyle, *Extradition, Politics, and Human Rights* (Philadelphia: Temple University Press, 2001), at 82.

<sup>222</sup> *Ibid.*

<sup>223</sup> In the Lockerbie case, Libya argued that there was neither a treaty between Libya and the U.S. nor between Libya and the U.K. Libya filed Preliminary Objections with the ICJ citing the Montreal Protocol. This issue remains pending today because an agreement was reached where Libya agreed to have the suspects, later convicted, to be tried in the Netherlands under a Scottish Court. See ICJ Press Release 2003/29 (Sept. 10, 2003). After the Court issued its Judgments, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. UK) (Libya v. U.S.), Preliminary Objections (Feb. 27, 1998), 37 ILM

referred to as a case of “extradition by analogy.”<sup>224</sup> This case is neither based on treaty, nor reciprocity of comity.<sup>225</sup>

The post-9/11 situation has changed the situation drastically. Many Al Qaeda operatives have been apprehended and handed over to the U.S. authorities in the absence of any trial or the existence of any treaty. For example, the U.S. has asked Pakistan to surrender some criminals, either on the basis of an agreement dating from 1931, when what is now Pakistan was then part of British India, or on the basis of the more recent less formal rendition arrangements.<sup>226</sup>

There is, however, a growing trend toward the acceptance of a generalized customary law norm requiring states to extradite or prosecute alleged fugitives.<sup>227</sup> In other words, states may arguably have a duty to extradite or prosecute an alleged fugitive under the principle of *aut dedere aut judicare*. This principle draws support from Hugo Grotius' statement "that a general obligation to extradite or punish exists with respect to all offences by which another state is particularly injured."<sup>228</sup> According to this argument, a state may have a natural right to punish the offender and other states cannot interfere with this right.<sup>229</sup> As it stands, however, the principle of *aut dedere aut judicare* remains controversial,<sup>230</sup> and a stronger argument could be made that customary international law does not impose a duty to extradite.

Nevertheless, “the duty to extradite or prosecute appears in at least seventy international criminal law conventions.”<sup>231</sup> Stronger arguments are being made that a duty to extradite exists

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587 (1998), the written procedure on the merits had been resumed. For Libya's statement, see UN Doc. S/2003/818; sanctions were lifted by Security Council Resolution 1506 (Sept. 12, 2003), 43 ILM 251 (2004).

<sup>224</sup> D. Arzt, ‘The Lockerbie “Extradition by Analogy” Agreement: “Exceptional Measure” or Template for Transnational Criminal Justice?’, (2002)18 Am. U. Int'l L. Rev. 163.

<sup>225</sup> See Alotaibi, n.73, at 250-255.

<sup>226</sup> For example: ‘USA seeks Omar Sheikh’s Extradition’, *India News Online* (Noida 4 March 2002), available at <http://news.indiamart.com/news-analysis/us-seeks-omar-sheikh-4336.html> (accessed 20 March 2010).

<sup>227</sup> M. Kelly, ‘Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists -- Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty,’ (2003) 20 Ariz. J. Int'l & Comp. Law 491, 497.

<sup>228</sup> *Ibid* at 497, citing M. Bassiouni and E. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Netherlands: Martinus Nijhoff Publishers 1995).

<sup>229</sup> *Ibid*.

<sup>230</sup> See generally, Plachta, n.1 (criticizing the principle of *aut dedere aut judicare*).

<sup>231</sup> See Kelly, n. 227, at 497. (“The United Kingdom is party to the following treaties containing the obligation to extradite or prosecute; the Geneva Conventions of 1949; the Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally

even in the absence of a treaty. A duty to prosecute could exist as to a specific crime like drug smuggling defined in a treaty and thus becomes part of customary international law.<sup>232</sup> Additionally, a broader duty to extradite could exist for a category of international crimes like crimes against humanity and terrorism.<sup>233</sup> For purposes of an international convention on extradition, states could agree on a list of crimes where states have a duty to extradite. The principle of *aut dedere aut judicare*, thus, will likely take a prominent role in the future of international extradition law. The United Nations Model Treaty on Extradition discussed further below, for example, already takes a step towards this type of regime, although it could expand the list.

### 3.3 The United Nations Model Treaty on Extradition

In order to enforce international effects and to help sovereign nation states to effectively deal with extradition and the return of alleged offenders, it is important to discuss the United Nations Model Treaty on Extradition,<sup>234</sup> and to consider its shortcomings.

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Protected Persons, including Diplomatic Agents, New York, 1973; the European Convention on the Suppression of Terrorism, Strasbourg, 1977; the International Convention against the Taking of Hostages, New York, 1979; the Convention on the Physical Protection of Nuclear Material, 1980; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (Montreal Protocol); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (Maritime Safety Navigation Convention); the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; the Convention on the Safety of United Nations and Associated Personnel, New York, 1994; the International Convention for the Suppression of Terrorist Bombings, New York, 1997; the International Convention for the Suppression of the Financing of Terrorism, New York, 1999; the United Nations Convention against Transnational Organized Crime, New York, 2000; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Sea and Air, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; and the United Nations Convention against Corruption, New York, 2003.”) See United Nations General Assembly 59<sup>th</sup> Session, *International Law Commission*, A/CN.4/579, Geneva, 7 May-8 June and 9 July-10 August 2007, available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_579.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_579.pdf) (last accessed Apr. 30, 2010). [hereinafter “U.N. International Law Commission”].

<sup>232</sup> See Kelly, n. 227, at 497.

<sup>233</sup> *Ibid* at 498.

<sup>234</sup> Model Treaty on Extradition, n. 2.

### 3.3.1 Origins of the Model Treaty

The UN Model Extradition Treaty<sup>235</sup> owes its origin to the objectives of the Milan Plan of Action as adopted by the Seventh United Nations' Congress on the Prevention of Crime and Treatment of Offenders. Its *Guiding Principles* stipulate that the United Nations should prepare model instruments suitable for use as international regional conventions as well as guides for implementing national laws.<sup>236</sup> Another contributory factor, which led to the birth of the UN Model Extradition Treaty, was recognition of the fact of the escalation of crime, both national and trans-national. Further, its avowed goal was to urge the member states to step up their activity at the international level in order to combat organised crime, including, as appropriate, strengthening co-operation by entering into bilateral treaties on extradition as well as mutual legal assistance.<sup>237</sup>

Also underlying the basis of the Model Treaty is the conviction of the international community that the establishment of bilateral and multilateral arrangements for extradition will greatly contribute to the development of more effective international co-operation for the control of crime.<sup>238</sup>

While recognising the importance of bilateral and multilateral extradition arrangements as a means to curbing organised crime at the national and international level, the Model Treaty is geared towards human rights protection and respect for human dignity by allowing to those extradited the rights conferred upon every person involved in criminal proceedings as embodied in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.<sup>239</sup>

The Resolution which adopted the Model also invited member states to follow this model if they had not yet established treaty relations with other states in the area of extradition, or if they

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<sup>235</sup> Since supplemented by adoption of 'Complementary Provisions for the Model Treaty on Extradition', United Nations General Assembly Resolution 52/88 (12 December 1997) UN Doc A/RES/52/188. See n.2 for the original UN Manual of the Model Treaty on Extradition.

<sup>236</sup> 'Guiding principles for crime prevention and criminal justice in the context of development and a new international economic order,' United Nations Seventh Congress on the Prevention of Crime and the Treatment of Offenders (15 April 1985) UN Doc A/CONF.121/19.

<sup>237</sup> UN Model Treaty, see n.2, Article 1.

<sup>238</sup> *Ibid*, s.II, art.6.

<sup>239</sup> *Ibid*, preamble,

wished to revise existing treaty relations, to take into account the contents of the model provided.<sup>240</sup> This was aimed at encouraging states to update existing bilateral extradition arrangements by replacing outdated agreements, which take into account recent developments in international criminal law and human rights protection.

In adoption of the Resolution, the international community placed their confidence in the Model Treaty as an instrument of dealing effectively with the complex aspects and serious consequences of crime, especially in its new forms and dimensions.

### **3.3.2 Principal characteristics of the UN Model Treaty**

As discussed above, under international law, states are under no obligation, nor are they legally bound, to extradite at the mere request of another state.<sup>241</sup> However, states may assume a binding obligation to extradite under international law by entering into a treaty, or other consent-based arrangement, which specifically imposes such an obligation, although this obligation is often subject to certain terms and conditions.<sup>242</sup> The Model Treaty is primarily meant to fill a gap which exists due to the non-availability of a universally applicable multilateral extradition treaty, although there are several UN conventions containing specific clauses on extradition, usually for the purpose of indicating that a particular international crime constitutes an extraditable offence.<sup>243</sup> Yet there is no single multilateral treaty which comprehensively covers all aspects of extradition. The absence of such a treaty is due to the political and cultural obstacles which have to be overcome. However, the Model Treaty remains a unique document of its kind, in the sense that it constitutes a fairly complete document on universally acceptable principles and provides an illustrative example which can be used as a basis for a bilateral or multilateral extradition

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<sup>240</sup> UN Model Treaty, see n.2, s.II, art.6.

<sup>241</sup> See, for example, Brownlie, n.25, at 318; R. Jennings and A. Watts, *Oppenheim's International Law*, 9<sup>th</sup> ed. (Harlow, Essex: Longman, 1992), at 415; P. Malanczuk, *Akelhurst's Modern Introduction to International Law*, 7<sup>th</sup> ed. (London: Routledge, 1997), at 117; Shearer, n.68, at 22-27.

<sup>242</sup> J. Harrington, *Human Rights Exceptions to Extradition: Moving Beyond Risks of Torture and III-treatment*, at 3, an excerpt from a longer work in progress, available at [www.isrc.org/Papers/Harrington.pdf](http://www.isrc.org/Papers/Harrington.pdf) (accessed 20 March 2010).

<sup>243</sup> See, for instance, 'Convention for the Suppression of Unlawful Seizure of Aircraft' (The Hague 16 December 1970), United Nations Treaty Series 1973, Article 8; 'Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation', (Montreal 23 September 1971), Article 8, 10 ILM 1151; 'International Convention Against the Taking of Hostages', see n.337, Article 10; and the 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', United Nations General Assembly Resolution 39/46 (10 December 1984) UN Doc A/RES/39/46, Article 8.

treaty between states. It serves as a kind of international formbook<sup>244</sup> to stimulate states to adopt extradition treaties based on a set of general and commonly agreed standards developed by experts in the field.<sup>245</sup>

Like many other extradition treaties it is a combination of certain obligations and exceptions. It begins by imposing on states a general obligation to extradite and provides that an extraditable offence is a serious crime. Seriousness of offence is usually measured by the term of imprisonment attached to the offence, but the Model Treaty does not stipulate in clear terms what is and what is not an appropriate measure, leaving states to decide whether an extraditable offence is one punishable by a minimum of one or two years' imprisonment.<sup>246</sup>

On the other hand, the Model Treaty also provides for several exceptions to the extradition obligations. While some of these are mandatory,<sup>247</sup> others are optional.<sup>248</sup> A closer look at these reveals that the Model Treaty gives "less weight...to traditional obstacles to co-operation like fiscal offences and nationality of the offender, while more systematic attention has been paid to the protection of human rights."<sup>249</sup> It is noteworthy that the mandatory exceptions in the Model Treaty are generally those which can be classified as the traditional extradition exceptions for political offences,<sup>250</sup> military offences,<sup>251</sup> and offences for which there has been a final judgment in the requested state.<sup>252</sup>

With regard to the exception for political offences, the Model Treaty does not specify any limits, although the complementary provisions suggest that "countries may wish to exclude certain conduct, e.g., acts of violence, such as serious offences involving an act of violence against the

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<sup>244</sup> R. Clark, 'Crime: The UN Agenda on International Co-operation in the Criminal Process', (1991) 15 *Nova L. Rev.* 474.

<sup>245</sup> See, for example, P. Szasz, 'Introductory Note to Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina, with Annexes,' (1991) 35 *ILM* 75 and P. Muller, 'Report on the 8<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders', (1991) 16 *Int'l Leg. Pract.* 50-4.

<sup>246</sup> Model Treaty on Extradition, see n.2, Annex, Article 2.

<sup>247</sup> *Ibid*, Annex, Articles 3 (a)-(g).

<sup>248</sup> *Ibid*, Annex, Articles 4 (a)-(h).

<sup>249</sup> B. Swart, 'Refusal of Extradition and the United Nations Model Treaty on Extradition', (1992) 23 *Netherlands Yearbook of International Law* 175.

<sup>250</sup> UN Model Treaty, see n.2, Annex, Article 3 (a).

<sup>251</sup> *Ibid*, Annex, Article 3 (c).

<sup>252</sup> *Ibid*, Annex, Article 3 (d).

life, physical integrity or liberty of a person, from the concept of a political offence.”<sup>253</sup> Only a footnote suggests that states may wish to exempt from the political offences exceptions any offences where an *aut dedere aut judicare* obligation has been assumed under the international convention, or where the particular countries have agreed that the offence is not political for the purposes of extradition. As for the third exception, no mention is made of judgments rendered by third states.<sup>254</sup>

Extradition is also barred under the Model Treaty when the requested individual has “become immune from prosecution or punishment for any reason, including lapse of time or amnesty,”<sup>255</sup> although a footnote suggests that “some countries may wish to make this an optional ground for refusal.”<sup>256</sup> The Model Treaty also prohibits extradition with respect of trials *in absentia* for which the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his defence and has not had or will not have the opportunity to have the case retried in his presence.<sup>257</sup>

The Model Treaty also contains a discrimination clause which extends extradition exceptions to risks of discrimination based on the grounds of “ethnic origin, sex or status,”<sup>258</sup> in addition “to race, religion, nationality, or political opinion.”<sup>259</sup> The clause which is directly concerned with human rights protections is one which provides for mandatory exceptions which bar extradition “if the person whose extradition is requested has been or would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings,”<sup>260</sup> which is based on the provisions contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR),<sup>261</sup> an instrument which provides for the universal protection of civil

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<sup>253</sup> UN Model Treaty, see n.2, Complementary Provisions.

<sup>254</sup> For a modification see *Additional Protocol to the European Convention on Extradition*, adopted 15 October 1975, ETS No. 86.

<sup>255</sup> UN Model Treaty, see n.2, Article 3 (e).

<sup>256</sup> *Ibid*, Annex, Article 3 (e).

<sup>257</sup> *Ibid*, Annex, Article 3 (g).

<sup>258</sup> *Ibid*, Annex, Article 3 (b).

<sup>259</sup> *Ibid*.

<sup>260</sup> *Ibid*, see n.5, Annex, Article 3 (f).

<sup>261</sup> United Nations General Assembly, ‘International Covenant on Economic, Social and Cultural Rights’, Resolution 2200A (XXI), (16 Dec 1966), UN Doc A/RES/2200A (XXI).



and political human rights. Article 3 (f) of the Model Treaty expressly acknowledges and accepts a role for human rights in extradition that goes beyond providing an extradition exception where there is a real risk of serious ill treatment in the requesting state.<sup>262</sup> In this way, the Model Treaty also adds to the prohibition on extradition contained in Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).<sup>263</sup> The latter, despite its full title, only bars extradition when there is a danger of torture, and not when there is a danger of other forms of ill treatment. At the same time, the Model Treaty makes past incidences of unfair punishments, as well as past incidences of unfair trial, sufficient grounds in themselves for refusing extradition and unlike the UNCAT prohibition there is no obligation to link the past incident with an ongoing or future threat of unfairness.<sup>264</sup>

As far as the optional exceptions to extradition are concerned, the Model Treaty includes a pending prosecution clause,<sup>265</sup> a death penalty clause,<sup>266</sup> and an extraordinary and *ad hoc* tribunal clause.<sup>267</sup> In a footnote, it further suggests that the restriction on extradition where there is a real risk of the imposition of the death penalty in the requesting state could also be applied to “the imposition of a life, or indeterminate, sentence.”<sup>268</sup> Yet another optional exception has to do with nationality, with the requirement to prosecute in the requested state when extradition is refused.<sup>269</sup> There is another optional humanitarian clause which requires countries to take into account an extradited person’s “age, health or other personal circumstances.”<sup>270</sup> The Model Treaty also suggested that extradition may be barred if the offence was committed within the territory of the requested state, or committed outside the territory of either state, or if the requested state, having jurisdiction over the offence, has decided to refrain from prosecuting the extradited person.<sup>271</sup>

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<sup>262</sup> See Harrington, n.242, at 7.

<sup>263</sup> Adopted 10 December 1984, 1465 UNTS 85, (1984) 23 ILM 1027 and (1985) 24 ILM 535.

<sup>264</sup> See Harrington, n. 242, at 7.

<sup>265</sup> UN Model Treaty, see n.2, Annex, Article 4 (c).

<sup>266</sup> *Ibid*, Annex, Article 4 (d).

<sup>267</sup> *Ibid*, Annex, Article 4 (g).

<sup>268</sup> *Ibid*, Annex, Article 4 (d) footnote 13.

<sup>269</sup> *Ibid*, Annex, Article 4 (a).

<sup>270</sup> *Ibid*, Annex, Article 4 (h).

<sup>271</sup> *Ibid*, Annex, Articles 4 (f), 4 (e) and 4 (b) respectively.

The Model Treaty has been seen as “an important innovation in international co-operation in criminal matters, because of both its contents and its structure.”<sup>272</sup> At the same time, it retains the key extradition exceptions applicable at the end of the twentieth century. It builds upon the developments and trends in both Europe and the Americas and does not mark a serious departure from the old notions of extradition law as a distillation of the standards which may now have become acceptable to a wide range of states.<sup>273</sup> As the format of obligation rather than exception is the same as that used in all major multilateral treaties of the post-war period, it does not cause a major upset and ensures continuity.

Another positive point about the Model Treaty is that it institutionalises human rights protections. It accepts the provisions of the ICCPR to be included in the UN’s list of exceptions to extradition.<sup>274</sup> However, the Model Treaty has not gone without criticism. For example, the separate death penalty clause and its exclusion from the forms of torture or cruel, inhuman or degrading treatment or punishment dilutes its status, which lowers its severity, and suggests that the death penalty, in and of itself, cannot be considered a form of torture or cruel treatment. This limitation also extends to the suggested exception for life and indeterminate prison sentences.<sup>275</sup> In addition, the Model Treaty has been criticised for not extending to “unmentioned penalties, such as mandatory sentences of the ‘three strikes’ variety.”<sup>276</sup>

The Model Treaty has also been subjected to criticism for its internal inconsistencies in the protections accorded to human rights. For instance, the discrimination clause which has been extended to apply to discrimination on the grounds of ethnic origin, sex or status, co-occurs with the nationality clause which continues to discriminate between a country’s nationals and its non-national permanent residents on the very basis of status.<sup>277</sup> The Model Treaty also shies away from characterising crimes such as genocide as non-political for the purpose of extradition,<sup>278</sup> even though this issue was decided long ago by the Genocide Convention.<sup>279</sup> The Model Treaty,

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<sup>272</sup> See Harrington, n.242, at 9.

<sup>273</sup> *Ibid*, at 9.

<sup>274</sup> *Ibid*.

<sup>275</sup> *Ibid* at 10.

<sup>276</sup> *Ibid*.

<sup>277</sup> *Ibid*.

<sup>278</sup> *Ibid* at 11.

<sup>279</sup> United Nations General Assembly, ‘Convention on the Prevention and Punishment of the Crime of Genocide’, Resolution 260 (III), (9 December 1948), UN Doc A/RES/3/260.

thus, may have loosened the protection of individual rights under the political offence exception.<sup>280</sup> These limitations suggest a rather haphazard approach to the protection of human rights.

The Model Treaty also fails to provide a specific definition for extradition. The Model Treaty should add a definition, similar to that suggested in Chapter 2 of this paper that specifically incorporates human rights obligations and allows for the application of a dual judicial-administrative extradition system. Adding a definition that incorporates human rights obligations under international law would put human rights at the front seat of extradition, instead of a secondary principle that can pave way whenever states deem it necessary. Such a definition would also signal an international recognition of a policy that aims to extradite criminals without forgetting internationally recognized human rights obligations.

Despite its weaknesses, the Model Treaty remains useful for harmonising extradition instruments at the international level, which would contribute significantly to the promotion of international co-operation in the matters of combating and curbing organised crimes. It is also useful as a template toward an international extradition convention.

### **3.4 Universal Jurisdictional Should Apply to Some Extraditable Offences**

The notion of jurisdiction, and theories developed in its domain of jurisdiction, are of critical importance to the practice of extradition, since they serve as the basis for the establishment of sovereignty in the state, and provides grounds for inter-state relationships. This section discusses the various theories on jurisdiction, the reasons for their popularity, and criticisms for their application. This section ends by arguing that universal jurisdiction should apply to some extraditable offences. The use of universal jurisdiction for specific types of offences like crimes against humanity could be a starting point in a proposed international extradition convention.

#### **3.4.1 Jurisdiction and Extradition**

Jurisdiction is a concept not amenable to a single definition. One of the definitions of jurisdiction offered is by George, who defines its doctrine as “the authority of nations, or states to create, or

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<sup>280</sup> The recent erosion of the political offence exception is discussed later in Part V of this chapter.

prescribe penal or regulatory norms and to enforce them through administrative and judicial action.”<sup>281</sup> According to this definition, jurisdiction refers to an intra-state authority or competence to make laws and enforce them in a state. This is vital for managing the affairs of the state. It provides the basis for the state machinery to implement regulations in the state.

Within the state, Gilbert identifies three main domains of jurisdiction dealing with three branches of government:

1. *Legislative jurisdiction* that “goes to the ability to prescribe the reach of national laws.”<sup>282</sup>
2. *Judicial jurisdiction* which refers to the power and authority of the courts to apply legislative jurisdiction to individual cases.
3. *Executive jurisdiction* which is the power to enforce the decisions of the courts or legislature.<sup>283</sup>

On the other hand, extradition operates at an inter-state level in which the question of jurisdiction is invoked between two sovereign states. Jurisdiction is both a prerequisite and an integral part of extradition. Bassiouni explains:

“the term ‘jurisdiction’ in international law refers to two aspects of the authoritative decision-making process: First is rule making, and second, is rule-enforcing. Both of these aspects are present in extradition, because initiating the process presupposes that the requesting state has a legal basis to exercise its authoritative control over the requested individual, because: (1) it has jurisdiction over the subject matter or a given interest which has been or is being affected by the conduct of the person sought (*ratione materiae*); and (2) once surrendered, that state would have *in personam* jurisdiction over the person (*ratione personae*).”<sup>284</sup>

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<sup>281</sup> B. George, ‘Jurisdictional Bases for Criminal Legislation and its Enforcement’, (1983) in *Michigan Yearbook of International Legal Studies, Transnational Aspects of Criminal Procedure*, at 3.

<sup>282</sup> *Ibid* at 3.

<sup>283</sup> See Gilbert, n.71, at 301.

<sup>284</sup> See Bassiouni, n.20, at 315.

He further refined the notion of jurisdiction by stating that “the interrelationship between sovereignty and jurisdiction delineates the extent and limits of a state’s power to proscribe conduct in relationship to other states.”<sup>285</sup> In this sense, jurisdiction plays a key role in determining the nature of the relationship between states. Needless to say, in the absence of such a competence and authority any law, domestic or international, would not be effective. As aptly pointed out by Blakesley, jurisdiction “provides the only practical means for applying the law to reality.”<sup>286</sup>

What distinguishes extradition from other methods of co-operation in crime control is that extradition is primarily a “conscious purpose to restore a criminal to a jurisdiction competent to try and punish him”<sup>287</sup> and the exercise of the “principle of reciprocity secured by formal arrangement.”<sup>288</sup> Similarly, Bassiouni sees jurisdictional issues, irrespective of their legal basis, as of primary importance, as extradition itself is a recognition of the fact that “the interests of a state have been affected by the conduct of a person who is not within the state’s jurisdiction, but is within the jurisdiction of the requested state.”<sup>289</sup> Gilbert also regards the returning of a fugitive to a foreign state as recognition of the principle of “jurisdiction asserted by the requesting State.”<sup>290</sup>

The importance of jurisdiction in extradition is also obvious from the fact that jurisdiction issues have a direct impact on other substantive requirements of extradition, particularly in terms of double criminality and extraditable offences since “the determination of the legal existence of an offence also inquires into the applicable jurisdictional theory underlying the creating of the offence charged.”<sup>291</sup> Similarly, execution of extradition under the terms of treaties or through principles of comity and/or reciprocity also bear out the fact that the states involved have assumed that the requesting state has successfully established jurisdiction over the subject matter with which the fugitive is charged. However, there is, to date, no international consensus on how far a state might extend its criminal jurisdiction over offenders. As a starting point, this paper

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<sup>285</sup> See Bassiouni, n.20, at 315.

<sup>286</sup> See Blakesley, n.22, at 181.

<sup>287</sup> See Shearer, n.68, at 21.

<sup>288</sup> *Ibid.*

<sup>289</sup> See Bassiouni, n.20, at 349.

<sup>290</sup> See Gilbert, n.71, at 87.

<sup>291</sup> *Ibid.*

argues that the international community should apply universal jurisdiction in the extradition of specific types of offences already recognized by courts as falling under universal jurisdiction jurisprudence.

### 3.4.2 Theories of Jurisdiction for Extradition

In the literature, various theories have been advanced on the matter of jurisdiction. *Harvard Research* has identified five theories of jurisdiction being implemented in various forms.<sup>292</sup>

These are:

- Territorial theory;
- Nationality/active personality theory;
- Passive personality theory;
- Protective principle theory; and
- Universality theory.

### 3.4.3 Territorial theory

A state is likely to make one of these five theories the basis for asserting jurisdiction. Yet in some cases, more than one theory can be cited in support of the claim. Of these, the territorial jurisdiction theory is invoked most often. This is quite popular with common law states, although the U.S. has recently used other jurisdictional principles more frequently in extradition cases. On the other hand, the nationality principle has been also commonly used by civil law states.<sup>293</sup>

The territorial theory is linked intimately to the concept of sovereignty. Within its own territory, the sovereign state exercises jurisdiction over all persons, legal entities and objects except in cases where a special jurisdictional immunity exists. A state asserts its sovereign rights to rule without interference – all states are competent to prosecute any crimes within their own territory. The link was unequivocally spelled out in *Schooner Exchange v McFadden* in which U.S. Supreme Court Chief Justice Marshall in 1812 stated:

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<sup>292</sup> Hein Library, 'Harvard Research in International Law, Jurisdiction with Respect to Crime', (1935) 29 Am. J. of Int'l L., Special Supplement, at 435.

<sup>293</sup> See Alotaibi, n.73, at 91.

“the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction...All exception...must be traced up to the consent of the nation itself.”<sup>294</sup>

A corollary of this position is that jurisdiction over totally extraterritorial crime would not be possible. The U.S. held to this position in the late nineteenth and early twentieth century.<sup>295</sup> In contrast, European civil law states have applied the territorial principle in a less strict manner.<sup>296</sup>

That the language of treaties commonly uses “territory” and “jurisdiction” interchangeably, confirms the fact that territorial theory is one of the most widely used principles. In fact, these terms are not synonymous as “jurisdiction is a legal theory whereby a political entity, namely a state, claims the power to prescribe and enforce its laws, while territory is the object upon which jurisdiction is exercised.”<sup>297</sup> Despite the equivalency of terms in treaties, the courts tend to draw a strict technical distinction between the two. For example, referring to *In re Stupp and Kossekechatko et al.*, the appellant in *R. v. Governor of H.M. Prison, Brixton, ex parte Minervini* argued that “territory” and “jurisdiction” were two distinct and non-equivalent concepts.<sup>298</sup> However, Lord Chief Justice dismissed the application holding that the word “territory” within the treaty was in fact synonymous with “jurisdiction.”

Apart from the territories belonging to a state, there are territories referred to as “special status territories.”<sup>299</sup> These territories are distinct from floating or airspace territories, where floating territorial principles apply. In most cases, where territorial exception occurs is the “area over which the jurisdictional control of one state extends is usually excepted from that of another state’s control either in whole or in part and varying in extent and duration because of peculiar circumstances such as military occupation, treaty or other arrangements.”<sup>300</sup> Currently, military

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<sup>294</sup> *Schooner Exchange v. Mcfadden*, 7 Cranch 116 (1812).

<sup>295</sup> See Alotaibi, n.73, at 91.

<sup>296</sup> *Ibid.*

<sup>297</sup> See Bassiouni, n.20, at 353.

<sup>298</sup> *Regina v. Governor of Brixton Prison ex parte Minervini*, [1959] I Q.B.155; [1958] 3 WLR 559; [1958] 3 All ER 318, DC.

<sup>299</sup> See Bassiouni, n.20, at 352.

<sup>300</sup> *Ibid.*

occupation and military-related special arrangements are the most common bases for special status territory. Because of its military presence in special status territories, provision has been made in the U.S. Extradition Statute for the return from the U.S. to “any foreign country or territory or any part thereof” occupied by or under the control of the U.S. of any person found in the U.S. who is charged with committing any of certain enumerated offences in violation of the criminal laws in force in such foreign country or territory.<sup>301</sup>

Lease territories for military and non-military purposes are also subject to special extradition arrangements which have been duly provided in agreements by including an extraterritorial clause or special jurisdictional clause which permits the lessee-state to exercise jurisdiction over the leased territory in certain circumstances. Instances of application of the special status territories are the Lease Agreement between the U.S. and Cuba for the U.S.’s lease of the Naval Base in Guantanamo, and with Panama concerning the Panama Canal Zone.<sup>302</sup>

Territorial theory is further divided into subjective and objective territorial theories,<sup>303</sup> which make it possible to assert jurisdiction based on the territorial principle even in situations when none of the crime or its effects occurred within the territory. These theories allow for extension of jurisdiction over conduct when an element of an offence occurs within the territory (subjective) or when an effect of an offence occurs within the territory (objective). This practice is widespread in common law countries. Gilbert<sup>304</sup> and Blakesley<sup>305</sup> see this extension of territorial principles as a parallel to the German principle of *doctrine of ubiquity* in civil law countries. The doctrine of ubiquity allows the state to assume jurisdiction over an offence and any inchoate offence connected therewith, if a part of the offence or even, according to some states, if just its effects are felt in the prosecuting state.

Articles of the French Criminal Code are cited as classic examples of subjective territoriality theory. The Code provides that an offence would be regarded as having been committed on

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<sup>301</sup> Crimes and Criminal Procedure (2004) 18 USC 3185.

<sup>302</sup> See Alotaibi, n.73, at 93.

<sup>303</sup> *Ibid* at 94.

<sup>304</sup> See Gilbert, n.71, at 87.

<sup>305</sup> See Blakesley, n.22, at 94.



French territory when “an act characterising one of its elements is accomplished in France.”<sup>306</sup>

The New Zealand Crimes Act of 1961 followed suit:

“for the purposes of jurisdiction, where any act or omission forming part of an offence, or any event necessary to the completion of an offence occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.”<sup>307</sup>

The Canadian Supreme Court’s decision in *Libman v. The Queen*<sup>308</sup> has “demonstrated the use of the subjective territoriality principle to create, in effect, extraterritorial jurisdiction.”<sup>309</sup> In this case, the accused was charged with fraud for telephoning U.S. residents from Canada and persuaded them to buy worthless shares in Costa Rican gold mines. The fraud victims sent their money to confederates of the accused in Panama and Cost Rica; and the money eventually arrived in Canada. A strict territorial view would not indict the accused, because the crime was committed in the U.S. and the money was received in Central America. However, the Canadian Supreme Court opined that the accused could be prosecuted in Canada, stretching the boundaries of the territorial principle maintaining that:

“all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting the offence took place in Canada... [It] is sufficient that there be a ‘real and substantial link’ between an offence and this country.”<sup>310</sup>

In contrast to the subjective territorial principle, the objective territorial principle includes situations where the offender is not physically present in the country where the effect of the offence is felt. The approach can be best illustrated by the following example: “the defendant shoots a gun in Italy, injuring a person in France, and the injured person travels to Switzerland where he succumbs to his wounds.”<sup>311</sup> The problem this hypothetical situation presents is that an

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<sup>306</sup> C.Pr. Pen Art. 693 (Dalloz 1989-90), cited and translated in Blakesley, see n.22, at 95.

<sup>307</sup> New Zealand Crimes Act 1961, Part 1, Article 7, available at <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328024.html> (last accessed 20 March 2010).

<sup>308</sup> *Libman v. The Queen*, (1985) 21 CCL 206; (1985) 21 DLR (4<sup>th</sup>) 174.

<sup>309</sup> See Alotaibi, n.73, at 95.

<sup>310</sup> *Libman v. The Queen*, 21 D.L.R. (4<sup>th</sup>) 174, S.C.C. (1986).

<sup>311</sup> See Blakesley, n.22, at 110.

act is carried out in one state, its immediate effect occurs in another and its result is consummated in a third. The important point to be made by this example is that jurisdiction could be claimed by all three states: “the first on the basis of subjective territoriality, the second on the basis of both objective and subjective territoriality, and the third on the basis of objective territoriality.”<sup>312</sup>

Under this principle, “the presence of the offender may be constructive rather than actual.”<sup>313</sup> The classic U.S. case articulating the objective territorial principle and the allowance of a reliance on the constructive rather than actual presence of an offender was the 1911 case of *Strassheim v. Dailey*. Justice Holmes stated that:

“acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”<sup>314</sup>

In this sense, the object territorial theory permits the state to assume jurisdiction where the effects – or a significant portion of the effects – of the crime are sustained in that state. Another case cited to exemplify objective territoriality is the *Lotus* case.<sup>315</sup>

Blakesley identifies three main applications of the objective territorial principle, namely:

“to assert jurisdiction to proscribe, prosecute, and punish offences committed abroad when the effect or result occurs within the territory of the asserting state; to seek extradition of the person accused of committing such an offence; and to provide extradition of an accused who has committed such an offence against the requesting state.”<sup>316</sup>

An “effects test” has been developed to ascertain the applicability of the objective territoriality principle. According to Blakesley,<sup>317</sup> the U.S. courts have traditionally allowed the assertion of

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<sup>312</sup> See Blakesley, n.22, at 110, footnote 54.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Strassheim v. Daily*, (1911) 221 U.S. 280 (U.S. Supreme Court).

<sup>315</sup> *Lotus* (1927), PCIJ Rep. Series A, No. 10.

<sup>316</sup> See Blakesley, n.22, at 116.

<sup>317</sup> *Ibid* at 113-114.

jurisdiction over an offence when the conduct giving rise to the offence has occurred extraterritorially.

Other European states have also applied the ‘effects test’ in determining jurisdiction in objective territoriality cases. For instance, in 1934 the Italian Supreme Court held in *In re Amper* that:

“in view of the principles of international co-operation for the suppression of crime, the sole duty of the court of the requested state is to determine the subjective and objective existence of the crime charged and to see whether it is extraditable according to the principles which rule the relations between the two states in the matter of extradition. It cannot raise questions of territorial jurisdiction if its own jurisdiction is *not* involved.”<sup>318</sup>

Some courts have held that objective territorial jurisdiction may apply even in situations when the planned effects of an act never came to fruition. The following hypothetical situation will illustrate the point. Suppose an individual in state A supplies bomb making equipment from state B to individuals in state C to be used (exploded) in state D but somewhere along the way, the plans for bombing State D fall apart. The question is: can State D obtain jurisdiction even though neither the elements nor the effects had any impact on it? The Brussels Court of Appeals was prepared to extradite an individual to Britain (State D in the above situation) under the objective territorial principle.<sup>319</sup>

British courts are known for being “among the strictest and most conservative in matters of jurisdiction.”<sup>320</sup> British courts would not be reluctant to assert “constructive jurisdiction” so long as the act was intended to have an effect on the state, but generally their treatment of territorial jurisdiction is very narrowly construed with all crimes divided into one of two categories: conduct and result. Gilbert has described the situation thus: “in the case of conduct crimes, such as blackmail or all varieties of inchoate offence, jurisdiction is asserted only if an element of the *actus reus* of the crime occurs within the territory of England and Wales. Result crimes, such as murder, only fall within the jurisdiction of the courts if the result occurs within the territory. Thus, if a person is attacked in England, but died in Scotland, a separate jurisdiction, the

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<sup>318</sup> *Amper*, Corte Sup., 5 Nov. 1934, n.149, Ann.Dig.353.

<sup>319</sup> See Alotaibi, n.73, at 98.

<sup>320</sup> See Gilbert, n.71, at 91.

assailant cannot be tried before the English courts.”<sup>321</sup> Whereas British courts may take too narrow or strictly constructed an approach, in U.S. courts a too broadly constructed approach is used.<sup>322</sup>

Despite its widespread usage, the subjective-objective approach has received criticism. One problem is that the theory is stated too broadly. It is nothing more or less than a form of extraterritorial jurisdiction, or “disguised extraterritorial jurisdiction.”<sup>323</sup> In the *Noriega* case, in which the district court asserted an expansion of international law principles to encompass an “intent doctrine” in objective territoriality, Bassiouni protested that “there is very little support, if any, in international law for the proposition that criminal jurisdiction can be exercised extraterritorially on the sole factor of ‘intent’ as the court claimed.”<sup>324</sup>

Another criticism brought against subjective-objective territoriality is the inherent conflict that it “recognises jurisdiction in more than one state without ranking priorities.”<sup>325</sup> The approach in the U.S. is that “the state that has physical custody has *de facto* priority.”<sup>326</sup> Yet another weakness of the theory is “it clearly is not the proper vehicle for asserting jurisdiction over any act of terrorism or narcotics conspiracy that has not actually had an impact within the U.S. or for asserting jurisdiction over thwarted extraterritorial conspiracies.”<sup>327</sup>

Apart from the subjective and objective principle, another non-territorial approach is floating and aerial territorial jurisdiction. The high seas and the airspace above them are not regarded in international law as being subject to the exercise of any nation’s sovereignty or jurisdiction. Article 2 of the 1958 Convention on the High Seas<sup>328</sup> and Article 87 of the 1982 Law of the Sea Convention<sup>329</sup> state that all countries, whether coastal or land-locked, have freedom to use the high seas. In these territories, the “law of the flag” will be implemented, which holds that ships on the high seas are, as a general rule, subject only to the jurisdiction of the state under whose

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<sup>321</sup> See Gilbert, n.71, at 92.

<sup>322</sup> See Alotaibi, n.73, at 99.

<sup>323</sup> *Ibid.*

<sup>324</sup> See Bassiouni, n.20, at 315.

<sup>325</sup> *Ibid* at 315.

<sup>326</sup> *Ibid.*

<sup>327</sup> See Blakesley, n.22, at 117.

<sup>328</sup> United Nations, ‘Convention on the High Seas’, (Geneva 29 April 1958), UN Treaty Series Vol.450.

<sup>329</sup> United Nations, ‘Convention on the Law of the Sea’, (Montego Bay 10 December 1982), UN Doc A/CONF/62/122.2.

flag they sail. In *Lotus*, the Permanent Court of International Justice recognised that “vessels on the high seas are subject to no authority except that of the State whose flag they fly.”<sup>330</sup> Similarly, in *Lauritzen v. Larsen*,<sup>331</sup> the US Supreme Court reconfirmed the law of the flag as “perhaps the most venerable and universal rule of maritime law.”<sup>332</sup> The same applies to aircraft by extension because “vessels, aircraft and spacecraft bearing the flag of a given state are an extension of the state’s territory, particularly on the high seas, in international air space, and in outer space. Therefore, the territoriality theory applies to them by extension.”<sup>333</sup>

### 3.4.4 National/active personality theory

The second theory of territorial jurisdiction is referred to as the nationality/active personality theory of jurisdiction. As the name implies, the active personality theory is based on the nationality of the perpetrator or accused. Like the territorial theory of jurisdiction, the nationality theory also derives from the principles of state sovereignty. These “dictate that the nationals of a state are entitled to the state’s protection even when they are outside the state’s territory.”<sup>334</sup> By the same token, the national “has a corresponding duty to obey those municipal laws which are recognized as having an extraterritorial affect.”<sup>335</sup>

The active personality theory of jurisdiction is more common in civil law states, and is strongest on the European continent, but it has expanded to common law countries as well. According to Blakesley, this is the second most widely applied theory today, after the territorial principle.<sup>336</sup> As noted by Gilbert,<sup>337</sup> English law has long made the crimes of murder and bigamy subject to extraterritorial prosecution using the nationality theory, and in more recent years, “even common law countries like Australia, Canada, Ireland, New Zealand, the United Kingdom have enacted, or are considering enacting legislation to tackle the problem of sex tourism by their nationals or

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<sup>330</sup> *Lotus* (1927), PCIJ Rep. Series A, No. 10.

<sup>331</sup> *Lauritzen v. Larsen*, (1953) 345 U.S. 571.

<sup>332</sup> See Alotaibi, n.73, at 101.

<sup>333</sup> *Ibid* at 100.

<sup>334</sup> See Alotaibi, n.73, at 102.

<sup>335</sup> See Bassiouni, n.20, at 401.

<sup>336</sup> See Alotaibi, n.73, at 102.

<sup>337</sup> See Gilbert, n.71, at 96.

residents.”<sup>338</sup> Blakesley also noted a trend to expand the use of the nationality theory of jurisdiction in the U.S.<sup>339</sup>

*Harvard Research* presented a survey of the implementation of the nationality principle among different states, paying particular attention to the legislative measures adopted pertaining to the theory. The study classifies statutes into five basic types:<sup>340</sup>

1. Those statutes which made all offences punishable.
2. Those statutes which made only those offences punishable which were also punishable by the *lex loci delicti*.
3. Those statutes which made all offences of a certain degree punishable.
4. Those statutes which made only those offences committed against co-nationals punishable.
5. Those statutes which made only certain enumerated offences punishable.

An example of the active personality theory of jurisdiction is illustrated by the case of *Public Prosecutor v. Antoni* in which Sweden applied the theory. In this case, the accused was a Swedish national who had been involved in a traffic accident in the Federal Republic of Germany. During the trial in Sweden, Antoni raised the defence that the Swedish Traffic Code had never been meant to apply outside of Swedish territory. The Swedish Supreme Court disagreed holding instead that in principle “every crime committed by a Swedish citizen may be punished, even if committed abroad.”<sup>341</sup> Most states would require the rule of double criminality to apply in the nationality/active personality principle, but as shown by the *Antoni* case this may not be a prerequisite for prosecution. Other states have attached strings to the application of the

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<sup>338</sup> J. Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: OUP, 2003), at 104, footnote 10.

<sup>339</sup> See Blakesley, n.22, at 131.

<sup>340</sup> *Harvard Research*, cited in Bassiouni, see n.20, at 401.

<sup>341</sup> *Antoni* (1960) ILR 140.

theory. France, for instance, will “assert jurisdiction based on nationality only if the accused escapes from foreign justice.”<sup>342</sup> This philosophy derives from the belief that:

“because nationals have the benefit and protection of their nationality and owe allegiance to their country, they should be answerable to the national jurisdiction for any offence they commit. Furthermore, any offence committed by a French national abroad actually injures France’s reputation and respect in the world.”<sup>343</sup>

More importantly, “if the country of their nationality did not have the authority to assert jurisdiction, the national who has committed an extraterritorial offence might be immune from prosecution anywhere.”<sup>344</sup> The application of the active personality theory assumes greater importance in the face of the latter point because “given that civil law states refuse, whether rightly or wrongly, to extradite their nationals, such breadth of competence is essential if fugitives are not to escape punishment merely by returning to their state of nationality.”<sup>345</sup>

While the active personality theory is gaining popularity, it is still ‘subsidiary’ to territorial jurisdiction. What this means is that territoriality takes precedence over the active personality principle or they are applied in combination. As noted, “even among those states which pursue their right to prosecute under the nationality theory most zealously, the use of theory to obtain jurisdiction is generally subsidiary to territorial jurisdiction.”<sup>346</sup>

### **3.4.5 Passive personality theory**

The third theory of jurisdiction is known as the passive personality theory of jurisdiction. It asserts jurisdiction and is based on the nationality of the victim of a crime.<sup>347</sup> It allows states to obtain jurisdiction to extradite and prosecute criminal conduct aimed at harming the nationals of the asserting state. The passive personality principle overlaps with the protective principle, yet it is distinguishable in the sense that it does not take into account the location of the conduct and therefore the “object of its protection is the person who is a national of the state, regardless of

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<sup>342</sup> See Blakesley, n.22, at 128.

<sup>343</sup> *Ibid* at 127.

<sup>344</sup> *Ibid* at 127-128.

<sup>345</sup> See Gilbert, n.71, at 96.

<sup>346</sup> *Ibid*.

<sup>347</sup> See Alotaibi, n.73, at 104.

where he may be.”<sup>348</sup> By contrast, the protective theory “allows a state to reach beyond its physical boundaries to protect its national interests; however it wishes to define them, from harmful effects arising from conduct abroad...”<sup>349</sup> The theory has recently risen in popularity in Europe, as it is capable of dealing with modern criminal acts like terrorism and air travel crimes against nationals of the requesting state. Despite its wider application in recent years, the theory has attracted numerous theoretical and practical problems mainly because it represents “a very broad assertion of jurisdiction which may interfere with the sovereign status of the state where the crime occurred.”<sup>350</sup> U.S. law and practice have traditionally rejected the use of the passive personality theory.<sup>351</sup>

The Restatement Law (Second) Foreign Relations Law of the U.S. explains its position by stating that: “a state does not have jurisdiction to prescribe a rule of law attaching a legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.”<sup>352</sup> An illustration of the U.S.’s rejection of the passive personality principle was the 1887 *Cutting* case. Cutting, an American national, was seized by Mexican authorities during a visit to Mexico and jailed pending prosecution for criminal libel allegedly perpetrated in Texas against a Mexican national. In response to this charge, the U.S. Secretary of State Brayard sent the following invective to Mr. Connery, to Mexico:<sup>353</sup>

“The assumption of the Mexican Tribunal, under the law of Mexico, to punish a citizen of the United States for an offence wholly committed and consummated in his own country against its laws was an invasion of the independence of this Government...As to the question of international law, I am unable to discover any principle upon which the assumption of jurisdiction made in Article 186 of the Mexican Penal Code can be justified...To say that he may be tried in another country for this offence, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they come, and

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<sup>348</sup> See Alotaibi, n.73, at 104.

<sup>349</sup> See Bassiouni, n.20, at 407-408.

<sup>350</sup> See Gilbert, n.71, at 100.

<sup>351</sup> See Alotaibi, n.73, at 105.

<sup>352</sup> American Law Institute, *Restatement Law (Second) Foreign Relations Law of the United States*, (St Paul’s: American Law Institute, 1962) 30 (2) comment (e).

<sup>353</sup> See Alotaibi, n.73, at 105.



thus subject citizens of the United States in their own country to an indefinite criminal responsibility.”<sup>354</sup>

The passive personality principle of jurisdiction has recently made inroads into legislative frameworks. The Penal Codes of Sweden and Germany, for instance, have included provisions on the extension of jurisdiction to cases involving victims who are nationals. Following suit, France also modified its Code of Criminal Procedure in 1975, providing jurisdiction to prosecute under French law and to punish “any foreign national who commits a crime, in which the victim is a French national.”<sup>355</sup>

Adoption of passive personality theory seems to be a reaction to threats posed by international terrorism. Its clauses have been made part of various multilateral conventions against terrorism, including the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents of 1973<sup>356</sup> and the Hostage Taking Convention of 1979.<sup>357</sup>

The most recent example of its application is the Lockerbie case.<sup>358</sup> The U.S. sought extradition of Libyan suspects on the basis that a U.S. aircraft was attacked, though the incident occurred over Lockerbie in Scotland. The U.S. joined Britain in asking for the handing over of Libyan suspects because US nationals were killed in the attack. The reason for the widespread application of the theory is that it allows the assertion of jurisdiction even if offences have not been committed in the territory of the requesting state and thus becomes an effective tool for combating international terrorism. This is probably the single most important explanation for the growth in popularity of the passive personality theory of jurisdiction.<sup>359</sup>

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<sup>354</sup> Case cited in Blakesley, see n.22, at 135-136.

<sup>355</sup> See Blakesley, n.22, at 132.

<sup>356</sup> United Nations General Assembly, ‘Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents’, Resolution 3166 (XVIII) (14 Dec 1973) UN Doc A/RES/3166 (XVIII).

<sup>357</sup> United Nations General Assembly, ‘International Convention Against the Taking of Hostages’, Resolution 34/146 (17 Dec 1979) UN Doc A/RES/36/141.

<sup>358</sup> *Libyan Arab Jamahiria v. U.K.*, [1992] ICJ Rep 3; *Libyan Arab Jamahiria v. U.S.* [1992] ISJ, at 16, para. 42 and at 113, para. 39.

<sup>359</sup> See Alotaibi, n.73, at 106.

### 3.4.6 Protective principle theory

The fourth theory of jurisdiction is referred to as the protective principle. States claim the right to prosecute persons whose crimes damage their vital interests. In contrast to the passive personality theory of jurisdiction which operates at the individual level, the protective principle focuses on a much broader level involving the ‘vital interests’<sup>360</sup> of the state. Likewise, the protective theory is related to subjective-objective territorial theory in that both theories require that an element of the offence takes place or the effects of the offence are felt in the state, but the former is disguisable from the latter in that it “can be exercised whenever the state’s vital interests are damaged or challenged even if the crime is committed outside of and its consequences have no direct effect within the state’s territory.”<sup>361</sup>

The major criticism of this theory, according to Gilbert, is in its “vagueness of the ambit of vital interests.”<sup>362</sup> Bassiouni joins Gilbert in the view that the protective principle represents an extremely broad theory of jurisdiction when he says that:

“It is, in effect, a ‘long arm’ jurisdictional theory which allows a state to reach beyond its physical boundaries to protect its national interests from harmful effects arising from conduct abroad. The protected interest theory allows a state to assert jurisdiction over an alien, whether an individual or other legal entity, acting outside the state’s territorial boundaries in a manner which threatens significant interests of the state.”<sup>363</sup>

“With a few exceptions, national penal codes throughout the world recognize this principle and its limitations,” notes Blakesley.<sup>364</sup> It is also recognized by *Harvard Research* and the Restatement Law (Third) Foreign Relations Law of the United States.<sup>365</sup> The theory fits particularly well in covering “counterfeiting of state documents...and to cases involving national security.”<sup>366</sup> A well-known case in this group is a 1991 espionage prosecution case in which the head of the former East German intelligence agency was prosecuted after German reunification

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<sup>360</sup> See Alotaibi, n.73, at 106.

<sup>361</sup> See Gilbert, n.71, at 97.

<sup>362</sup> *Ibid.*

<sup>363</sup> See Bassiouni, n.20, at 407-408.

<sup>364</sup> See Blakesley, n.22, at 119.

<sup>365</sup> *Harvard Research*, cited in Bassiouni, see n.20, at 408.

<sup>366</sup> See Bassiouni, n.20, at 408.

for spying against the former Federal Republic of Germany (FRG). The German Supreme Court decided that he had violated the law of the former FRG, even though his activities had all been carried out in what had been, at that time, a separate state. Another example of the application of the protective principle is in *In re Urios* concerning a Spanish national<sup>367</sup> “who during World War I and whilst in Spain, maintained contact with the enemies of France” and as a result, was arrested and sentenced to twenty years imprisonment. He was tried under Article 7 of the then French criminal code which stipulated that “any alien who...is guilty outside French territory of a crime against the security of the State is liable to prosecution and sentence under French law if he is arrested in France or if the Government obtains his extradition.”<sup>368</sup> In French law the protective principle is ‘reserved’, to be exercised over

- “1. acts that threaten the general interest of the Republic, including the security of the state and its diplomatic or consular posts or agents, or counterfeiting the seal of national currency;
2. offences against French nationals; and
3. those very grave crimes that all states have an interest in prosecuting.”<sup>369</sup>

The US law that comes closest to providing legislative authority for the use of the protective principle is the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, which provides jurisdiction over purely terrorist offences held to be intended “to coerce, intimidate, or retaliate against a government or a civilian population.”<sup>370</sup>

### **3.4.7 The universality theory**<sup>371</sup>

Universal jurisdiction could perhaps be a starting point for countries to agree that certain international crimes are subject to universal extradition. As the name suggests, there is no restriction of location where a state can obtain jurisdiction for prosecution of “certain particularly heinous crimes.”<sup>372</sup> On this assumption, it includes assertion of jurisdiction both territorially and

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<sup>367</sup> *Urios* [1920] I AD 107.

<sup>368</sup> Translated and cited in Gilbert, see n.71, at 98.

<sup>369</sup> See Blakesley, n.22, at 123.

<sup>370</sup> Jurisdiction over Extraterritorial Violence (1986) 18 U.S.C. No. 2331.

<sup>371</sup> The alternative to universal jurisdiction obligation is *aut dedere aut judicare* (an obligation to extradite or prosecute). Most states would like to exercise the latter option in lieu of the first. This preference is also the emerging trend in most of the recent multilateral conventions. See Alotaibi, n.73, at 110.

<sup>372</sup> *Ibid* at 108.

extraterritorially. The theory is not concerned about the location of the criminal activity, the nationality of the criminal or the victim(s), or even the state which was particularly affected by the criminal activity. On the other hand, the universal jurisdiction principal would be invoked to cover “certain widely recognized offences which are condemned by virtually all national domestic laws, i.e. genocide, war crimes, torture, crimes against humanity, crimes which would fall under the jurisdiction of the newly established International Criminal Court, etc.”<sup>373</sup> The universal jurisdiction theory is distinct from other theories discussed above in that it does not recognise the concept of sovereignty, a notion which is a fundamental concept in all other theories. This theory is thus “extraneous to the concept of national sovereignty.”<sup>374</sup> In particular, it conflicts with the basic tenet of territorial jurisdiction which recognises the right of the accused to be tried by the ‘natural judge’.

Bassiouni identifies a three-part rationale behind the exercise of universal jurisdiction.<sup>375</sup> Universal jurisdiction may be exercised:

1. If no other state is able to exercise jurisdiction on the basis of traditional theories.
2. If no other state has a direct interest.
3. If there is an interest of the international community to enforce.

On this view, states exercise universal jurisdiction not only as national jurisdictions, but also as a surrogate for the international community. In exercising universal jurisdiction under these circumstances, a state “carries out an *action popularis* [popular action] against persons who are *hostis humani generis* [enemies of mankind].”<sup>376</sup>

However broad in scope the universal jurisdiction theory is in terms of its national and territorial parameters, it is quite narrow in terms of its applicability. Universal jurisdiction cannot be applied wantonly or freely. There are certain rules which are to be adhered to before contemplating the exercise of this option. “The exercise of universal jurisdiction is generally reserved for the most serious international crimes, such as war crimes, crimes against humanity,

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<sup>373</sup> See Alotaibi, n.73, at 108.

<sup>374</sup> See Bassiouni, n.20, at 418.

<sup>375</sup> *Ibid.*

<sup>376</sup> T. Panetta, ‘The United States and the International Criminal Court: Why Jurisdictional Opposition Falls Flat’, available at [www.portfolio.du.edu/portfolio/getportfoliofile?uid=64351](http://www.portfolio.du.edu/portfolio/getportfoliofile?uid=64351) (accessed 20 March 2010).

and genocide.”<sup>377</sup> “Since the beginnings of international law as it is known today, piracy has been recognised as a crime subject to the universality principle.”<sup>378</sup> Recently, universal jurisdiction has been extended to encompass crimes like traffic in narcotic drugs and terrorism.<sup>379</sup>

The second rule for invoking universal jurisdiction is that it has to be applied along with another principle: “it is rare for it to be exercised where some other principle would not also apply.”<sup>380</sup> In this respect, “the legislation and practice of states overwhelmingly evidences a connection between the crime and the enforcing state based on the crime’s territorial impact or because of the nationality of the perpetrator or the nationality of the victim.”<sup>381</sup> Countries like Switzerland, Germany, Austria, and Belgium, which have the most comprehensive legislation, do not provide for the direct application of universal jurisdiction.

A third rule or principle states that when the universal jurisdiction principle is operative, it “gives all states the right to exercise domestic jurisdiction over the specified universal offence, international law does not necessarily require that states exercise universal jurisdiction.”<sup>382</sup> States which have enacted domestic legislation on universal jurisdiction, however, are able to exercise universal jurisdiction without assigning another principle or right to exercise domestic jurisdiction.

There are many factors which have contributed towards strengthening of the universal jurisdiction principle recently. Amongst them are the development of the International Criminal Court, the proliferation of international conventions aimed at control of international crimes, the trend towards prosecuting former heads of state (e.g. Milosevic and Pinochet), and the apparent accompanying erosion of sovereign immunity. The trend has been summarised by Professor Gibney of the University of North Carolina who noted that:

“we presently live in the age of universal jurisdiction, best exemplified in the unprecedented international effort to prosecute General Pinochet. Although the

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<sup>377</sup> See Bassiouni, n.20, at 412.

<sup>378</sup> See Gilbert, n.71, at 102.

<sup>379</sup> See Blakesley, n.22, at 138-140.

<sup>380</sup> See Gilbert, n.71, at 103.

<sup>381</sup> See Bassiouni, n.75, at 424.

<sup>382</sup> L. Steven, ‘Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations’, (1999) 39 *Vir. J. of Int’l L.* 425, 439-443.

concept of universal jurisdiction goes back centuries – the pirates of old were considered *hosti humani generis* (the enemy of all) – this principle has now started to take on an entirely new meaning.”<sup>383</sup>

Despite a considerable rise in the popularity of the universal jurisdiction principle, it is not as “well-established in conventional and customary international law as its ardent proponents profess it to be”<sup>384</sup> and has not risen “to the level of customary international law.”<sup>385</sup> Yet, the international community should consider the role it can play in an international extradition convention. Universal extradition could even be handled by an International Criminal Court (ICC) as already supported by many countries and the U.N.<sup>386</sup>

### **3.5 The Current Extradition System Does Not Adequately Protect Human Rights**

Perhaps, one of the most compelling reasons for the international community to act and create an international extradition convention is to halt the current erosion of human rights because of the inadequacies of the current extradition system. The current international extradition trends of violating individual rights and international human rights obligations<sup>387</sup> is disturbing, and has even received much attention from the media. Countries—either impatient with an existing extradition treaty or wanting to circumvent the lack of an existing treaty—resort to alternatives means of transferring persons.<sup>388</sup>

#### **3.5.1 The Growth of Human Rights Law**

The half-century following the Second World War and the Holocaust saw, (as a reaction to those horrors), a proliferation of human rights treaties and the rapid development of the field of international human rights law.<sup>389</sup> This has led to a dramatic impact on domestic law.

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<sup>383</sup> M. Gibney, ‘The Evolving Architecture of International Law: On the Need for an International Civil Court’, (2002) 26 *Fletcher Forum of World Affairs* 47, 50.

<sup>384</sup> See Bassiouni, n.20, at 413.

<sup>385</sup> *Ibid* at 451.

<sup>386</sup> See Rebane, n.15, at 1663-1680.

<sup>387</sup> *Ibid* at 1680.

<sup>388</sup> See Rebane, pp 1666-1670, 1680-1682.

<sup>389</sup> See Jones and Doobay, n.78, at 95.

The United Nations came into being through the United Nations Charter on 24<sup>th</sup> October 1945. This was a multilateral treaty that served as the constitution of the United Nations Organisation. Commitment to human rights still forms the very basis of the Organisation, as it expresses the determination of the ‘Peoples of the United Nations’ *inter alia* ”to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”<sup>390</sup>

Another avowed purpose of the United Nation as stated in Article 1 (3) of its Charter is its commitment “to achieve international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>391</sup> Articles 55 and 56 of the Charter further recognise the importance of “universal respect for, and observance of, human rights and fundamental freedoms.”<sup>392</sup> Thus the notion of human rights is at the centre of the founding instrument of the United Nations.

The Universal Declaration of Human Rights (UDHR) seeks also to refine and build upon the notion of human rights and fundamental freedoms. The UDHR is “non-binding, but has, over time, come to be regarded as an authoritative statement of the rights that Member States of the United Nations have undertaken to promote under the United Nations Charter.”<sup>393</sup>

The fourth Geneva Conventions of 1949 provide the basis for the formulation of international humanitarian law, considered by some writers to be a branch of human rights law. These conventions are geared towards providing humanitarian protection to war victims, in particular prisoners-of-war, the wounded, sick and shipwrecked, and civilians. The ‘grave breaches’ provisions of the Geneva Conventions of 1949 bind the member states to a mandatory ‘try-or-extradite’ principle for specified serious violations of the provisions of the conventions. This regime has been incorporated into English law through the Geneva Conventions Act 1957 as amended by the Geneva Conventions (Amended) Act 1995.

The relatively recent development of human rights law has also impacted on extradition policies, practices, and laws. In addition to a broad spectrum of crime control conventions, there are a

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<sup>390</sup> United Nations Charter, 1945, available at [www.un.org/aboutun/charter/](http://www.un.org/aboutun/charter/) (accessed 10 March 2010).

<sup>391</sup> *Ibid.*

<sup>392</sup> Jones and Doobay, n.78, at 96.

<sup>393</sup> See UDHR, n.44.

number of multilateral conventions dealing with fundamental human rights and humanitarian concerns which directly or indirectly impact upon international extradition treaties and enactments for that matter.

The Human Rights Act 1998 (HRA 1998) incorporates the provisions of the European Convention on Human Rights<sup>394</sup> (ECHR) into domestic law. The adoption of the law constitutes the “most significant development in English human-rights law.”<sup>395</sup> The U.K., thus, is obligated to follow the provisions of the ECHR when implementing its extradition laws.

### **3.5.2 Other types of extradition or alternatives to extradition violate international agreements on human rights.**

There are different types of extradition, and a number of ways of implementing it. While some are directly related to the term in the modern sense and meaning, others have similarities, but do not fall into the legal definition of extradition. For example, in modern times, although judicial extradition is the official process whereby one jurisdiction secures the return of a suspected or convicted criminal from another jurisdiction, there are also a number of quasi-judicial disguised forms of extradition: a backdoor extradition process employed by a number of states. The various forms of alternatives to extradition are discussed in more detail below.

Many countries today, and especially those that do not formally enjoy a legal treaty on extradition with another country, do from time to time resort to those systems and practices which do not automatically belong to extradition in essence.<sup>396</sup> There has recently been, for example, an increase in the use of irregular rendition to circumvent treaty obligations or extradition requirements, to fast track the extradition process, or when there is no extradition

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<sup>394</sup> ECHR, see n.41.

<sup>395</sup> See Jones and Doobay, n78, at 98.

<sup>396</sup> It is important to distinguish between alternatives to extradition that aim to return an alleged fugitive to stand trial and those that aim to capture a suspected criminal for purposes of information or any other purpose except to return the alleged fugitive to stand trial. This thesis does not discuss in detail those alternatives to extradition with a purpose other than return for trial, like extraordinary rendition, because these alternatives are beyond its scope. However, these practices are nevertheless mentioned here to show that government resort to these practices is yet another example of the willingness of states to ignore human rights and other international obligations for purposes of law enforcement. Often, these practices are supported by competing interpretations of international law obligations.



treaty.<sup>397</sup> These practices violate international obligations, specifically international agreements on human rights.

### 3.5.3 Secret extradition

Secret extradition violates the due process rights of individuals, and thus violates international principles as recognized in the UDHR, ICCPR, ECHR, and other international treaties and conventions. This form of extradition is conducted without documentation and in complete secrecy, whereby the media and the public do not have access to information about it. Secret extradition would violate the right to a fair trial under Article 6 of the ECHR.<sup>398</sup> Further, the Model Treaty on Extradition prohibits extradition if an alleged fugitive “has not received or would not receive the minimum guarantees in criminal proceeding, as contained in the International Covenant on Civil and Political Rights, Article 14.”<sup>399</sup> The ECHR in *Soering* stated that “the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.”<sup>400</sup>

In a secret extradition, the extraditing country arrests the individual concerned and hands him over to the requesting country without making any announcement of this action. Secret extradition could be carried out in different ways. For example:

1. Country A may approach Country B to secure the extradition of a certain individual without having an extradition agreement between them. Country B might be willing to extradite that individual, but because of the scrutiny exercised by the judicial or legislative authorities and public opinion, Country B may resort to transferring this individual to a third country which has an extradition agreement with Country A, from where he could be extradited without any controversy.

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<sup>397</sup> See Rebane, n.15, at 1668-1672.

<sup>398</sup> ECHR, n.41, at art. 6.

<sup>399</sup> UN Model Treaty, n. 2, at art. 3(e).

<sup>400</sup> *Soering*, n.12, at 101.

2. The extraditing country could also resort to declaring the individual concerned, if he enjoys diplomatic privileges, as *persona non grata*, or unwanted and, accordingly, he could be extradited administratively to the requesting country.<sup>401</sup>

The first possibility may occur if a country was approached to extradite one of its nationals and the country might have an interest in doing so, but its constitution prohibits such an action. One response is to co-ordinate with a third country, to which its citizen has travelled, to carry out this action in total secrecy. One of the most striking examples is the case of the Israeli citizen Levy Shiem Hayeim Levy.

Levy was wanted in the U.S. for committing, according to U.S. authorities, murder and involvement in drugs trafficking. The Israeli authorities could not extradite their citizen directly to the United States (because the Israel constitution forbids it). They informed the U.S. of his movements, which included a trip to Egypt. This helped U.S. authorities in turn to approach the Egyptian government and request his arrest and then his extradition to the U.S.<sup>402</sup> A case like this does indeed indicate that co-ordination can help to extradite criminals and alleged offenders, despite the existence of a constitutional provision that forbids the action, and also in the absence of any formal extradition treaty between two countries. This is in some ways similar to the practice of irregular rendition discussed below.

While the speed and swiftness of secret extradition, and the avoidance of legal controversy or intervention, have attracted countries to resort to secret extradition, this process simply violates international norms and customs, and specifically international agreements on human rights like the UDHR, ICCPR, and the ECHR.<sup>403</sup> Secret extradition is a total disregard of legal and procedural legitimacy that ought to be strongly respected by governments. Countries that use secret extradition exposes itself as a direct target for international human rights organisations; and would have, therefore, its image tarnished. Secret extradition does indeed violate the rights of the individuals concerned because it deprives the individuals concerned of their right to legal due process, which is supposed to take place before extradition is carried out.<sup>404</sup>

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<sup>401</sup> See Alrousi, n.188, at 34.

<sup>402</sup> *Ibid*, citing case, DRI-1163.

<sup>403</sup> *Ibid* at 35.

<sup>404</sup> *Ibid*.

A related concept to secret extradition is mutual extradition. This form of extradition occurs when a requested country agrees to extradite an accused individual on condition that the requesting country agrees to extradite a particular individual to the requested country. A prominent example of this is that of two Mossad (Israeli intelligence) agents who were arrested in Jordan after their attempt to assassinate Khalid abu Mish'al, a member of Hamas, the Palestinian resistance group, in 1997. The Israeli government offered to release the spiritual leader of Hamas, Sheikh Ahmed Yassin, on condition that the two agents are also released. This offer, or rather mutual extradition was agreed, and both sides secured the release and exchange of the individuals concerned.<sup>405</sup>

However, this kind of extradition is more of a political arrangement than an action driven by law, as the decision to extradite was issued by the top political authorities in both countries and not the judiciary. This type is often conducted in total secrecy and away from media scrutiny. Mutual extradition, thus, often leads to a violation of individual rights. Further, it might involve interruption of legal proceedings, or a sentence against an individual that could be a danger for the national security of a particular country.<sup>406</sup>

#### **3.5.4 Rendition and Irregular Rendition**

Perhaps an alternative to treaty based extradition that has received much attention in recent years is rendition. Generally speaking, rendition is a legal term meaning “surrender,” or “turn over,” particularly from one jurisdiction to another, and applies to property as well as persons. It is an act of *rendering*, i.e. delivering, criminal suspects. Thus, extradition is the most common type of rendition.

Rendition, however, is used where there is no formal treaty in existence between the member states. Instead, a rendition “arrangement” is agreed. This arrangement, to give it a formal legal

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<sup>405</sup> For example, a report of the incident see Kirk Albrecht and Neil Sandlerin, ‘A fiasco in the Mideast – for everyone but King Hussein’, *Business Week* (New York, 20 October 1997), available at <http://www.businessweek.com/archives/1997/b3549084.arc.htm> ( accessed 20 March 2010).

<sup>406</sup> See Alrousi, n.188, at 41.

recognition, is then incorporated into the member states' own legal systems through the actions of their legislative institutions.<sup>407</sup>

With regard to the U.S., rendition, both judicial and extra-judicial, has become a common method for dealing with foreign defendants. For example, in the case of the *Achille Lauro* hijackers, who were on an airplane over international waters, a United States Air Force fighter forced the plane down in an attempt to turn them over to U.S. agents for transport to and trial in the U.S.<sup>408</sup> Later, this extra-judicial practice expanded to include the deportation and expulsion of persons deemed enemy aliens, or terrorists from other countries into the U.S. custody.<sup>409</sup>

This type of practice has grown sharply since 9/11 and now includes situations in which suspects are taken into U.S. custody, but delivered to a third-party state, often without ever being on U.S. soil. Because such cases do not involve the rendering country's judiciary or, they have been termed "irregular or extraordinary rendition."<sup>410</sup>

Irregular rendition, or the extraterritorial abduction of individuals, when done without the cooperation of an agent of the other nation, violates the other nation's territorial integrity.<sup>411</sup> Further, in such situations, the rendered suspects are denied due process because they are arrested without charges and deprived of legal counsel. The UCCPR expressly prohibits arbitrary arrests.<sup>412</sup> Thus, countries that are signatories to the UCCPR, though lacking in enforcement mechanisms, would violate their obligations under the UCCPR. Recently, irregular rendition have been used by the U.S. to bring a suspect into another country for the purpose of interrogation, sometimes involving torture and inhumane interrogation techniques that violate international human rights law like the ICCPR and the UDHR.

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<sup>407</sup> The rationale for such an approach is based on the fact that the Commonwealth countries have shared a long history with Britain. This centuries old experience has facilitated the development of common cultural and legal traditions, which in turn allow member states a degree of mutual trust.

<sup>408</sup> For brief details of the incident see, for example, 'What happened during the hijacking of the Italian cruise ship *Achille Lauro* in 1985?', *Palestine Facts*, available at [http://www.palestinefacts.org/pf\\_1967to1991\\_achille\\_lauro.php](http://www.palestinefacts.org/pf_1967to1991_achille_lauro.php) ( accessed 20 March 2010).

<sup>409</sup> See generally Bassiouni, n.20, discussing some of these practices in his Chapter V.

<sup>410</sup> The term "extraordinary rendition" as used by the use seems to be a clever way to disguise its often illegal character. It is also commonly referred to as irregular rendition, or illegal rendition.

<sup>411</sup> See Rebane, n.15, at 1656.

<sup>412</sup> J. Paust, 'After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims, (1993) 67 St. John's L. Rev. 551. Consider, however, the EAW's doing away with the arrest warrant in some instances. The EAW would arguably make rendition more possible, especially between countries under the EAW regime.

Certainly, irregular rendition is against the spirit of both international as well as national laws, and closer to what may be termed international piracy.

### **3.5.5 Abduction**

The use of abduction has also increased in recent years.<sup>413</sup> Countries often get frustrated with extradition procedures, or another country may refuse the request for extradition, especially in the absence of a treaty.<sup>414</sup> As a result, countries will employ abduction to obtain the individual, thereby defeating the purpose of the extradition system. The practice of abduction is troubling because countries may resort to it even if there is an international extradition convention. This implies, thus, that an international extradition convention must have some sort of enforcement mechanism or penalty provision to be effective. The drawback to such a provision, however, is that most countries may object and therefore not sign the convention altogether.

### **3.6 Exceptions to extradition are eroding**

Extradition (despite its legal status once approved) has exceptions in its practice as well as setbacks. Another sign of the insufficiency of the current extradition system is the erosion of these exceptions to extraditions originally developed to protect individual rights. Additionally, these exceptions create controversies that prevent some countries from concluding formal, legal treaties for extradition. There are controversies over what a political offence is and what is not. What are the boundaries of human rights in this respect? To what extent is it legal to extradite someone who may be tortured or executed in the requesting country? For these questions it is useful to identify the exceptions to extradition.

#### **3.6.1 Exceptions for double criminality and extradition crimes**

At the heart of any extradition request is the notion of an extradition crime predicated on the rule of double criminality. Double criminality is a well recognized exception to extradition. The principle of double criminality<sup>415</sup> requires that a fugitive be extradited only for conduct that is

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<sup>413</sup> See Rebane, n.15, at 1670.

<sup>414</sup> *Ibid.*

<sup>415</sup> See Blakesely, n.22, at 1. The principle is “founded on the long-standing international principle of *nulla poena sine lege.*” *Ibid.*

criminal and punished to the prescribed minimum by the law of both parties.<sup>416</sup> This rule was explained by Lord Browne-Wilkinson in the *Pinochet* case. He stated that “[f]or the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.”<sup>417</sup> In short, if the crime or conduct alleged by the requesting state does not amount to an offence in the requested state, no extradition can lie.

What amounts to an extradition crime varies according to the scheme concerned. In the U.K., the basic principles regarding an extradition crime remain the same under the 2003 Act, with the notable exception that the requirement of double criminality has been removed for European Arrest Warrant cases.<sup>418</sup> What the 2003 Act has, however, sought to do, and has achieved to a certain extent, is to remove the onerous steps required under Schedule 1 to the 1989 Act. The new Act has sought to simplify the definition of ‘extradition crime’ by adhering to the definition provided for in s.2 of the 1989 Act, namely conduct that is punishable by imprisonment for twelve months or more in the requesting state.<sup>419</sup>

Unlike s.1 (1) of the 1989 Act, which specifically pins “liability to extradition” onto the notion of an extradition crime, the 2003 Act simply refers to “an offence specified in the warrant.”<sup>420</sup> The 2003 Act divides into Category 1 territories (EAW) and Category 2 territories. Of the former, the EAW has two distinct categories of extradition offence:

1. Offences punishable with imprisonment for twelve months or more.
2. Offences contained in the Framework list (discussed in section 4.5.3 following) punishable with imprisonment for three years or more and which, as defined by the law of the issuing Member State, shall under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant.<sup>421</sup>

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<sup>416</sup> See Blakesely, n.22, at 42-43.

<sup>417</sup> *Pinochet (No 3)* [2000] 1 AC 147.

<sup>418</sup> See Jones and Dooray, n.78, 4.15, at 47.

<sup>419</sup> Extradition Act 2003, s.64.

<sup>420</sup> *Ibid*, s.2 (3).

<sup>421</sup> *Ibid*, s.64.

Double criminality has historically been a very important principle because the criminal laws of various countries divergently prohibited and punished conduct.<sup>422</sup> Double criminality protects states' rights by promoting reciprocity and also safeguards individual rights by shielding the individual from unexpected and unwarranted arrest and imprisonment.<sup>423</sup> The necessity of the principle becomes especially obvious when one looks at the different prohibitions and punishments for offences like euthanasia, suicide, adultery, and abortion.<sup>424</sup>

The double criminality exception to extradition may arguably be a human rights exception to extradition, and has been applied as such in some cases, especially in early cases like slavery.<sup>425</sup> As such, the principle of double criminality has been closely tied to human rights.<sup>426</sup> At one time, the number of cases in which the principle of double criminality determined the outcome of the request was abundant.<sup>427</sup> The principle worked to ensure fairness and as a safeguard for human rights. However, the double criminality exception has been so limited in current practice, at least in some countries like the United States.<sup>428</sup> As stated above, the requirement has even been removed from the EAW. Double criminality does not work today as it once did in the past to protect human rights in the context of extradition.<sup>429</sup> This pattern is also seen in other exceptions to extradition as further discussed below.

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<sup>422</sup> See Blakeley, n.22, at 43.

<sup>423</sup> See Bassiouni, n. 20, at 314.

<sup>424</sup> See Blakeley, n. 354, at43.

<sup>425</sup> *Ibid* at 36 (“Around 1853, a fugitive slave from Missouri, named John Anderson, entered Canada on the underground railway to what he hoped would be freedom. In 1860, however, proceedings began for his extradition back to Missouri for the murder of Seneca T. Diggs. Anderson, indeed, had killed Diggs in Missouri and was likely to be convicted of murder under Missouri law, as the simple fact that he had killed a human being was sufficient for probable cause. Normally, a fugitive is not allowed to posit affirmative defenses, so, it appeared that Anderson was extraditable. Canada, however, recognized a specialized form of self-defense (also applicable to extradition) based on the fact that he had killed Diggs to escape from slavery. The Queens' Bench, on habeas corpus, held that surrender should be forbidden unless the offence charged was also punishable in Canada.”) See *Pinochet III*, where the House of Lords refused to extradite Pinochet to Spain based on the double criminality. See, e.g., *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No. 3), 2 Eng. Rep. 97, 170 (H.L. 1999), [1999] 2 W.L.R. 827.

<sup>426</sup> See, e.g., Ellen Goodman, ‘The Hidden Suffering of Women in Afghanistan,’ *Bos. Globe*, (Dec. 6, 1998), at D7 (showing the value of dual criminality for human rights protection), cited in Blakesley, n. 22, at 42.

<sup>427</sup> See Blakesley, n. 22, at 43.

<sup>428</sup> *Ibid* at 40, arguing that double criminality has been made meaningless.

<sup>429</sup> *Ibid*.

Double criminality in current practice has been largely limited to only serious offences, and some states like the U.S. only require that the offences be similar.<sup>430</sup> Some states view it as an onerous practice, and have relaxed requirements for double criminality.<sup>431</sup>

One could argue that double criminality has become superfluous in serious international crimes like crimes against humanity and terrorism. One could further argue that the realist approach to international law and the increasing number of treaties relating to criminal law has made double criminality less necessary as before. From a limited beginning, treaties first provided only for a small number of extraditable offences, sometimes limited to two offences like murder and forgery.<sup>432</sup> Modern treaties have now come to list extraditable offences exhaustively.<sup>433</sup> Yet, this debate returns to the competing views on extradition as traditionally applied to the benefit of the state or, as a growing view, to be applied to the individual as a subject of international law.<sup>434</sup> This paper argues that the protection of human rights, especially of the accused, need to focus on the individual. The balance between the goals of extradition and the need for human rights protection could only be properly struck if the sovereignty of states is also to be balanced with the rights of individuals.

### **3.6.2 Exceptions for political offences**

Exceptions for political offences are an important component in contemporary extradition practices. The controversy has attracted considerable attention recently, as the distinction between ‘terrorist’ and ‘freedom fighter’ blurs (discussed below). The focus here is on the origin and developments in exceptions for political offences, whether this serves any purpose in contemporary extradition practice, and what legal scholars say concerning its perpetuation, or cessation in the modern context.

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<sup>430</sup> See Soma, n. 13, at 326 (“U.S. courts have shown an unwillingness to submit to in-depth examinations of the differences between U.S. and a foreign country’s laws, thus allowing extradition where the criminal laws of both countries are merely similar.”)

<sup>431</sup> *Ibid* (arguing that “[d]ouble criminality has become a burden to states that must determine not only whether the action is criminalized in both states, but also the severity of punishment in both states.”). It is also important to note that not all states have loosened its requirement for double criminality, and some states like Switzerland have actually followed a more traditional application of double criminality.

<sup>432</sup> *Ibid* at 324.

<sup>433</sup> *Ibid*.

<sup>434</sup> See Blakesley, n.22, at 1-2.



Exception for political offences is a defence against extradition and is a relatively recent notion in the history of extradition. Yet it has established itself as a mandatory element of any bilateral or multilateral agreement or convention on extradition. It even figures as a compulsory element in the UN Model Treaty.<sup>435</sup> Article 3 (“Mandatory Grounds for Refusal”) dictates that extradition shall not be granted “if the offence for which extradition is requested is regarded by the requested State as an offence of a political nature.”<sup>436</sup> As Van den Wyngaert observed, “[exception for political offence is] considered as a generally accepted principle.”<sup>437</sup>

Despite being now commonplace and important, the phrase ‘exception for political offences’ is, however, poorly defined. Most treaties, conventions, and acts mention it as an exception without defining to what exactly it refers. Generally, exceptions for political offences are defined negatively, i.e. what they are *not* rather than what they *are*. The explanation for this comes through case law. The difficulty in defining the term accurately stems from the fact that “despite its commonplace status, the political offence exception is poorly defined.”<sup>438</sup> As pointed out by Van den Wyngaert, the term ‘political offence’ is a broad term which can encompass a variety of crimes.<sup>439</sup> Bassiouni surmises that the reason why the term is not defined in treaties and acts “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 occurrences.”<sup>440</sup>

Traditionally, the extradition of political offenders was not sought vigorously, as it was seen as a ridding of criminals and nuisances and their punishment was seen to be leading lonely lives abroad. In contradistinction to this view, political offenders who commit crimes against the state, or the ruler, represent a direct threat to the integrity of the sovereign. These elements are considered a threat to the stability of the political order, as they would be involved in conspiracies. Therefore, their capture was the primary function of extradition.<sup>441</sup>

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<sup>435</sup> Model Treaty on Extradition, see n.2.

<sup>436</sup> *Ibid* at art. 3.

<sup>437</sup> C. Van Den Wyngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Deventer: Kluwer, 1980), at 1.

<sup>438</sup> See Alotaibi, n.73, at 175.

<sup>439</sup> See Van den Wyngaert, n.437, at 95.

<sup>440</sup> See Bassiouni, n.22, at 653.

<sup>441</sup> See Alotaibi, n. 73, at 3.

France was the first state to codify the new perspective in its 1793 constitution, which guaranteed political asylum to those who were forced to flee their countries while fighting for liberty. In the 18<sup>th</sup> century, revolutionary ideologies were romanticised and became favourable in public opinion and with legal scholars like Gotius.<sup>442</sup>

The emergence of exceptions to extradition for political offence can be largely attributed to the rise of revolutionary ideologies and political theories on freedom, democracy, and the right to rebel against tyranny that caught the fancy of many states of the time and became widely popular in Europe. The sympathy towards political offenders who fought against autocracy and despotism was growing. Pyle has captured that contemporary fever,<sup>443</sup> as has Claeys:

“Today most politically motivated killers are denounced as terrorists, but to many mid-nineteenth century European liberals, rebels against reactionary regimes were genuine heroes. Leaders of the unsuccessful revolutions of 1830 and 1848, like Mazzini, Kossuth, and Garibaldi were lionised by the liberal societies to which they fled...This romanticism dominated the writings of European criminologists. For example, Cesare Lombroso, the leading Italian scholar of crime, characterised political criminals as men of ‘Powerful intellect, exaggerated sensibility, great altruism, patriotic, or even scientific ideals.’”<sup>444</sup>

The French Revolution sowed the seed of liberal democracies. The ideals surrounding the Revolution effectively upgraded the idealised image of the political offender from that of an especially dangerous criminal to that of a noble revolutionary. Political offenders were considered worthy of protection.<sup>445</sup> By the 19<sup>th</sup> century, the concept of an exception to extradition for political offences was widely accepted. It was first enacted by Belgium in an 1833 Act, which stipulated that foreigners “shall not be prosecuted nor punished for any political offence [committed] before extradition, nor for any fact connected to such crime.”<sup>446</sup> From that point onward, Belgium included the exception for political offences clause in all the extradition agreements it entered into. The rationale behind adopting this exception was primarily to prevent

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<sup>442</sup> See Alotaibi, n. 73, at 177-178.

<sup>443</sup> See Pyle, n.221, at 82.

<sup>444</sup> G. Claeys, ‘Mazzini, Kossuth, and British Radicalism, 1848-1854’, (1989) 28 *The Journal of British Studies* 225-261.

<sup>445</sup> See Alotaibi, n.28, at 185

<sup>446</sup> *Ibid* at 178.

interference from neighbouring states in this newly established country. The contemporary situation prevailing in the regions at that time accounts for the need to incorporate this clause by Belgium. A great number of refugees were migrating to various states to escape the tyranny of their ruling governments. Belgium, which had just achieved independence from the Netherlands, feared an influx of fugitives, which would allow the countries from which they had fled to interfere and create tension with those countries. This was an important function of enacting exceptions, as has been noted by Van den Wyngaert:

“the introduction of the political offence exception in this 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.”<sup>447</sup>

In short, the decision of most of European countries to incorporate the exception for political offences was a reflection and endorsement of liberal European sentiments, which saw political resistance and rebellion as noble and worthy of protection, coupled with a broader shift toward a humanitarian concern over the likely unfair treatment of the political offenders in the requesting states.<sup>448</sup> More and more states included exception for political offences in their bilateral and multilateral treaties and enacted statutes to accord it legal status. By the second half of the 19<sup>th</sup> century, the political offence exception had become commonplace in international extradition law, reflected both in bilateral treaties and in national legislation.<sup>449</sup>

Even in totalitarian regimes, political prisoners were treated differently from other offenders. Fascist Italy used a separate system for the prosecution and incarceration of political prisoners. In such systems, they were treated more harshly than common criminals.<sup>450</sup> Political offenders were considered dangerous as they aired anarchic views, which could pose a serious threat to state sovereignty, and hence, were incompatible with the strong state. Nazi Germany regarded

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<sup>447</sup> See Van den Wyngaert, n.437, at 13.

<sup>448</sup> See Alotaibi, n.73, at 179.

<sup>449</sup> *Ibid* at 181.

<sup>450</sup> *Ibid* at 187.

political offenders as enemies of the people.<sup>451</sup> These facts lend support and credibility to the application of an exception for political offences in extradition.

By the latter half of the 19<sup>th</sup> century, the rationale for the exception for political offences was well established. However, the rationale is a complex one, which intertwines political, moral, and humanitarian arguments. Poncet and Gully-Hart explain the complexity as follows.<sup>452</sup>

1. The *political argument* that states should remain neutral *vis-a-vis* political conflicts in other states, therefore, extradition of political opponents is to be *a priori* refused;
2. The *moral argument* based on the premise that resistance to oppression is legitimate and that political crimes can therefore be justified; and
3. The *humanitarian argument*, whereby, a political offender should not be extradited to a state in which he risks an unfair trial.

With regard to the political argument, returning a fugitive could give rise to conflicts with other states, as it is possible that those dissenting may become the rulers of that state which might injure political relation with it. Extradition of political offenders may also not be in the interest of the requesting and the requested state.<sup>453</sup>

The moral arguments stems from the fact that it is considered to be a right for anyone to rebel against the ruling government. Dissent may be due to differences based on religious or political conflicts. As a political offender's right to differ is recognised and accepted, it would, therefore, not be legitimate to hand him over to a state which might punish him because of those differences.<sup>454</sup>

As for the humanitarian arguments, the political offenders sought by a state may not be treated fairly on one or other pretext. A fair trial is not something that could be guaranteed on the part of

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<sup>451</sup> See Alotaibi, n.73 at 187.

<sup>452</sup> D. Poncet and P. Gully-Hart, *The European Approach to Extradition*, in M. Bassiouni (ed.), *International Criminal Law: Procedural and Enforcement Mechanisms*, 2<sup>nd</sup>. ed. (New York: Transitional, 1999), at 277-290.

<sup>453</sup> *Ibid* at 293.

<sup>454</sup> *Ibid*.

the requesting state if it was determined to punish or torture political offenders to crush rebellion.<sup>455</sup>

Van den Wyngaert advanced three reasons for the political offences exception, namely, the convergence of the interests of the requested persons, the interests of the states involved (requesting and requested), and the general interests of the international public order.<sup>456</sup> These rationales are commensurate with those argued by Poncet and Gully-Hart.<sup>457</sup> The interests of the requested persons can be mapped on the humanitarian argument, as both of them are meant to safeguard the interests of political offenders, as a fair trial may not be forthcoming from the requesting state. The interests of states can be related to the political argument, as should the political offender prevail and become the ruler of the requesting state, it would strain the relations between the two countries. Therefore, such a return would not be in the interest of either country. Cervasio has also advanced political, humanitarian, moral, and legal rationales for the political offences exception.<sup>458</sup>

Littenberg based the exception for political offences on four principles. These were:

1. Recognition of the legitimacy of political dissent.
2. The desire to protect the political offender from biased or inhuman treatment.
3. The principles of state neutrality in the internal matters of another state.
4. A desire not to include the wealth of an insurgent group.<sup>459</sup>

Rao put forward two primary rationales for the creation of the political offences exception. These were:

1. To protect the fugitive's human rights.

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<sup>455</sup> See Poncet and Gully-Hart, n.452, at 293.

<sup>456</sup> See Van Den Wyngaert, n.437, at 2.

<sup>457</sup> See Poncet and Gully-Hart, n.452, at 293.

<sup>458</sup> C. Cervasio, 'Extradition and the International Criminal Court: the Future of the Political Offence Doctrine', (1999), 11 Pace Int'l L. Rev. 419-446.

<sup>459</sup> M. Littenberg, 'The Political Offence Exception: An Historical Analysis and Model for the Future', (1990), 64 *Tulane L. Rev.* 1198.

2. To simultaneously protect the requested state's interest in remaining neutral in the internal affairs of the requesting state.<sup>460</sup>

As can be seen from the above arguments, it appears that the interests of the political offender, the interests of the states involved, and the fear of inhuman treatment of the fugitive after extradition, are the main drivers for creating the political offences exception. Based on these grounds, the political offence exception has become a universal phenomenon underlying bilateral and multilateral treaties, created through the formulation of relevant statutes.

The advent of a new international order, which approved and favoured revolutions, to bring about change in colonisation and dictatorships warranted the political offences exception in that the exception was seen as an indication of this change of world order. The revolution did not aim to replace one authority with another, but changed the underlying social system. A change in one country was expected to trigger a change in other countries, thus bringing about a change in the international system.<sup>461</sup> Most of the earlier, political offenders falling under the exception were those involved in a rebellion against individual tyrants. In the 20<sup>th</sup> century, new forms of tyranny occurred, which were encountered by new forms of rebellion. By the mid-20<sup>th</sup> century, many colonisations were also seen as a form of tyranny and the struggle to liberate from the clutches of occupation for national independence was seen as justified. The UN's charter pledged the principle of self-determination and encouraged and supported movements for independence and self-governance. As a result of this sanction, a number of independent countries emerged on the world map. From 1946 to 1960 the membership of the UN General Assembly grew from 51 to 97, largely attributable to the struggle for self-determination and self-rule.<sup>462</sup>

In recent times, however, there has been growing opposition to the exception for political offences, despite the fact that it has continued to be a standard clause in extradition treaties. In 1854, Belgium introduced a statutory "*attentat*" clause which made an exception to the political offence exception in cases involving an attack on or attempted assassination of a foreign head of state or members of his family. The introduction of such an exception to the exception was

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<sup>460</sup> R. Rao, 'Protecting Fugitives' Rights While Ensuring the Prosecution and Punishment of Criminals: An Examination of the New EU Extradition Treaty', (1998) 21 B.C. Int'l and Comp. L. Rev. 243.

<sup>461</sup> See Alotaibi, n.73, at 191.

<sup>462</sup> *Ibid.*

aimed at nullifying any possibility that the political offence exception would serve as *carte blanche* for would-be assassins.<sup>463</sup>

However, there are other reasons for criticism of the political offences exception. One of these relates to the principle of national sovereignty. Cervasio argued that:

“If a person commits a crime within a particular nation, that nation should presumably have the right to try him. There is no justification for other nations to step in and impose their values and/or judicial systems upon a criminal fugitive, or the nation from where he came.”<sup>464</sup>

More importantly, protecting a criminal and refusing the requesting state return of the offender “may be infringing upon the national sovereignty of [that] state.”<sup>465</sup>

Another argument advanced against making the political offences exception has to do with its deleterious impact on international world order. As noted above, in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, political crimes were romanticised and a right to rebel coupled to any means of achieving independence were accepted. Such revolutions were not seen of a particular danger to the international world order, because of their inherently nationalist character. This common wisdom was proved wrong with the increasing globalisation of politics and with the emergence of international crime and terrorism in the late 20<sup>th</sup> century, which posed a serious threat to the world order. This point of view has been further emphasised by the 9/11 and 7/7 incidents, which were the result of internationally organised terrorism and caused an upheaval at the international level. The Afghan and Iraqi crises are seen as progenies of these incidents. It has been argued that the political offence exception effectively, supports, or encourages any criminal activities – including ‘terrorism’ against the general citizenry – as long as it has political links.<sup>466</sup>

Yet another related argument is that the overly broad character of the political offences exception shields serious, violent criminals from punishment. Rao argues that traditional rationales advanced in favour of the political offences exception, including protection of fugitives’ human

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<sup>463</sup> See Alotaibi, n.73, at 211.

<sup>464</sup> See Cervasio, n.458, at 495.

<sup>465</sup> *Ibid.*

<sup>466</sup> See Alotaibi, n.73, at 190.

rights and the protection of the state's interest in neutrality can in fact be turned around to create a rationale *against* the political offences exception. As he puts it:

“the political offence exception has been criticised on grounds that the notion of human rights is actually a *hindrance* to combating international crime. Human rights of the political offender are, as a matter of fact, a domestic matter and the responsibility of the requesting state.”<sup>467</sup> [Emphasis added].

This decline in the acceptance of the political offences exception has coincided with the expansion in international terrorism, and the efforts to control it. Once, the UN was concerned with “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”<sup>468</sup> and recognising peoples' right to use force to gain independence and self-governance. Halberstam interpreted omission of “resort to terrorism as justification for self-determination”<sup>469</sup> in later UN resolutions, and its employment of a broader language condemning terrorism “wherever and by whomever”<sup>470</sup> committed, as constituting “a clear rejection of the [earlier] position.”<sup>471</sup> The erosion of international support for the doctrine of self-determination, and the associated support for the legitimacy of the struggle for liberation can be interpreted as a weakening of the political offences exception as a norm of international law.

Interpretation of the political offences exception has been subject to various approaches. However, there are conditions that should be fulfilled to be eligible for the political offences exception. Just as there is no consensus on how to define the term ‘political offence’, no agreement in international law exists in terms of how to determine whether or not a particular political offence qualifies for the exception to extradition. Various approaches are taken to deal with the exception for political offences in extradition practices and principles. Van den Wyngaert argues for three approaches. The first of these is the *subjective approach*, which emphasises the intentions of the perpetrator and the decisive question as to the nature of an

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<sup>467</sup> See Rao, n.460, at 243.

<sup>468</sup> ‘Declaration on the granting of independence to colonial countries and peoples’, United Nations General Assembly Resolution 1514 (XV) (14 Dec 1960) UN Doc A/RES/1514 (XV).

<sup>469</sup> M. Halberstam, ‘The Evolution of the United Nations’ Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed’, (2003) 41 Col. J. of Transn'l L. 573-574.

<sup>470</sup> *Ibid* at 573.

<sup>471</sup> *Ibid* at 574.



offence is whether the offender was politically motivated, regardless of whether the act had a political outcome.<sup>472</sup> As is evident, this approach attaches a great deal of importance to what the aim of the offender was.

The second is referred to as the *objective approach*. In contrast to the subjective approach, this takes into account the political context of the act and its actual outcome or consequences. It does not focus on the intentions of the perpetrator. It considers whether the actual interests ‘injured’ are of a political nature, regardless of the aim of the offender.<sup>473</sup>

The third is an amalgamation of the other two, and is called the *mixed approach*. As the term indicates, it pays attention to both the political motivation of the offender, and the circumstances surrounded the offence. In other words, it allows that either the intention to commit the offence, or the outcome of the offence could be a political crime.<sup>474</sup>

Bassiouni points out that in contemporary extradition practices, in most countries, the dominant element in determining the political offences exception is that “the political element must predominate over the intention to commit the common crime. It must constitute the purpose for the commission of that crime.”<sup>475</sup> Thus, Bassiouni’s approach is much closer to the subjective approach of Van den Wyngaert and suggests that the objective approach is not a common practice.<sup>476</sup>

Despite considerable convergence on this view, there exist significant differences in how states approach the exception for political offences. According to Alotaibi, the current differences in approach are grounded in historical divergences.<sup>477</sup> In this context, three approaches can be identified as being followed in the treatment of the political offences exception in contemporary extradition practice. These include the French approach, also referred to as *injured rights theory* or the *objective approach*; the Swiss approach, also known as the *political motivation theory* or

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<sup>472</sup> See Van den Wyngaert, n.437, at 122-123.

<sup>473</sup> *Ibid* at 120-122.

<sup>474</sup> *Ibid* at 123-126.

<sup>475</sup> See Bassiouni, n.20, at 665.

<sup>476</sup> See Van den Wyngaert, n.437, at 120.

<sup>477</sup> See Alotaibi, n.73, at 196.

*proportionality/predominance theory*, and, finally, the Anglo-American approach, commonly known as the *political-incidence* theory.

The French injured rights theory holds that the political offences exception to extradition law is “dependent upon the nature of the rights injured by the accused actions.”<sup>478</sup> The theory does not give weight to the motives of the offender, but measures the amount of loss caused, hence the injured rights approach. The leading case in this theory was heard in 1947 in *In re Giovanni Gatti* wherein the Republic of San Marino requested Gatti’s extradition for attempting to murder a local communist. The Court of Appeal of Grenoble granted Gatti’s claim that his act was political, holding that “political offences... are directed against the constitution of the Government and against Sovereignty .... and disturb the distribution of powers ... The offence does not derive its political character from the *motive* of the offender, but from the nature of the *rights* it injures.”<sup>479</sup> [Emphasis added]. This emphasis on the outcome in terms of the rights injured characterises the approach as *objective*. Despite containing the neutrality of the objective test, the theory has been attacked by many critics. One concern is voiced by Littenberg, that neutrality apart, “it did little to achieve the humanitarian goals of the exception because it prevented the political characterisation of most crimes.”<sup>480</sup> Another criticism leveled is by Van den Wyngaert, who finds the approach “too radical and too formal in practice”<sup>481</sup> on the grounds that “the political character is denied to acts, which do not constitute a direct attack against the political institutions”<sup>482</sup> and it does not draw any distinction “with respect to absolute political crimes committed from strictly personal motives and no attention is paid to the seriousness of the facts.”<sup>483</sup> Because of these shortcomings, the injured rights test was mainly discarded by the 1960s.

The second main approach to the political offences’ exception is the Swiss approach, also called proportionality, or political motivation. As the name implies, the approach “does not look strictly to the nature of the rights injured, but tries to correlate the ideological beliefs of the offender, and the proportionate effect of his acts, or offences and the political purpose in trying to reach an

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<sup>478</sup> See Alotaibi, n.73, at 196.

<sup>479</sup> *Ibid*, citing *In re Giovanni Gatti*, 14 I.L.R. 145 (Ct. App. Grenoble 1947).

<sup>480</sup> See Littenberg, n.459, at 122.

<sup>481</sup> Van den Wyngaert, see n.186, at 121.

<sup>482</sup> *Ibid* at 122.

<sup>483</sup> *Ibid*.

equitable result which lacks in other theories.”<sup>484</sup> This theory maintains a balance between the political motivation and the actual offence committed. Under this approach, a crime will qualify for the political offences exception if it is predominantly political, that is, if the political element supersedes the common element. The Swiss Extradition Act of 1892 serves as the basis of this theory. The Swiss Federal Tribunal evolved three criteria to determine the political offences exception in *V.P. Wassilief* 1908. The three elements are:

1. That the offence was committed for the purpose of helping, or ensuring the success of a purely, political purpose.
2. That there was a direct connection between the crime committed, and the purpose pursued by a party to modify the political, or social organisation of the state.
3. That the political element predominated over the ordinary, criminal element.

These characteristics have earned this approach the title of the political motivation predominance test. A good illustration of the application of this test has been cited in the literature in the case of *re Kavic*,<sup>485</sup> who with other crew-members hijacked and diverted a Yugoslavian plane to Switzerland. He, together with his crew-mates, was charged with endangering the safety of public transport and wrongful appropriation of property. The Swiss court applied the proportionality test, which took into account both the injury to private persons, and property and the interests of the accused. The extradition was denied on the grounds that ... “the relation between the purpose and the means adopted for [the political offence’s] achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender worthy of asylum. Freedom from constraint of a totalitarian State must be regarded as an ideal in this sense.”<sup>486</sup> In 1961, the Swiss Federal Tribunal laid down a clear-cut criterion for the proportionality test in *Kitr v. Ministere Public Federal*,<sup>487</sup> noting that “political offences include common crimes which had a predominantly political character, from their motive and factual background. However, the

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<sup>484</sup> See Bassiouni, n.20, at 703.

<sup>485</sup> *Kavic* (1953), ILR 371.

<sup>486</sup> UNHCR, ‘In re Kavic, Bjelanovic, and Arsenijevic’, Refworld, available at [http://www.unhcr.org/refworld/publisher,CHE\\_FC,,,3ae6b7448,0.html](http://www.unhcr.org/refworld/publisher,CHE_FC,,,3ae6b7448,0.html) (accessed 20 March 2010).

<sup>487</sup> *Kitr v. Minister Public Federal*, (1961) 34 ILR 143.

damage had to be proportionate to the aim sought; in the case of murder, this had to be shown to be a sole means of attaining the political aim.”<sup>488</sup>

The Swiss proportionality approach has been regarded as preferable by some analyses for the way it strikes a balance between the political motives and the proportionality criteria.<sup>489</sup> This approach to the political offences exception has been practiced by other European countries, including the Netherlands, Denmark, Germany, and France.<sup>490</sup> However, the theory has also attracted criticism for its “innate subjectivity and its tendency to impose the values and ideals of one state on the other,”<sup>491</sup> as pointed out by Van den Wyngaert, and the “theory [suffers from] arbitrariness because it relies on a number of subjective evaluations which cannot be measured by objective standards... It is virtually impossible to evaluate in objective terms whether or not a given act was instrumental towards the attainment of a particular political goal.”<sup>492</sup>

The third approach is the Anglo-American. It is also referred to as political incidence theory. This is practiced in Britain and the U.S. The British Extradition Act of 1870 does not provide a definition of a political offence. It only states that extradition will not be granted for an “offence of a political character.”<sup>493</sup> However, the definition emerges from case law. In Mill’s view, a political crime is “one committed in the course of a civil war or other political commotion.”<sup>494</sup> Justice Stephen built on that notion by adding that the crime should be “incidental to” and “part of political disturbance” from whence the term political-incidence was derived.<sup>495</sup>

The political-incidence theory was first applied to *in re Castioni* in 1890 involving Switzerland’s request for the extradition of Castioni for having killed a member of the State Council of a Swiss canton.<sup>496</sup> Castioni led an uprising against the government involving large-scale armed attacks in which an official was killed. There was, however, no evidence that Castioni had premeditated the murder, nor was there any indication that he and the victim had ever met. Under the

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<sup>488</sup> *Ktir v. Minister Public Federal*, n.487.

<sup>489</sup> See Alotaibi, n.73, at 199.

<sup>490</sup> *Ibid.*

<sup>491</sup> See Van den Wyngaert, n.437, at 131-132.

<sup>492</sup> *Ibid.*

<sup>493</sup> Extradition Act 1870, s.3 (1), see n. 133.

<sup>494</sup> J. Mill, *On Liberty* (London: Penguin, 1982).

<sup>495</sup> See Alotaibi, n.73, at 200.

<sup>496</sup> *Castioni* [1891] IQ.B. 149.

circumstances, “a more obvious case of a political offence could hardly be imagined.”<sup>497</sup> The extradition of Castioni was refused on the grounds that it was a political offence. The court ruling also established the political incidence approach to interpreting political offences. It stated that:

“The question really is, whether, upon the facts, it is clear that the man was acting as one of a number or persons engaged in acts of violence of a political character, with a political object, and a part of the political movement and rising in which he was taking part.”<sup>498</sup>

The decision in the Castioni case established three criteria which must be fulfilled for a political offence to qualify for exception:

1. There must be a political revolt or disturbance.
2. The act for which extradition is sought must be incidental to the disturbance, or from a part of it.
3. The ideological or political motivation must be established.<sup>499</sup>

The criteria established in the case were further refined in the 1894 case in *In re Meunier*.<sup>500</sup> In this case, France lodged a request for the extradition of Meunier, charged for two explosions, which had killed two people. Meunier described himself as an anarchist. But the court refused to consider Meunier’s crime as a political offence, as it failed the incidence test. This is important, because the political incidence notion was further refined with the addition of a requirement for a two-party struggle, as elucidated in Justice Cave’s statement that “in order to constitute an offence of a political character, there must be two or more parties in the State each seeking to impose the government of their own choice on the other.”<sup>501</sup> This also served to automatically exclude anarchists and terrorists from consideration for the political offences exception.

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<sup>497</sup> See Shearer, n.68, at 170.

<sup>498</sup> See Bassiouni, n.13, at 389.

<sup>499</sup> See Bassiouni, n.20, at 667.

<sup>500</sup> *In re Meunier* [1894] 2 Q.B. 415.

<sup>501</sup> *Ibid.*

Later, in 1954, the English courts dropped the previously “rigid requirement”<sup>502</sup> for an uprising, or civil disturbance in *Regina v. Governor of Brixton Prison, ex parte Kolczynski*.<sup>503</sup> In this case, Poland demanded the extradition of several soldiers, who mutinied on a fishing trawler, for revolt on the high seas. The case began when a group of sailors overpowered the captain and the rest of the crew and brought the vessel into an English port with the aim of seeking political asylum. The sailors applied for a political offences exception to Poland’s demand for extradition, on the grounds that their conversations on the vessel had been overheard with a view to later preparing a case against them based on their political opinions. The justices concluded that, if returned, the sailors would be prosecuted for the political crime of treason. The precedents of *Castioni* and *Meunier* were not directly applicable, since there was no political uprising in this case. The court decided to relax the specific requirement for an uprising, and refused the extradition of Kolczynski and his colleagues. Chief Justice Goddard held that “the revolt of the crew was to prevent themselves from being prosecuted for political offences and in my opinion; therefore, the offence had a political character.”<sup>504</sup>

In *Regina v. Governor of Brixton Prison, ex parte Schtraks* further clarification of the circumstances that could be used for the political offences exception was offered. In this case, Israel had requested the extradition of Schtraks for having refused to comply with a judicial order asking for the return of a child to his parents, but Schtraks refused to return the child on the plea that it would no longer have a strict orthodox education and claimed the political offences exception. The House of Lords refused the application and led Lord Radcliffe to explain this denial by stating that:

“In my opinion the idea that lies behind the phrase ‘offence of a political character’ is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country. The analogy of ‘political’ in this context is with ‘political’ in such phrases as ‘political refugee’, ‘political asylum’ or ‘political prisoner.’”<sup>505</sup>

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<sup>502</sup> See Alotaibi, n.73, at 201.

<sup>503</sup> *Regina v. Governor of Brixton Prison ex p.Kolczynski*, [1955] 1Q.B.540.

<sup>504</sup> *Ibid.*

<sup>505</sup> *Regina v. Governor of Brixton Prison, ex parte Schtraks*, [1964] AC 556; [1962] 3 WLR. 1013; [1962]3 AII ER 529, HL (E).

In 1973, in *Cheng v. Governor of Pentonville Prison*, Great Britain added another requirement to the political incidence test.<sup>506</sup> The U.S. sought Cheng's extradition for the attempted murder of a Taiwanese vice-Premier in New York. The House of Lords denied the request for exception on the grounds that for it to apply the act must be directed against the opposed government and that the U.S. aimed to enforce its own criminal laws (against attempted homicide).<sup>507</sup>

The political-incidence theory for the political offences exception has been applied in the U.S. as well. For instance, the Castioni incidence test was adopted into American jurisprudence in the 1894 case of *in re Ezeta*. The *Ezeta* court defined a political offence as "any offence committed in the course of or furthering of civil war, insurrection, or political commotion"<sup>508</sup> and offences committed "during the progress of actual hostilities between the contending forces."<sup>509</sup> U.S. courts also applied the second prong of the political-incidence test in that the concomitant acts should be geared towards furthering the political cause. In *Ornelas v. Ruiz*, the U.S. Supreme Court ruled that the offences were not politically based, as the "character of the foray, the mode of attack, the persons killed, or captured, and the kind of property taken ... did not advance a political cause."<sup>510</sup>

More recently, there has been considerable opposition to this exception and many have sought its exclusion from treaties and acts. Its existence has been challenged on the grounds that the reasons for which the exception was made have undergone change. As discussed above, originally the exception was developed and accepted in order to maintain world order, but recent incidents have clearly shown that the political circumstances have taken a new turn, which involves terrorism and other crimes which pose a serious threat to world peace.<sup>511</sup>

It has therefore been argued that exceptions to the political offences exception have to be made. Certain acts and crimes should be excluded from this exception to discourage acts of international terrorism, which are arising from increasing globalisation. Following the recent

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<sup>506</sup> *Cheng v. Governor of Pentonville Prison*, [1973] A.C.931.

<sup>507</sup> See Alotaibi, n.73, at 202.

<sup>508</sup> *In re Ezeta*, 62 F. 2d 972 (ND Cal. 1 894).

<sup>509</sup> *Ibid.*

<sup>510</sup> *Ornealas v. Ruiz*, (1896) 161 U.S. 502.

<sup>511</sup> See Alotaibi, n.73, at 190.

terrorist attacks, those involved in terrorist acts should not be granted the exception and be barred from this privilege.<sup>512</sup>

### 3.6.3 The death penalty exception

Recently, there has been increased acceptance of human rights concerns in international extradition. The traditional focus on this issue has been on a fugitive being subject to torture or other gross injustices in the requesting state's criminal justice system.<sup>513</sup> Over the last two decades, considerable attention has been paid to human rights concerns over extradition to states which impose the death penalty. This has become a more pressing matter as more countries around the world have moved away from capital punishment. In Europe, for example, after the Council of Europe adopted an amendment to the European Convention on Human Rights (Protocol 6) in 1985, which abolished the death penalty in peacetime, capital punishment has been abandoned.<sup>514</sup> Protocol 6 was extended under Protocol 13 of the Council of Europe to abolish the death penalty even in times of war.<sup>515</sup> Because of the adoption of the policy, countries which have abolished it are reluctant to extradite fugitive criminals to countries where it is enforced. Generally, these states will extradite a wanted person on the assurance from the requesting state that the death penalty will not be imposed. For instance, U.S. treaties on extradition are couched in terms which follow the discretionary pattern, giving each partner the option to refuse extradition for the death penalty or to stipulate that it is not be imposed if extradition is granted. The following excerpt from the 1971 Extradition Treaty between Canada and the U.S. illustrate how the death penalty exception is worded:

“When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for the offence, extradition may be refused unless the requesting State

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<sup>512</sup> See Alotaibi, n.73, at 210-216 for a fuller discussion of the exception to the exception.

<sup>513</sup> *Ibid* at 263.

<sup>514</sup> Council of Europe, 'Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty', (1983), ETSeries 114.

<sup>515</sup> 'Protocol No.13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty', (2002), ETS 187.



provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.”<sup>516</sup>

In 1989, the seminal *Soering* case was heard, in which the European Court of Human Rights blocked the extradition of a German man from England to Virginia, where he faced capital charges of murder.<sup>517</sup> The court took the view that “the very long period of time spend on death row in...extreme conditions, with the ever-present and mounting anguish of waiting execution”<sup>518</sup> amounted to a breach of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>519</sup> Although no direct reference was made to the death penalty, the fact that in the State of Virginia the death penalty was imposed was vital in reaching the verdict. Sharfstein notes: “*Soering* inspired a series of abolitionist decisions in tribunals around the world. The English Privy Council and high courts in the Netherlands, Zimbabwe, India, South Africa, and Italy all took strong stands against the ‘death row phenomenon.’”<sup>520</sup>

The U.S. has been following an extradition policy whereby it remains committed to the death penalty, which is practiced in some of its states. Recently, there has been intense pressure from countries around the world, particularly from those in Europe, on the U.S. to back away from its commitment to capital punishment.<sup>521</sup>

Bassiouni argues a two-fold rationale for refusing extradition on the grounds that the fugitive criminal is likely to incur the death penalty. These are:

1. The abolition of the death penalty by a given state is predicated on humanitarian considerations and public policy.

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<sup>516</sup> Treaty on Extradition Between the Government of Canada and the Government of the United States of America 1971, Article 6, <[http://www.oas.org/juridico/mla/en/traites/en\\_traites-ext-can-usa4.html](http://www.oas.org/juridico/mla/en/traites/en_traites-ext-can-usa4.html)> accessed 15 July 2009.

<sup>517</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 439 (1989).

<sup>518</sup> *Ibid.*

<sup>519</sup> Council of Europe, ‘Protocol No.6’, see n.257, Article 3.

<sup>520</sup> D. Sharfstein, ‘European Courts, American Rights: Extradition and Prison Conditions’, (2002) 67 *Brooklyn Law Review* 719-727, 729-30.

<sup>521</sup> See Alotaibi, n.73, at 164.

2. It would be therefore abhorrent to the state to grant extradition because this would be using its processes to reach an outcome which is in violation of its laws and public policy.<sup>522</sup>

As pointed out by Alotaibi, “while it cannot yet be said that the imposition of the death penalty is recognised as a violation of international law, it can be argued that the trend is leading in that direction.”<sup>523</sup>

The next three chapters discuss the extradition systems in the U.K. and Saudi Arabia, identify the obstacles to an extradition treaty between the two countries, and argue that an extradition treaty between the U.K. and Saudi Arabia is possible, especially within the framework of international law. If two drastically different countries like the U.K. and Saudi Arabia can resolve the major obstacle to an extradition agreement, then there is hope for an international extradition convention.

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<sup>522</sup> See Bassiouni, n.20, at 623.

<sup>523</sup> See Alotaibi, n.73, at 164.

## **Chapter Four**

### **Extradition and the U.K. judicial and quasi-judicial mechanisms**

#### **4.1 Introduction**

In this chapter, a description is given of the mechanisms governing the extradition system in Britain and the various judicial and quasi-judicial procedures involved in the process. The focus is on providing an overview of the U.K. context and identifying the sources of the extradition system in Britain, with particular attention to the Extradition Act 2003 (EA2003). This chapter argues that the primary concern that the U.K. would have toward an extradition treaty with Saudi Arabia is its concern over human rights and its international human rights obligations, for example, under Protocol 6 of the ECHR. The U.K. would primarily be concerned with the imposition of the death penalty in Saudi Arabia. This concern over human rights is further exacerbated because the U.K. employs a judicial extradition system, while Saudi Arabia employs an administrative system—criticised for its lack of due process.

It can be noted that although Britain has a long history of extradition and is an active member of the EU and a number of other organisations, it is today trying hard to align its extradition system with the emerging norms and trends in the extradition domain, as well as meeting the new challenges. As there is a statutory obligation in U.K. law that all treaty and conventions provisions should be given a legal effect through legislation, extradition acts have been a norm in the history of U.K. law.

This chapter discusses the U.K. approach to jurisdiction principles in the context of U.K. extradition. The U.K. follows more than one approach to jurisdiction, including the principle of territoriality and the active personality principle. The U.K. is obliged to extradite fugitive criminals present in the U.K. against a valid extradition request. At the same time, U.K. extradition law also meets international law principles by providing for internationally

recognised and accepted norms of exceptions for political offences or where there is a likelihood of the extradited person being subjected to treatment that contravenes human rights protection.

This chapter additionally discusses the motives and purpose of introducing the Extradition Act of 2003. The U.K. came under tremendous pressure and world focus to review the existing extradition act after the Pinochet case. This pressure was aided by other developments like the Council Framework Decision, which required Member States to enact the provisions of the Decision. This was given further impetus by the U.K.'s desire to match other countries in having a more efficient extradition system and to accommodate new provisions contained in the treaties and conventions. Also, an attempt on the part of the U.K. government has been made to simplify procedures and make the whole process less cumbersome in order to speed up extradition of criminals wanted by the requesting states – the avowed goals of the EA 2003. At the same time, as has been observed by many writers, the lengthy procedures involved in dealing with an extradition request afford many loopholes to the fugitive. This may result in otherwise valid extraditions falling through the net.

On the whole, the system which aims at expediting the process seems to encourage delays and leaves huge room for adopting delay tactics to either abort the whole extradition attempt or protract. The efforts being made are suggestive of how keen Britain is to introduce and implement extradition laws to make the system even more effective - one which is fit to meet modern challenges like terrorism.

This chapter also describes extraditable offences as well as their controversies and challenges. Under the Extradition Act, Britain follows the extradition crimes list provided by the Council Framework decision of 13 June 2002. Discussion of this is followed by extradition hearing procedures with their detailed processes. The procedures for appeals are also discussed, as were the authorities invested with the power to hear appeals and what procedures are to be followed. The High Courts and the House of Lords are empowered to hear appeals and there can be multiple hearings in a case should new evidence make it essential.

This chapter then discusses the relationship between U.K. extradition law and the human rights protections bestowed by the UNHRC under the ECE. This is important, as it provides impediments to some extradition requests from, for example, the U.S., Yemen, Egypt, and to some degree Saudi Arabia, when Britain refused extradition on the basis of human rights. This has been a victory for human rights organisations and the rule of humanitarian law. Human rights standards have been embedded into U.K. extradition law by imposing bars on extradition where there is a danger of a violation of human rights. As a signatory of the ECHR Rights Convention, Britain has faithfully endeavoured to accommodate the Convention's provisions through the 1989 and 2003 Acts, discussed at length above. The concern for human rights standards and international law principles can partly account for a rigorous regimen of extradition process and the delays that can occur in those proceedings.

#### **4.2 An overview of the U.K. extradition context**

The formal history of extradition law in Great Britain begins with the "Extradition Statutes" of 1843, which constitute the first recognisable statutory mechanism put in place.<sup>524</sup> In the pre-1843 era, "few references to the subject may be found in legal treatises before the first recognisable extradition statutes of 1843."<sup>525</sup> Traditionally, extradition was dealt with under criminal law provisions. Before the formulation of extradition law in Britain in 1843, the authority for refusing or granting a request from a country rested purely with the monarch. Whether the offender was to be 'delivered up' was the monarch's prerogative and extradition was therefore part of the executive power, not the legislative, invested solely in the King or Queen.<sup>526</sup> This gave the extradition system prevalent at the time in Britain an executive character.

After the mid-twelfth century, Britain concluded various treaties with other countries. Since then treaties and agreements have become the main instruments of extradition. This practice continued up to the mid 19<sup>th</sup> century, until in 1843 extradition acts were introduced for the

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<sup>524</sup> These were two treaties given statutory force: An Act for giving effect to a Convention between Her Majesty and the King of the French for the Apprehension of Certain Offenders, 6 & 7 Vict. c.75, and An Act for giving effect to a treaty between Her Majesty and the United States of America for the Apprehension of Certain Offenders, 6 & 7 Vict. c.76.

<sup>525</sup> See Jones and Doobay, n.78, 1-001, at 3.

<sup>526</sup> *Ibid*, citing Clarke, 1-004, at 7.

first time.<sup>527</sup> Britain falls into the category of a common law country. The traditions in law are the basic guiding principles. However, some departures from the traditional approach have been necessitated because of fast changing circumstances in the nature and extent of crimes. Many factors have played a part in shaping U.K. law. “Traditionalists claim that the U.K. constitution is the happy and pragmatic outcome of an evolution towards freedom and democracy ordered by benevolent customs.”<sup>528</sup> Modern trends like globalisation, where boundaries have become meaningless because of developing technologies, have seen the emergence of new forms of crime.

With regard to territorial jurisdiction, in 1963 Britain adopted an approach which was local in character, as the House of Lords, in line with the spirit of the common law, held that “the whole body of the criminal law of England deals only with acts committed in England.”<sup>529</sup> This view was re-affirmed in *Pinochet (No. 3)* by Lord Browne-Wilkinson who held that “[in] general a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries.”<sup>530</sup>

However, a number of inroads have been made through both common law and statute which allow English courts to try persons for acts or omissions not committed within the territory of the U.K.<sup>531</sup> This is referred to as extra-territorial jurisdiction. This shift was voiced in *Liangsiriprasert v. United States* in which Lord Griffiths noted that:

“crime has ceased to be largely, local in origin and effect. Crime is now established on the international scale and the common law must now face this new reality... [There is] nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England...”<sup>532</sup>

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<sup>527</sup> See n. 524.

<sup>528</sup> See Alder, n.32, at 67.

<sup>529</sup> *Cox v. Army Council* [1963] AC 48, per Viscount Simonds at 67.

<sup>530</sup> *Pinochet (No 3)* [2000] 1 AC 147.

<sup>531</sup> Jones and Doobay, n.78, 8.01, at 95.

<sup>532</sup> *Liangsiriprasert v. U.S.*, [1991] 1 AC 225 at 251.

This approach to jurisdiction was formally incorporated through various enactments. For instance, conspiracy formed abroad to commit a crime in England became justiciable under the Criminal Justice Act 1993. Other exceptions to the basic principle of territoriality include conspiring in the U.K. to commit crimes abroad, under the Criminal Law Act 1977, while sexual offences were made justiciable under the Conspiracy and Incitement Act 1996. Similarly, crimes of torture, hostage-taking, and grave breaches of the Geneva Conventions were also made triable under the Criminal Justice Act 1988, the Taking of Hostages Act 1982, and the Geneva Conventions Act 1957. With regard to jurisdiction, Britain follows more than one principle of jurisdiction, in addition to the principle of territoriality, a characteristic approach of common law.<sup>533</sup> For instance, it follows the active personality principle<sup>534</sup> in that it provides that the murder or manslaughter of a British or foreign victim outside the U.K. may be tried in the U.K. if the offender is a British national (Offences Against the Person Act 1861); the offence is bigamy; murder in Germany or on territory under German occupation committed between 1 September 1939 and 5 June 1945 is justiciable provided the offender was a British citizen or resident on 8 March 1990 (The War Crimes Act 1991). This Act also covers any crime performed outside the U.K. by an offender who was or has become a British citizen or resident in the U.K. that constitutes an offence in the other country; and includes rape, intercourse with a girl under 16, buggery, indecent assault, gross indecency, or offences in relation to indecent photographs (Sex Offenders Act 1997). It adheres to the national security principle of jurisdiction in that the integrity of the proceedings in the English courts is protected by extending criminal jurisdiction to cover the offence of perjury, for statements made abroad, before a British tribunal or officer abroad, which are used in England (Perjury Act 1911).

This was extended by the Serious Crime Act 2007, which aimed to bring in two significant developments in crime fighting and prevention: Serious Crime Prevention Orders (which place constraints on an individual's or an organisation's finances, business dealings, associations, means of communication, travel, and use of premises) and Inchoate Offences (which are defined as offences encouraging or assisting crime).<sup>535</sup> Section 52 of the Serious

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<sup>533</sup> See Chapter 3.

<sup>534</sup> *Ibid.*

<sup>535</sup> Serious Crime Act 2007 (c. 27).

Crime Act 2007, states in pertinent part that “[i]f a person knows or believes that what he anticipates might take place wholly or partly in England or Wales, he may be guilty of an offence ... no matter where he was at any relevant time.”<sup>536</sup>

The U.K. is a member of a number of international bodies whose rules bear directly or indirectly upon extradition laws. As a member of the European Union, the U.K. is also a signatory to the European Convention on Extradition and is legally obliged to abide by the extradition rules contained in the Convention’s provisions.<sup>537</sup> The U.K. has also given legal effect to a large number of Convention provisions through enactment. For instance, the human rights protection provided for by the convention has been enshrined in EA 2003.<sup>538</sup>

#### **4.3 Obligations and bars to extradition – a statutory requirement**

In 1841, the House of Lords took a unanimous view that extradition without an Act of the Parliament was unlawful, which required the formulation of extradition statutes in Parliament.<sup>539</sup> This rendered any extradition without statutory provision invalid. In pursuant of the House of Lords’ decision, the first Acts which dealt with extradition were introduced in 1843.<sup>540</sup> After these, a number of extraditions acts were passed to accommodate new developments. The most important of these was the 1870 Extradition Act, which remained largely in force for over a century before being replaced by the 1989 Extradition Act, which in turn was superseded by EA 2003. The statutes oblige Britain to extradite fugitive and accused criminals against a valid extradition request for the extraditable crimes, the list of which has changed from act to act. The latest list is given in Schedule 2 of the Extradition Act 2003 which is based on the European Framework List (see section 4.6.6 below). Thus, extradition is an obligation rather than an option.

The Lords’ ruling also meant that from the introduction of the first extradition Acts, mere subscription to treaties and conventions as instruments of extradition was not sufficient to

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<sup>536</sup> Serious Crime Act 2007 (c. 27).s.52.

<sup>537</sup> Council of Europe, ‘Convention on Extradition’, (13 December 1957) ETS024. The text may be seen at <<http://conventions.coe.int/treaty/en/treaties/html/024.htm>> accessed 16 July 2009.

<sup>538</sup> For example, Extradition Act 2003, s.195, n.39.

<sup>539</sup> See Jones and Doobay, n.33, 1-007, at10.

<sup>540</sup> The Statutes of Extradition, see n.524.



warrant extradition. It was required that all the provisions of these treaties and conventions had to be given legal effect through legislation before they took effect. The extradition Acts not only imposed obligations to extradite a fugitive criminal – accused or convicted – but also provided bars to extradition. EA 2003, for example clearly states the situations in which extradition should be refused.<sup>541</sup> These bars are primarily geared towards accommodating human rights protections. For instance, the statutes prohibit the return of an accused or criminal fugitive to a state where there is danger of the extradited person being subjected to torture or ill treatment or where the death penalty is imposed.<sup>542</sup>

These obligations and exceptions are also in keeping with the international law principles which require states to extradite fugitive criminals against a valid request with a view to reducing and preventing the spread of crime in the world. Bassiouni writes of “the existence of an international duty to preserve and maintain world order.”<sup>543</sup>

#### **4.4 The motives and purposes of the Extradition Act 2003**

Because of weaknesses in the Extradition Act 1989 and a desire to make its process more efficient and to accommodate new developments, the Extradition Act 2003 was introduced. Its avowed aim is to consolidate and reinforce the legal framework for the efficient working of extradition law. EA 2003 has its roots in a review that commenced in 1997 to consider the legislative requirements of two European Union Conventions on Extradition signed in 1995<sup>544</sup> and 1996, as the provision of the Convention have to be given legal effect to become enforceable. However, this review developed into “a much more extensive inquiry following the Tampere Special European Council in October 1999.”<sup>545</sup> The conclusion of the Council was that “mutual recognition of judicial decisions should become the cornerstone of judicial co-operation in both criminal and civil matters within the EU.”<sup>546</sup> In the meantime, the *Pinochet* case revealed many weaknesses of the U.K.’s extradition arrangements and soon after the return of General Pinochet to Chile, the Home Secretary announced in the House of Commons that “a more wide-

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<sup>541</sup> See Extradition Act 2003, n.39, s.11-s.19, for example.

<sup>542</sup> *Ibid*, n.39, s.11-s.19.

<sup>543</sup> See Bassiouni, n.13, at 571.

<sup>544</sup> European Union, ‘Convention on Simplified Extradition Procedure’, (10 March 1995), OJ C 78, and,

‘Convention Relating to Extradition between the Member States of the EU’, (27 September 1996, OJ C 313.

<sup>545</sup> J. Knowles, *Blackstone’s Guide to the Extradition Act 2003* (Oxford: OUP, 2004), at 3.

<sup>546</sup> *Ibid*.

ranging review of the U.K.'s extradition legislation was to be carried out.”<sup>547</sup> The review, which aimed at modernising arrangements between the U.K. and its extradition partners included:

1. The creation of a four-level framework with countries being designated for each tier by Order in Council.
2. A simple fast-track extradition procedure for member states of the EU.
3. Retention of current arrangements for non-European Union states with modifications to reduce the duplication and complexity of extradition procedures.
4. A single avenue of appeal for all extradition cases.
5. Accession to the 1995 and 1996 European Union Conventions on Extradition.<sup>548</sup>

A series of other simultaneous developments also contributed to the framing of the 2003 Act. These were the events of the 9/11 attacks on the U.S. and the consequent onset of the ‘war against terror’ in Western Europe and the U.S. The review was also overtaken by progress in respect of extradition to other EU member states, in particular the Council Framework Decision on 13 June 2002 on the European Arrest Warrant (EAW),<sup>549</sup> which created a system of mutually enforceable arrest warrants within the EU. The events “provided added political impetus for speeding up the extradition of criminal suspects.”<sup>550</sup> The Act also sought to incorporate human rights concerns as approved in the UN Human Rights Convention and subsequent European Convention on Human Rights.

The Act is aimed at:<sup>551</sup>

- Simplifying the extradition process, aimed at expediting extradition cases and making the overall process less cumbersome. This was achieved by introducing new terminology, tightening the procedural time-limits, and restricting the avenues of appeal. For example,

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<sup>547</sup> See Knowles, n.345, at 4.

<sup>548</sup> Home Office, *The Law on Extradition: a Review* (London: TSO, 2001).

<sup>549</sup> European Union, ‘Council Framework Decision on the European Arrest Warrant and the surrender Procedures between Member States’, (13 June 2002), 2002/584/JHA. See also section 4.6.6 of this chapter.

<sup>550</sup> See Knowles, see n.545, at 4.

<sup>551</sup> Jones and Doobay, n.78, 1.25-1.28, at 8.

under the 1989 Act, there was no definitive time period for the receipt of the Authority to Proceed/Order to Proceed (ATP/OTP).

- The most significant feature of the Act is in its limiting of the role of the Secretary of State at the initial stages of the request. This has two effects. First, it reduces the prospect of any proceedings for judicial review at the initial stages of an extradition request. Second, it has sought to make extradition largely a judicial function, particularly in respect of Category 1 territories where there is no involvement by the Secretary of State whatsoever. In other words, the Act changed the extradition process to being purely judicial, rather than judicial and executive as envisaged in the 1989 Act.
- The Act aimed at facilitating the country in discharging its international obligations by consolidating the ‘schemes’ (see section 4.4, following). It focused mainly on the EAW and in its removal of the requirement that a *prima facie* case be shown with respect to countries such as the U.S. and some Commonwealth countries. This requirement was already removed for European Convention on Extradition (ECE) countries.
- The Act replicates some of the terminology used in the 1989 Act such as ‘unjust and oppressive’ and adopts parts of the 1989 Act. For example, s.6 of the 1989 Act is now contained within the bars to extradition in s.11 and s.79 of the 2003 Act.
- At the same time, the Act introduced new terminology to describe the parties and the procedure. Equally, it has introduced new bodies in the extradition process. Whereas, under the 1989 Act a request was deemed to be from a state, the 2003 Act removes all reference to the term ‘state’, instead employing the term ‘territory’. The effect of removal of the concept of state is not yet clear. According to Sambei and Jones, this confusion may lead to long and protracted arguments on the validity of the request and may result in delays.<sup>552</sup>

Another feature of the 2003 Act is the role of the Criminal Prosecution Service (CPS) and responsibility for expenses. The CPS and foreign states hold a solicitor-client relationship. The CPS cannot withdraw without the consent of the client.<sup>553</sup>

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<sup>552</sup> Jones and Doobay, n.78, 1.28, at 8-9.

<sup>553</sup> *Ibid* at 1.33, at 10.

When a full order request is received by the Home Office, it is generally forwarded to those acting for the foreign State (which in most cases is the CPS). The file is examined to ensure that all necessary documents and evidence are present, including disclosure of the identity of the requested person, the law in question, and the offences committed.<sup>554</sup> Once the CPS is satisfied that a request is in good order, a number of steps are taken.<sup>555</sup> When the fugitive is arrested and brought before Bow Street magistrates, the court should be in a position to fix a committed date.

It is important to discuss the extradition procedures of EA 2003 and describe the legal measures, judicial and administrative regulations that facilitate the extradition process to and from Britain. This detailed examination is important because a number of extradition requests from Saudi Arabia to Britain in the 1990s failed because of the detail of the law of the time. These matters are discussed more fully in Chapter 6.

#### **4.5 Extradition procedures under EA 2003**

The 1989 Act was the culmination of many additions and amendments to the seminal 1870 Act. As noted above, the 2003 was a complete review of the law. For this reason, it is used as a point of comparison with the following.

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<sup>554</sup> Jones and Doobay, n.78, at 2.40, at 21.

<sup>555</sup> *Ibid*, 2.40-2.41, at 21-22:

1. The CPS invites the Home Office to issue an ATP/OTP setting out the offences it considers to be disclosed by the file. (The Home Office is required to determine what offences should be cited and it is open to the Home Office to accept or reject the offences recommended by the CPS). The Home Office is also informed if the papers are sufficiently complete or if the CPS requires further information from the requesting state. This is because requests under the 1989 Act are routed through diplomatic channels and thus any supplemental information from the requesting state has to be submitted via the Judicial Co-Operation Unit of the Home Office.
2. The proposed charges are drafted. Although there is no requirement that the order should identify any statutory provision on which the committal charges are based. Lloyd LJ sitting in the Divisional Court in *Farinha (No 2)* stated:  
“of course, the accused is entitled to know the case against him... But this is done by providing the accused with a schedule of charges, which may be amended from time to time to fit the evidence as it comes forward from the foreign state... there is no objection to this course provided always the charges, as amended, remain within the description of the offence specified in the authority to proceed.”
3. The proposed charges are sent to Bow Street Magistrates’ Court (BSMC).
4. The Extradition Unit at New Scotland Yard is contacted, enclosing one copy of the request and the proposed charges (this is for serving on the fugitive when he is arrested). .

The Extradition Act 2003 is geared towards consolidating the schemes conceived in the 1989 Act. In the new Act, what were five schemes in the 1989 Act were recast into the following categories:<sup>556</sup>

- Category 1 territories (gives effect to the European Arrest Warrant (EAW));
- Category 2 territories (covers all bilateral and multilateral treaties);
- International conventions;
- *Ad hoc* arrangements.

For each category the procedure is specified in conformity with the Act. For example, Category 1 territory consists of most of the European Union countries, for which the procedures are quicker than, for instance, those concerning Category 2 territories, which are divided into two sub-categories – those territories that are required to furnish a *prima facie* case and those that are not.<sup>557</sup> ECE countries continue to submit their requests as before; that is, they do not need to demonstrate a *prima facie* case. However, in respect of all other states, the Secretary of State determines which territories will or will not need to show a *prima facie* case. The relevant statutory instrument, the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, sets out this division. First, it lists all the countries in Category 2 and second, it identifies the territories not required to produce a *prima facie* case. All other territories not contained in this list will be required to submit a *prima facie* case.<sup>558</sup>

When a state is seeking the arrest of a fugitive it does so in one of two ways – either by ‘provisional arrest’ or upon the submission of a full request. A provisional arrest is requested when there is a chance of escape, if, say, the fugitive is within a country for a short period of time and may leave if not arrested. By contrast, a full order request is received by the Home Office from where it is generally forwarded it to the CPS.

Under the 2003 Act, Part 1 gives effect to the EAW.<sup>559</sup> This section governs the procedure regarding provisional arrest for Category 1. Sections 2 to 4 of the 2003 Act govern the procedure

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<sup>556</sup> Jones and Doobay, n.78, 1-23, at 7.

<sup>557</sup> *Ibid.*, 2.37, at 20.

<sup>558</sup> *Ibid.*, 2.37, at 20-21.

<sup>559</sup> *Ibid.*, 2.43-2.48, at 22-23.

for arrest under a Part 1 warrant, as opposed to a provisional arrest.<sup>560</sup> The following steps are taken in this case. First, the Category 1 territory submits a Part 1 warrant to the designated authority, NCIS, which must contain the following information:

1. That the arrest warrant is issued by a judicial authority of a Category 1 territory.

In an accusation case, a statement that the person is accused of the offence specified in the warrant and the warrant is issued with a view to seeking his arrest and extradition

2. That the arrest warrant is issued by a judicial authority of a Category 1 territory.

3. In an accusation case, a statement that the person is accused of the offence specified in the warrant and the warrant is issued with a view to seeking his arrest and extradition.

4. In a conviction case, a statement that the person is alleged to be unlawfully at large after conviction in respect of an offence specified in the warrant and the warrant is issued with a view to seeking his arrest and extradition for the purpose of being sentenced or serving the sentence or another form of detention imposed.

5. Other information, including:

- Particulars of identity;
- Particulars of any other warrant issued;
- Particulars of the circumstances in which the person is alleged to have committed the offence (it is not clear what is meant by this), the conduct, the date, time and place of the offence and the law; and
- The relevant sentence if one was imposed.

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<sup>560</sup> Jones and Doobay, n.78, 2.43-2.48, at 22-23.

Second, the designated authority may then issue a certificate if it believes that the authority which issued the Part 1 warrant has the function of issuing warrants in that territory, and the certificate confirms this.<sup>561</sup> Third, once the certificate is issued the warrant may be executed by a constable or customs officer in any part of UK and a copy of the warrant is served on the person after the arrest and the person is brought before the appropriate judge as soon as practicable.<sup>562</sup> The last step is then dedicated to the hearing stages.<sup>563</sup>

Under the law, a constable, custom officer, or service policeman may arrest a person if he believes that a Part 1 warrant has been issued or is about to be issued.<sup>564</sup> This contrasts with the provisions of the 1989 Act, under which the court has to be satisfied that a warrant or any judicial document was in existence in the requesting state.

The Act also provides that the Fugitives Unit may be contacted by the appropriate authority in a Category 1 territory or Interpol or via the Schengen Information System to request the provisional arrest of a person pending the issuance of a warrant in a Category 1 territory.<sup>565</sup>

The Act details the procedure to be followed after the arrest has been made. The person must be brought before an 'appropriate judge' within the 'required period' (forty-eight hours) and the Part 1 warrant, together with the certificate issued by the designated authority, the National Criminal Intelligence Service (NCIS), must be produced. A copy of the warrant must be served on the person after arrest or as soon as practicable after arrest. If the documents are not produced within forty-eight hours (as opposed to served), the arrested person may apply for the matter to be discharged and the judge *must* do so.<sup>566</sup> Once discharged, the person cannot be arrested again under s.5 (provisional arrest).<sup>567</sup> This marks a shift from the provision in the 1989 Act, whereby a provisional warrant could be sought again.

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<sup>561</sup> Jones and Doobay, n.78, 2.43-2.48, at 22-23.

<sup>562</sup> *Ibid.*, n.78, 2.43-2.48, at 22-23.

<sup>563</sup> *Ibid.*

<sup>564</sup> Extradition Act 2003, n.39, s.3.

<sup>565</sup> Jones and Doobay, n.78, 2.24, at 17.

<sup>566</sup> Extradition Act 2003, n.39, s.6.

<sup>567</sup> *Ibid.*, s.6 (10).

At the first appearance, referred to as the ‘initial hearing’ in the 2003 Act, the judge must decide, on a balance of probabilities, whether the person before him is the person referred to in the warrant.<sup>568</sup> If he is so satisfied, then the matter is remanded for the extradition hearing within the permitted period, which is twenty-one days starting from the date of arrest, and the person is (i) informed of the contents of the Part 1 warrant; (ii) provided with the required information about consenting to extradition and an explanation of the effects and procedure of the consent. The consent must be given in writing and, once given, is irrevocable; and (iii) remanded in custody or on bail.<sup>569</sup>

The Act permits any party to apply for an extension of the permitted period. The application is only granted if the judge “believes that it is in the interests of justice to do so.”<sup>570</sup> If the extradition hearing does not begin on or before the date fixed for the hearing, the arrested person is to be discharged, whether or not he applies for the discharge, unless a reasonable cause for delay is shown. As for who has to show ‘reasonable cause for delay’ either that person or his legal representative will have applied for an extension. Sambei and Jones observe that what is not clear, though, is that if the person is not in a position to proceed on the date of the hearing, how his application can be acceded to on that basis under s.8 (5).<sup>571</sup> Similarly, they find it even odder that s.8 (8) of the 2003 Act would require the judge, in the absence of an application under s.8 (7) by the person, to discharge the person unless reasonable cause for the delay can be shown.<sup>572</sup>

In the next step, the matter is then remanded for an extradition hearing, which comprises two stages, namely, “the initial stage of the extradition hearing”<sup>573</sup> and “bars to extradition.”<sup>574</sup> The above is the process for Category 1 territories. There is a process for arrest under certificate for Category 2 territories. The procedure for arrests under certificate consists of four steps.

First, upon receipt of a “valid request,” the Secretary of State *must* issue a certificate (unless there is a competing extradition request under section 126 of the Act) certifying that the request

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<sup>568</sup> Extradition Act 2003, n.39, s.7.

<sup>569</sup> *Ibid*, s.8.

<sup>570</sup> *Ibid*, s.8 (5).

<sup>571</sup> Jones and Doobay, n.78, 5.37, at 64.

<sup>572</sup> *Ibid*, 5.38, at 64.

<sup>573</sup> Extradition Act 2003, n.39, s.10.

<sup>574</sup> *Ibid*, s.11.



is made in an “approved way.” The request must contain a statement that the person is accused of being unlawfully at large after conviction of an offence. Second if a certificate is issued, the Secretary of State sends the documents to the appropriate judge, including the request, the certificate, and a copy of any relevant Order.

Third, once the appropriate judge receives the above documents, he may issue a warrant of arrest if he has reasonable grounds to believe that the offence is an extraditable offence and that there is sufficient evidence/information to justify the issue of a warrant. The warrant is executed by any person to whom it is directed or by any constable or customs officer and it is not a prerequisite that the person carrying out the arrest must have the warrant or a copy in his possession at the time of the arrest.

Fourth, after a person is arrested, he must be served with a copy of the warrant as soon as practicable. Failure to do so allows the person to apply for discharge, and the judge *may* order his discharge. The person must be brought before an appropriate judge as soon as practicable, unless he has been granted bail by the constable or the Secretary of State has received a competing extradition request under section 126 and decides that this request is not to be proceeded with. Failure to bring the person arrested before an appropriate judge as soon as practicable allows the person to apply for discharge, which the judge *must* grant.

As for Category 1 territories, there are a number of steps.<sup>575</sup> Section 73 of the 2003 Act prescribes the procedures for provisional arrest for Category 2 territories, which comprise states that are party to the ECE, treaty countries such as the U.S., Commonwealth countries, overseas dependent territories, and the Hong Kong Special Administrative Region.<sup>576</sup> It confers upon a justice of the peace the right to issue a warrant if he has reasonable grounds to believe that the person sought is accused or convicted of an extraditable offence and has written evidence or information that the person sought is accused of the commission of an offence in a Category 2 territory or is unlawfully at large after conviction.<sup>577</sup> Unlike the provisions of the ECE<sup>578</sup> or treaty provisions, there seems to be no requirement that the person in respect of whom a

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<sup>575</sup> Extradition Act 2003, n.39, s.70, s.71, and s.72.

<sup>576</sup> Jones and Doobay, n.78, 2.30, at 18.

<sup>577</sup> *Ibid*, 2.31, at 18-19.

<sup>578</sup> Council of Europe, ‘Convention on Extradition’, see n.537, Article 16.

provisional warrant is issued be a flight risk. Existing practice may well, however, govern the decision as to whether or not to issue a provisional warrant.

Upon issuance of the provisional warrant, regardless of whether the person authorised to arrest is in possession of the warrant or a copy of it, a person may be arrested. However a copy of the warrant must be served after the arrest has been made and the arrested person should be brought before an appropriate judge as soon as possible, failing which he may be discharged upon an application by the person arrested.<sup>579</sup>

At the first appearance, the judge must:

1. Inform the arrested person that he is accused or unlawfully at large after conviction in a Category 2 territory.
2. Provide him with the required information about consent and explain the effect and procedure of the consent. This consent must be given in writing and is irrevocable.
3. Remand him in custody or on bail (the exception from the general right to bail in extradition proceedings is no longer applicable). The matter is then adjourned for receipt of the documents within the required period.<sup>580</sup>

So far the procedure remains essentially the same as under the Act of 1989. Yet, the Act of 2003 departs from the 1989 Act in that the “landmark” date is different. The 2003 Act provides for the days available to a foreign state for the submission of the request and a certificate to be issued by the Secretary of State under s.74 (11), the required period. Strictly speaking, the time limit remains the same as in the 1989 Act: it only sets out the time period for the Secretary of State’s certificate to be issued. Prior to the 2003 Act, the time limit was only specified for the receipt of the request for extradition, which would then be followed by an adjournment for the issuance of an ATP/OTP, for which no time-limit was set. The 2003 Act does not refer to ATP/OTP, but requires a certificate applying a different test.<sup>581</sup>

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<sup>579</sup> Extradition Act 2003, n.39, s.74.

<sup>580</sup> *Ibid.*

<sup>581</sup> *Ibid.*, s.2.

The Secretary of State then has to issue a certificate insofar as Category 2 territories are concerned, unless deciding that the request is not to be proceeded with.<sup>582</sup> The Act allows for an order of surrender to be made by the “Secretary of State, a Minister of State, a Parliamentary Under-Secretary of State or a senior official.”<sup>583</sup>

The certificate must be issued within the time period stipulated by the 2003 Act. This means that, under the ECE, a European request should previously have been received by the fortieth day and then remanded for the ATP; the court has until the forty-fifth day for the request and certificate to have been received. However, the 2003 Act is identical with the 1989 one in that if the documents are not before the court at the end of the required period, the person will be discharged.<sup>584</sup> Unlike the 1989 Act, under the 2003 Act<sup>585</sup> necessary documents are required.<sup>586</sup>

Once this extradition hearing commences it is divided into parts: (1) the initial stages of the extradition hearing,<sup>587</sup> and (2) bars to extradition.<sup>588</sup> Once the arrest has been accomplished, the hearing takes place.

*Ad hoc* arrangements are dealt with under s.194 of the 2003 Act, and follow the procedures for Category 2 territories.<sup>589</sup> The 2003 Act is mindful of international conventions, which are given effect by s.194. Although in general treated like Category 2 territories, in such cases the terms of the convention and the relevant U.K. statute will influence the procedure.<sup>590</sup> The Act, however, does not make it clear how requests under UN conventions will work with regard to provisional arrest.<sup>591</sup>

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<sup>582</sup> Extradition Act 2003, n.39, s.70 (1) and (2).

<sup>583</sup> *Ibid*, s.101.

<sup>584</sup> *Ibid*, s.74 (10).

<sup>585</sup> *Ibid*, s.70 (9).

<sup>586</sup> Noted by Jones and Doobay, n.78, 2.38, at 21. The necessary documents are the request; the certificate; and a copy of any relevant Order in Council. Upon receipt of the requisite documents, the judge must fix a date, within the permitted period, on which the extradition hearing commences. This time period can be extended at the application of either party provided the judge believes that it is in the interests of justice to do so.

<sup>587</sup> Extradition Act 2003, s.78, see n. 39

<sup>588</sup> *Ibid*, s.79.

<sup>589</sup> Jones and Doobay, n.78, 4.39, at 53.

<sup>590</sup> *Ibid*, 4-40, at 53.

<sup>591</sup> *Ibid*, 2.14, at 15.

## 4.6 The main stages of the hearing

### 4.6.1 Export cases

While all export cases (in which Britain is requested to extradite by another country) were dealt with by the 1989 Act, the scheme determined which part of the 1989 Act would apply. The 1989 Act is essentially divided into two parts – Part III and Schedule 1. There is very little cross-pollination between the two.<sup>592</sup>

Part III applied to all “foreign states,” as defined by s.3 of the 1989 Act. Section 3 (2) of the 1989 Act sets out a list of countries that are *not* foreign states, which means that it covers all the ECE countries and those states with which the U.K. does not have general extradition arrangements, but with which an *ad hoc* arrangement is made: states that have ratified the various UN conventions and are seeking to rely upon that convention as a basis for extradition and countries with which recent general extradition arrangements have been established, Brazil for example.

*Schedule 1* covers all extant treaties, of which there are quite a number. The U.S. is by far the largest ‘trading partner’ of Britain in extradition and so misunderstandings arise, as it is sometimes thought that Schedule 1 only applies to the U.S. If Britain received a request from Thailand or Uruguay, say, this would also fall under Schedule 1. Schedule 1 has its roots in the Extradition Act 1870.

With regard to the steps of the extradition process under the 1989 Act, at each stage a distinction must be drawn between Part III and Schedule 1 cases, which also require procedural steps.<sup>593</sup>

Under the 2003 Act, the distinction drawn is between Category 1 and Category 2 territories. The basic procedure for Category 1 territories, those covered by the EAW, have been summarised by

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<sup>592</sup> Jones and Doobay, n.78, 2.55, at 258.

<sup>593</sup> The following are the general procedural steps:

1. ATP/OTP.
2. Committal proceedings and Section 6 arrangements.
3. *Habeas corpus* and/or judicial review.
4. Petition to the House of Lords.
5. Surrender.
6. Judicial review of the surrender decision.

Sambei and Jones to include the following steps.<sup>594</sup> The process begins with a certificate being issued by the NCIS. Next, an appropriate judge issues a warrant, and the person is arrested. An initial hearing is then conducted. After the initial hearing, an extradition hearing is held. After the extradition hearing, either party may appeal to the High Court and/or the House of Lords. If appeal is denied to the person, then the person is surrendered to the requesting state.

For Category 2 territories, the process includes the following steps.<sup>595</sup> First, the Secretary of State issues a certificate unless prohibited by section 126.<sup>596</sup> The next step is the extradition hearing, which include the initial hearing and a hearing on the bars to extradition.<sup>597</sup> The person can appeal the decision in the hearing to the High Court on questions of law or fact. The person can also afterwards appeal an unfavourable ruling by the High Court to the House of Lords.<sup>598</sup> If the appeal is unsuccessful, then an order is issued to surrender the individual to the requesting states.<sup>599</sup> The individual has one last chance to challenge the surrender order.<sup>600</sup>

#### 4.6.2 Import cases

Extradition in import cases (in which Britain requests another country to extradite) commences in the same way as in export cases i.e. either by provisional arrest or full order request. The export extradition procedure applies *mutatis mutandis* to import cases. Import requests are based on the Royal Prerogative. Thus the prosecuting authorities submit the request to the Home Office, which in turn submits the request to the foreign state.

On that basis, the warrant should, if possible, set out all the offences for which the fugitive is wanted. This has assumed greater importance after EAWs came into force.<sup>601</sup> The foreign state, on receipt of the request makes an arrest, on the basis that a warrant has been issued in Britain. Where the defendant has attended court but has subsequently failed to appear and a warrant of arrest is issued, either the original or a certified copy of warrant may be used. Sambei and

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<sup>594</sup> Jones and Doobay, n.78, 2.63, at 25-26.

<sup>595</sup> *Ibid.*, 2.64, at 26.

<sup>596</sup> *Ibid.*

<sup>597</sup> *Ibid.*

<sup>598</sup> *Ibid.*

<sup>599</sup> *Ibid.*

<sup>600</sup> *Ibid.*

<sup>601</sup> *Ibid.*, 2.67, at 26.

Jones<sup>602</sup> see some confusion in respect of Crown Court warrants. The difficulty arises from the idea that a Crown Court warrant simple states “failed to appear” and this was deemed not to be an extradition crime – hence the insistence on a first-instance warrant. The difficulty that arises is that once a defendant is subject to the jurisdiction of the Crown Court, then the magistrates’ courts is *functus officio*, in that they are no longer seized of the matter. In such circumstances, a magistrates’ court may rightly refuse to issue a first-instance warrant. The procedure to be adopted in such circumstance is that the prosecuting authority should obtain a certified copy of the Crown Court warrant and the indictment. If the judge is prepared to insert the words “failed to appear for the offences contained in the indictment,” then it circumvents the arguments that the only offence upon which the prosecuting authority is seeking the fugitive’s return is failing to attend. If that is not possible, then a certified copy of the indictment may be submitted with the warrant and in the statement of facts the Crown can set out the position, namely, that the warrant relates to a failure to attend for trial for the offences contained in the indictment. That is usually sufficient.<sup>603</sup>

The following information needs to be included in a request for a provisional arrest extradition sent from Britain to a requested state:<sup>604</sup>

1. *Statement of facts.* This may be attached in the letter by the prosecuting authority to Interpol, which will be submitted to the requested state. It is usually a very brief summary of the facts in order to satisfy a foreign judge that the conduct alleged amounts to an extradition crime.
2. *Statement of law.* At this stage all that is set out are the offence and the maximum penalty – no more. Details will follow in the formal request.
3. *Particulars of identity.* Any information is included which will assist, including the address or area where the fugitive might be located. Photographs and/or fingerprints are sent directly to Interpol. In some instances, all the information in (1) and (2) above is sent by the officers and the prosecuting authority simply confirms its intention to extradite and the statement of law.

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<sup>602</sup> Jones and Doobay, n.78, 2.68, at 26.

<sup>603</sup> *Ibid*, 2.68, at 27.

<sup>604</sup> *Ibid*, 2.69, at 27.

The prosecuting authority will inform Interpol confirming its intention to extradite, then, following the fugitive arrest, a full request is sent to the requested state.

#### **4.6.3 Special arrangements**

The above procedures are the general procedures which Britain applies to extradition. There are, however, a number of cases for which special arrangements need to be followed. In order to have a better understanding, four of these special arrangements are discussed further: U.S. cases, European cases, *prima facie* cases, and conviction cases.

##### **a. U.S. cases**

Where the request for a provisional arrest is made to the U.S., the procedure is different. Due to Article VIII of Britain's extradition treaty with the U.S., all of the above information must be sent via diplomatic channels.<sup>605</sup> In practical terms, all the information is sent to the Home Office's Judicial Co-operation Unit for onward transmission to the U.S. The U.S. Department of Justice then deals with the request.

Once the provisional request has been transmitted, the prosecuting authority must prepare and submit the formal request within time-limits of the various schemes. Here it is vital to consider any reservations/declarations a state may have entered regarding time-limits (for example, Holland only allows twenty-one days for submission of the request) and format (Israel and Malta still insist on sworn evidence to prove a *prima-facie* case).<sup>606</sup> Thus, it is essential to consult carefully any reservations/declarations made by states to extradition treaties.

##### **b. European cases**

European formal requests are unsworn and contain the following:

1. *Warrant of arrest* (either original, or a certified copy) in accusation cases. In conviction cases, a certified copy of the certificate of conviction is sent, often with a

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<sup>605</sup> Great Britain, Extradition Treaty between the Government of Great Britain and Northern Ireland and the Government of the United States of America, Washington, 31 Mar 2003, UKTS 13 (2007).

<sup>606</sup> Jones and Doobay, n.78, 2.71, at 28.

certified copy of the indictment attached, as it provides a guide as to the charges of which the person has been convicted, unlike the certificate itself.

2. *Statement of facts.* This is unsworn and generally prepared by the officer. The essential information is the conduct alleged, where it took place (in order to show that English courts have jurisdiction and exhibiting a photograph and/or fingerprints. For conviction cases, the information provided must contain a summary of the offences for which the fugitive was convicted, the chronology of events, information as to when the fugitive escaped, the sentence imposed and the time left to serve and confirmation that the fugitive is unlawfully at large.
3. *Statement of law.* It must contain the speciality guarantee.
4. *Photograph and fingerprints.*<sup>607</sup>

The whole request is translated into the relevant country's language and forwarded to the judicial co-operation unit at the Home Office.

### **c. Prima facie cases**

The countries that require a *prima facie* case to be demonstrated in order for extradition to be granted are mostly Commonwealth countries, overseas territories, the U.S., Brazil, and the Hong Kong Special Administrative Region. Generally any country which is not in the ECE requires a *prima facie* case to be shown. It must, however, be remembered that a *prima facie* case needs to be submitted only in respect of *accusation* cases. Essentially such requests must contain:

1. The warrant for arrest (or a certified copy).
2. A sworn statement from the officer setting out the facts of the case in some detail, the fugitive's whereabouts (unless that is sensitive information), exhibited photographs of the fugitive, and sometimes case summaries.
3. Sworn evidence of the witnesses. The usual practice is to draw up a deposition and exhibit the statement that the witness made to the police as his exhibit.
4. Other relevant exhibits.

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<sup>607</sup> Jones and Doobay, n.78, 2.72, at 28.



5. Sworn statement of law. Section 18 of the 1989 Act (for foreign states) and s.19 (for Commonwealth states and colonies) are included in the 'deposition' in the request. Sections 18 and 19 are the speciality provisions. These are now contained in s.150 and s.151 of the 2003 Act.
6. *Jurat*, namely the document attached at the end of every request which authenticates the whole request.
7. All the above is then sewn up and submitted to the Home Office.<sup>608</sup>

#### **d. Conviction cases**

These are cases for which a fugitive has been tried and convicted of a crime, but has managed to flee the country concerned. Normally, the prosecuting authority would send a European-style request, but sworn. It must contain a summary of the offences for which the fugitive was convicted, the chronology of events, information as to when the fugitive escaped and the sentence imposed and the time left to serve.

Note, when a fugitive is sought in a country with which Britain has no extradition arrangement, there are two options. First, in serious cases, an *ad hoc* arrangement is made, or alternatively, if the offences fall within any of the UN conventions set out in the 1989 Act (and now the 2003 Act) and the relevant convention is ratified by Britain, then the convention acts as a basis for extradition. The second option is that the prosecuting authorities simply do nothing and wait for the fugitive to move (the police can circulate the fugitive as wanted by means of a "red notice").<sup>609</sup>

If an attempt is made to circumvent extradition process, this may be considered as an abuse of process once the fugitive is before the court, causing the prosecution to be stayed.

Generally speaking, import cases do not raise any serious issues of law. This is because the proceedings are conducted in a foreign state in accordance with their law. The relevant law is that of the state to which the request has been sent and the applicable treaty.

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<sup>608</sup> Jones and Doobay, n.78, 2.74, at 28-29.

<sup>609</sup> *Ibid*, 2.76, at 29.

There will be no significant difference with regard to import cases under the 2003 Act, since imports remain an exercise of the Royal Prerogative. Part 3 of the 2003 Act does, however, set out the basic procedures for obtaining warrants and it divides the import scheme into Category 1 territories (EAW) and Category 2 territories (all other countries). In essence the only difference from the steps set out above is in relation to requests to Category 1 territories, where the EAW will be the basis for returning the person to Britain.

For the purposes of obtaining an EAW, the judge must be satisfied that a domestic warrant is in existence before a warrant will be issued.<sup>610</sup> The contents of the warrant are determined by the EAW and must include convincing arguments as well as credible documents.<sup>611</sup>

It is nevertheless, important to assert that the 2003 Act seeks - through its rules and procedures - to limit or remove the role of the Secretary of State in extradition proceedings in order to make them largely a judicial function and to limit the number of challenges that may be mounted.<sup>612</sup> Further, it divides states into Category 1 and Category 2 territories.

#### **4.6.4 Category 1 and 2 territories**

##### **a. Category 1**

Part 1 of the 2003 Act gives effect to the Council Framework Decision of 13 June 2002 between European Union Member States. As stated in paragraph (5) of the Framework Decision, the objective set for the Union to become an area of freedom, security and justice, leading to abolishing extradition between Member States and replacing it with a common arrangement between judicial authorities.

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<sup>610</sup> Extradition Act 2003, n.39, s.142 (2).

<sup>611</sup> *Ibid*, s.142 (4), (5), (6):

1. Confirmation that there are reasonable grounds to believe that the person is accused/convicted of an extradition offence.
2. The person whose extradition is sought is accused/convicted of the extradition offence specified in the warrant and the warrant is issued with a view to his arrest and extradition to Britain.
3. Certificate confirming whether the offence for which extradition is sought is one that falls within the Framework list; whether the offence is an extra-territorial offence and finally the maximum sentence.
4. Speciality

<sup>612</sup> Jones and Doobay, n.78, 3.30, at 38.

Thus, the EAW “represents a move away from diplomatic/judicial proceedings towards a system of surrender between judicial authorities.”<sup>613</sup> The shift of emphasis necessarily entailed the removal of any involvement of the Secretary of State in requests from EU Member States. Thus, the first step with an EAW is receipt by the designated central authority (NCIS in Britain) which *may* then issue a certificate “if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the Category 1 territory.”<sup>614</sup>

The certificate must certify that the “authority which issued the Part 1 warrant has the function of issuing arrest warrants in the Category 1 territory.”<sup>615</sup> Whether this will be the subject of any judicial scrutiny by way of judicial review remains to be seen.<sup>616</sup>

A Part 1 warrant is by a judicial authority of a Category 1 territory, which contains a statement<sup>617</sup> and specific information.<sup>618</sup> The words ‘statement’ and ‘information’ are defined for accusation and conviction cases respectively.<sup>619</sup>

Once the EAW is certified, it may be “executed by a constable or customs officer.”<sup>620</sup> This means that, unlike the 1989 Act, there is no requirement that a domestic warrant be obtained in

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<sup>613</sup> Jones and Doobay, n.78, 3.32, at39.

<sup>614</sup> *Ibid.*

<sup>615</sup> Extradition Act 2003, n.39, s.2 (7).

<sup>616</sup> Jones and Doobay, n.78, 3.33, at 39.

<sup>617</sup> Extradition Act 2003, n.39, s.2 (2).

<sup>618</sup> *Ibid.*, s.2 (3) and 2 (4) for accusation cases, s.2 (5) and 2 (6) for conviction cases.

<sup>619</sup> *Ibid.*, *Statement (accused person)*. The person is accused of an offence specified in the warrant and the warrant is issued for the purpose of securing his return for the prosecution for the offence mentioned in the warrant.

*Information (accused person)*. The warrant must contain:

- Particulars of identity;
- Details of any other warrant issued in the issuing territory for that person;
- Facts of the case;
- Relevant foreign law; and
- Particulars of the sentence which may be imposed in the event of conviction.

*Statement (convicted person)*. The person is alleged to be unlawfully at large after conviction for the offence specified in the warrant and the warrant is issued to secure his return either to be sentenced or to serve the sentence of imprisonment of any other form of detention imposed.

*Information (convicted person)*. The warrant must contain:

- Particulars of identity;
- Details of the conviction for which return is sought;
- Details of any other warrant issued in the issuing territory for that person;
- Particulars of the sentence which may be imposed if the person has not been sentenced for the offence; and

Particulars of the sentence imposed (if the person has been sentenced).

<sup>620</sup> *Ibid.*, s.3(2).

order to execute the foreign warrant of arrest. The person is then arrested and brought before an appropriate judge for the extradition hearing.

## **b. Category 2**

Part 2 of the 2003 Act is concerned with all other countries except for those EU countries that have adopted the EAW. Thus, countries that were formerly described as Part III countries under the 1989 Act and those operating under Schedule 1 to the 1989 Act, for example, the U.S., all now fall under Part 2 of the 2003 Act. As noted in section 4.4 of this chapter above, Category 2 countries are divided into those that are not required to submit a *prima facie* case, and those that are.<sup>621</sup> The Secretary of State *must* issue a certificate upon receipt of a valid request following the submission of the request after a provisional arrest or a full order request,<sup>622</sup> unless the provisions of s.126 of the 2003 Act apply (competing extradition requests). Also, it is important to note that a valid request<sup>623</sup> is one which contains the statement referred to earlier and is made in the approved way. The definition of ‘statement’ for accused and convicted persons are a statement that a person is accused in a Category 2 territory of an offence specified in the request, or a statement that a person is alleged to be unlawfully at large after conviction by a court in a Category 2 territory of an offence specified in the request.<sup>624</sup> According to Sambei and Jones,<sup>625</sup> it remains to be seen how much difference there will be in the nature of information sought under the new Act.

The ‘approved way’ referred to above, as the way in which a valid request is made, is defined as follows:<sup>626</sup>

- British overseas territories - a request is made in the approved way if it is made by or on behalf of the person administering the territory.

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<sup>621</sup> Those countries that are *not* required to submit a *prima facie* case, are all the ECE States, the U.S., under the 2003 Act (previously, were required to show a *prima facie* case) and some Commonwealth countries, namely Australia, Canada, New Zealand and South Africa. Those countries that *are* required to submit a *prima facie* case, namely all the remaining Commonwealth countries and the British overseas territories. In requests received under the various UN conventions from State parties that do not have general extradition arrangement with Britain, as well as in *ad hoc* arrangements, a *prima facie* case must also be demonstrated.

<sup>622</sup> Extradition Act 2003, n.39, s.70.

<sup>623</sup> *Ibid*, s.70 (3).

<sup>624</sup> *Ibid*, s.70 (4).

<sup>625</sup> Jones and Doobay, n.78, 3.42, at 41.

<sup>626</sup> Extradition Act 2003, n.39, s.70 (5-7).

- Hong Kong Special Administrative Region - a request is made in the approved way if it is made by or on behalf of the government of the Region.
- All other Category 2 territories-a request is made in the approved way if it is made by:
  - An authority of the territory which the Secretary of State believes has the function of making requests in that territory; or
  - A person recognised by the Secretary of State as a diplomatic or consular representative of the territory.

The certificate issued must certify that the request is made in the approved way. Thus, unlike the ATP/OTP requirement of 1989 Act is no longer be required to specify the offence(s) under the new Act. "Thus the onus of proving that the fugitive has committed a crime and the burden to prove it now rests with the requesting state rather than the Secretary of State and he is not required to specify the offence(s) under British law."<sup>627</sup> Once the certificate is issued, the relevant official will send a file document containing (the request, the certificate and a copy of any relevant Orders in Council) through the judicial co-operation unit to the appropriate judge. Upon receipt, the country will either issue a warrant for the arrest of the person, or – in provisional arrest cases – fix a date within the permitted period on which the extradition hearing is to start.<sup>628</sup>

#### **4.6.5 The Framework list**

The Council Framework Decision of 13 June 2002 contains a list of generic offences which member states regard as serious.<sup>629</sup> Consequently, the Framework Decision seeks to remove the need for the transposition of conduct in order to satisfy the double-criminality rule. This perceived removal of the double-criminality rule raised a huge concern amongst practitioners, as it was thought that extradition would be granted for offences which are not offences under English law. However, this concern is somewhat misplaced for two reasons:<sup>630</sup>

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<sup>627</sup> Jones and Doobay, n.78, 3.44, at 42.

<sup>628</sup> *Ibid*, 3.45-3.46, at 42.

<sup>629</sup> European Union, 'Council Framework Decision on the European Arrest Warrant', see n. 524.

<sup>630</sup> Jones and Doobay, n.78, 4.19, at 48.

1. The reason for the removal of the double-criminality rule is plain - the EU has, after negotiations, identified core crimes/offences that are criminal in all the relevant jurisdictions and therefore there is an underlying presumption that the rule is satisfied. This removes the need for the conduct to be entered into a conduct transposing exercise.
2. Section 10 (2) of the 2003 Act ('initial stage of extradition hearing') requires the appropriate judge to be satisfied that the offence contained in the warrant is an extradition offence.

'Extradition offence' for the purpose of Category 1 territories is defined by s.64 of the 2003 Act. Unlike the simple definition contained in s.2 of the 1989 Act, the new Act has created a number of definitions. Sambei and Jones observe that it is not clear from the 2003 Act how the sections are to be read, i.e. whether they are mutually exclusive or whether the appropriate judge will apply the entire section in order to be satisfied that the offence contained in the warrant amounts to an extradition offence. The correct view would appear to be that they are mutually exclusive.<sup>631</sup> Similarly, s.64 gives rise to a number of ambiguities. Such ambiguities are further exposed during the initial stage of extradition hearing.

#### **4.6.6 The initial stage of the extradition hearing**

Under the 2003 Act,<sup>632</sup> at the initial stage of the extradition hearing the judge must decide whether the offence specified in the Part 1 warrant is an extradition offence. If the section does not provide a relevant definition, the judge would then turn to the interpretation contained in Section 64 of the 2003 Act. Herein lies one of the difficulties. The old Act "flowed with some level of elegance, the new is [in fact] extremely prescriptive and does not lend itself to easy navigation."<sup>633</sup> Furthermore, the 2003 Act sets out different types of conduct, which can be considered to be extradition offences.<sup>634</sup> This may be regarded as a move away from the more simplified definition under s.2 of the 1989 Act. Section 64 (1) of the 2003 Act states that the section applies where the person is accused, or convinced, but not sentenced.

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<sup>631</sup> Jones and Doobay, n.78, 4.19, at 48.

<sup>632</sup> Extradition Act 2003, n.39, s.10 (2).

<sup>633</sup> Jones and Doobay, n.78, 4.22, at 49.

<sup>634</sup> Extradition Act 2003, n.39, s.64.

Sections 64 (2) to (7) sets out the conditions to be met in order for the conduct to constitute an extradition offence. The 2003 Act divides offences into territorial and extra-territorial offences.

#### 4.6.7 Territorial offences

Sections 64 (2) and (3) of the 2003 Act require the conduct to occur within the territory of the issuing state and set out the conditions which must be met in order for the conduct to amount to an extradition offence. There are three conditions set out in s.64 (2):

1. The conduct must occur in the territory of the issuing state with no part of it occurring in Britain.
2. A certificate must be issued to confirm that the conduct falls within the Framework list.
3. The certificate must confirm that the penalty for the offence under the law of the territory is imprisonment *or other form of detention* for a term of three years or more.

Extra-territorial offences are classified according to s.64 of the 2003 Act and require a number of conditions as well as specific procedures.<sup>635</sup>

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<sup>635</sup> Jones and Doobay, n.78, 4.28-4.30, at 50. Extra-territorial offences require the following: s.64 (4) to (6) of the 2003 Act allow for extra-territorial offences and further split those into three types of conduct. One type of conduct is set out in s.64 (4) (which is identical to s.2 (2) of the 1989 Act), and comprises three conditions:

1. The conduct occurs outside the territory;
2. The conduct is punishable with imprisonment for twelve months or more under the law of the Category 1 territory; and
3. In corresponding circumstances, the conduct would amount to an extra-territorial offence under U.K. law.

A second type of conduct is set out in s.64 (5) of the 2003 Act. Again, three conditions must be met:

1. The conduct occurs outside the territory and no part of it occurs in Britain;
2. The conduct would constitute an offence attracting imprisonment for twelve months or more if it occurred in Britain; and
3. The conduct is so punishable under the law of the Category 1 territory.

Although there is a subtle distinction between subsections (4) and (5) of s.64, it is not clear what it seeks to achieve.

The third type of conduct is set out in s.64 (6). The three conditions there are:

1. The conduct occurs outside the territory and no part of it occurs in Britain;
2. The conduct is punishable with imprisonment for twelve months or more under the law of the Category 1 territory; and
3. The conduct constitutes, or if committed in Britain amounts to, an offence under s.64 (7).

Section 64 (7) however, deals with crimes under the Statute of the International Criminal Court (the ICC), namely, crimes of genocide, crimes against humanity, and war crimes.

#### 4.6.8 Persons convicted and sentenced

Section 65 of the 2003 Act applies to persons convicted *and* sentenced. It provides for identical conditions to those set out under s.64, except that, for offences outside the European Framework list, the person must be sentenced to imprisonment for four months or more.

The following points are worth noting in this respect. First, the Framework Decision purports to identify the most serious offences, yet the 2003 Act does not provide for their commission on an extra-territorial basis. It specifies the Framework list in s.64 (2) but links it squarely to conduct that occurs in the Category 1 territory. Many of the offences included in the Framework list are those which, by their very nature, often have an extra-territorial component: terrorism, human trafficking, drug-trafficking, and money laundering (to name a few). By fixing these offences firmly in the territorial sphere, while at the same time failing to reflect the Framework list in the sections relating to extra-territorial offences noted above, the 2003 Act is extremely prescriptive and, in that light, should have extended the Framework list to both categories. The Framework only extends to Category 1, which is seen as a hindrance in meeting the modern challenges posed by terrorism. It would appear that the only recourse would be to satisfy the appropriate judge that the words “under the law of the Category 1 territory” means “jurisdiction” rather than “territory,” when strictly construed.<sup>636</sup>

Second, in seeking to provide a comprehensive breakdown of what amounts to an extradition offence, the 2003 Act provides no guidance as to how s.64 is to be applied, as noted above in section 4.5.3. If the subsections of s.64 are indeed mutually exclusive, this will pose tremendous difficulties in respect of offences that contain both territorial and extra-territorial elements.<sup>637</sup>

Third, removal of the condition, which appeared in the 1989 Act, that the requesting state bases its jurisdiction on the nationality of the offender, creates difficulties. The rationale behind this change in the 2003 Act is that there has been a general shift to allow the extradition of a state’s own nationals to the place where the offence was committed. The difficulty is that this would necessarily involve a change in the basic law or constitutions of some Member States and unless that is achieved they will continue to remain as Category 2 territories. The small number of

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<sup>636</sup> Jones and Doobay, n.78, 4.32, at 51.

<sup>637</sup> *Ibid*, 4.33, at 51.



Member States in respect of which the EAW is in force reflects this fact.<sup>638</sup> Out of the thirty-eight States that are parties to the ECE, the EAW is only in force with respect to seven of them, namely: Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden, and the U.K.<sup>639</sup>

The procedure for Category 2 territories is identical to that as set out above. Thus the appropriate judge must be satisfied that the “offence specified in the request is an extradition offence.”<sup>640</sup>

#### 4.6.9 The extradition hearing

This stage was known as the “committal hearing” before a district judge sitting at Bow Street Magistrates’ Court under the Act of 1989.<sup>641</sup> However, the 2003 Act provides for a substantive hearing. This, critically, examines the sufficiency of the request by the requesting state for a fugitives’ extradition, although not necessarily in terms of a *prima facie* case (cf. the difference between Category 1 and Category 2 territories). Furthermore the hearing is followed by High Court proceedings referred to as statutory appeals.<sup>642</sup>

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<sup>638</sup> Jones and Doobay, n.78, 4.34, at 51.

<sup>639</sup> *Ibid*, footnote 27, at 51.

<sup>640</sup> Extradition Act 2003, n.39, s.137, (‘Interpretation’) defines an ‘extradition offence’, in respect of requests from Category 2 territories for the extradition of persons accused or convicted but not sentenced, as follows:

- s.137 (2) - the conduct occurs in a Category 2 territory and the conduct when transposed would amount to an offence under U.K. law. The offence is punishable with imprisonment of twelve months or more in Britain and the Category 2 territory. This is identical to an extradition crime under s.2 (1) (a) of the 1989 Act.
- s.137 (3) - the conduct occurs *outside* the Category 2 territory and in corresponding circumstances it would amount to an extra-territorial offence under U.K. law. The offence is punishable with imprisonment of twelve months or more in Britain and the Category 2 territory. This is identical to an extradition crime under s.2 (1) (b) and (2) of the 1989 Act.
- s.137 (4) - the conduct occurs *outside* the Category 2 territory and no part of it occurs in Britain and when transposed to Britain it would amount to an offence under U.K. law. The offence is punishable with imprisonment of twelve months or more in Britain and the Category 2 territory. This is similar but not identical to an extradition crime under s.2 (1) (b) and (3) of the 1989 Act.
- s.137 (5) - the conduct occurs outside the Category 2 territory and no part of it occurs in Britain and when transposed to Britain it would amount to an offence set out in subsection (6). The offence is punishable with imprisonment of twelve months or more in the Category 2 territory (there is no requirement that the offence should meet the penalty threshold under British law. However, given the nature of an offence under the International Criminal Court Act 2001, it is unlikely that they would be punishable with less than twelve months’ imprisonment)
- s.137 (7) states that if an offence in the request is of an offence under military law, then it must also be an offence under the general criminal law of the Category 2 territory, in order to constitute an extradition offence.

<sup>641</sup> Jones and Doobay, n.78, 5.01, at 55.

<sup>642</sup> The process was referred to as *habeas corpus* and judicial review under the 1989 Act. It is important to bear in mind that the Act 2003 is divided into two ‘schemes’: one for Category 1 territories (EAWs) and one for Category 2 territories (*prima facie* and non-*prima facie*) cases where these steps are further taken:

It is important to note that the 2003 Act is much more progressive than the 1989 Act in its procedures and stages. It is an improvement over the older Act by, for example, creating specific procedural provisions for dealing with requests for convicted persons in their absence (conviction *in absentia*).<sup>643</sup>

But, under the 1989 Act, the fugitive could raise a challenge at the magistrates' court and thereafter in any application for a writ of *habeas corpus*.<sup>644</sup> The court would then apply the 'interests of justice' test with guidance from the jurisprudence of the ECTHR in order to determine the issue. The procedure under the 2003 Act is now governed by s.20 in respect of Category 1 territories and s.85 and s.86 in respect of Category 2 territories.

#### **a. Category 1 territories**

Section 20 (1) of the 2003 Act states that

“If the judge is required to proceed under this section (by virtue of section 11) he must decide whether this person was convicted in his presence.”<sup>645</sup>

Upon determining whether or not the bars are engaged, the appropriate judge then has to decide whether the person is alleged to be unlawfully at large after conviction.<sup>646</sup> If so, then the appropriate judge must proceed under s.20.<sup>647</sup> Up until this point it would therefore appear that

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1. First appearance hearing (the 'initial hearing').
  2. Initial hearing (the 'initial stage of the extradition hearing').
  3. Extradition hearing ('bars to extradition').

<sup>643</sup> Extradition Act 2003, n.39, s.86.

<sup>644</sup> *Ibid*, s.6 (2).

<sup>645</sup> *Ibid*, s.20 (1). S.11 sets out the various 'bars to extradition'.

<sup>646</sup> *Ibid*, s.11 (4).

<sup>647</sup> After the steps listed in s.3, the procedure would be as follows:

- Was the person convicted in his presence? If yes, then proceed directly to s.21 ('Human rights'). If the appropriate judge determines that the person was not convicted in his presence, the next step is s.20 (3).
- Under s.20 (3) the appropriate judge must decide if the person deliberately absented himself from the trial. If yes, then no further issue arises under s.20 and the appropriate judge will proceed to human-rights considerations under s.21. If, however, the appropriate judge decides that the person did not deliberately absent himself, then the next step is s.20 (5).
- s.20 (5) considers would the person, if returned, be entitled to a retrial or a review tantamount to a retrial? In order to determine that issue, the appropriate judge must also be satisfied that the person would have his rights to a fair trial protected in accordance with s.20 (8) of the 2003 Act. It is only after he is so satisfied that he may proceed to the human rights considerations under s.21. Clearly, if the judge is not satisfied that the person would be entitled to a retrial or a review tantamount to a retrial, the person will be discharged.

the appropriate judge has made no determination as to the legal status of the person: is he accused, convicted or convicted in his absence? It seems to make little sense to go through the initial hearing, the initial stages of the extradition hearing, and the extradition hearing itself (which engages the bars to extradition) and then, only if the appropriate judge decides that the bars to extraditions are not engaged, is he then required to determine the legal status of the person.<sup>648</sup>

## **b. Category 2 territories**

The appropriate judge will follow identical steps to those under s.20 save for Category 2 territories that are required to adduce a *prima facie* case. Therefore for Category 2 territories the steps are as follows:

1. Initial stages of the extradition hearing (s.78).
2. The extradition hearing (s.78 and s.79).
3. Procedure (s.85).<sup>649</sup>

Where a Category 2 territory is required to produce a *prima facie* case, the appropriate judge must proceed under s.86 and decide whether there is “evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.”<sup>650</sup> If he is so satisfied, then the next step is to consider the question of human rights under s.87. If he is, however, not so satisfied, then the person will be discharged.<sup>651</sup>

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<sup>648</sup> Jones and Doobay, n.78, 6.35, at 82.

<sup>649</sup> *Ibid.* After the steps listed in s.3, the procedure would be as follows:

- Was the person convicted in his presence? If yes, then proceed directly to s.87 (‘Human rights’). If the appropriate judge determines that the person was not convicted in his presence, the next step is s.85 (3).
- Under s.85 (3) the appropriate judge must decide if the person deliberately absented himself from trial. If yes, then no further issue arises under s.85 and the appropriate judge will proceed to human-rights considerations under s.87. If, however, the appropriate judge decides that the person did not deliberately absent himself, then the next step is s.85 (5).
- Under s.85 (5) would the person, if returned, be entitled to a retrial or review tantamount to a retrial? In order to determine that issue, the appropriate judge must also be satisfied that the person would have his rights to a fair trial protected in accordance with s.85 (8) of the 2003 Act. It is only after he is so satisfied that he can proceed to the human-rights considerations under s.87. Clearly if the judge is not satisfied that the person would be entitled to a retrial or a review tantamount to a retrial, then the person will be discharged.

<sup>650</sup> Extradition Act 2003, n.39, s.86 (1).

<sup>651</sup> *Ibid.*, s.86 (6).

Thus the Act has been able to lay down the procedures and criteria very clearly, removing any room for the uncertainties which characterised its predecessor, the 1989 Act, with regard to “conviction in absence” cases.<sup>652</sup>

#### **4.6.10 Habeas corpus and appeals**

“The aim of the 2003 Act is to remove the statutory acknowledgment of the right to make an application for *habeas corpus* under the 1989 Act, and to replace it with a right of appeal to the High Court.”<sup>653</sup> There are different sections for Category 1 and Category 2 territories. The Act lays down that once an extradition order is made by the appropriate judge, the person may appeal to the High Court on a question of fact, or law before the end of the allowed period.<sup>654</sup> What other grounds there could be is not clear.<sup>655</sup> However, it is worth adding here that no appeal can lie if the person has consented to his extradition, or if following consent, the judge is informed that another Part 1 warrant has been issued and has not been disposed of.<sup>656</sup> In order for an appeal to be successful appeal, the Act sets out two main conditions: first, the appropriate judge ought to have decided a question differently, and second, having decided the question differently, he would have been required to discharge the person.<sup>657</sup>

Alternatively, the court may allow the appeal under s.27 (4), which sets out three conditions:

1. An issue is raised at the High Court that was not raised at the extradition hearing; or in the case of *prima facie* requests, there exists evidence that was not available at the extradition hearing.
2. The issue/evidence would have led to the appropriate judge deciding it differently.
3. It would have led to the person’s discharge.

Section 28 allows the issuing authority (i.e. the Category 1 territory) to lodge an appeal on a question of fact or law where a person has been discharged. The legal representative for the Category 1 territory must inform the court immediately of their intention to appeal - so far, this is

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<sup>652</sup> Jones and Doobay, n.78, 6.39, at 84.

<sup>653</sup> *Ibid*, 13-002, at 264.

<sup>654</sup> Extradition Act 2003, n.39, s.26 (3) and (4).

<sup>655</sup> Jones and Doobay, n.78, footnote 13, at 90.

<sup>656</sup> Extradition Act 2003, n.39, s.26 (2).

<sup>657</sup> *Ibid*, s.27 (3).

identical to the 1989 Act. Thus, once the appropriate judge has given his decision, the legal representative must inform the court immediately after the decision is announced. No right of appeal exists if a warrant is withdrawn. The conditions for allowing an appeal are identical to those set out in s.27 of the 2003 Act. At the conclusion of a successful appeal, the High Court must:

1. Quash the discharge order.
2. Permit the case.
3. Or direct the appropriate judge to proceed as he would have been required to do if he had decided the relevant question differently, at the extradition hearing.

The 2003 Act requires the rules of court to prescribe the ‘relevant period,’ within which the High Court must commence the appeal hearing. The relevant period must commence from the date that the warrant was issued and not the date that the extradition order was made. As with the magistrates’ court, the High Court may extend the relevant period in the interests of justice.<sup>658</sup> The term ‘interests of justice’ is not defined in s.31 (4) of the Act, where the phrase occurs, and so is far from clear and begs many questions. In the absence of an objective criterion, the term lends itself to subjective interpretation.

Still at the stage of appeals, either party may do so to the House of Lords, However, under s.32 (4) of the 2003 Act, leave to appeal may only be granted if the High Court has certified there is a point of law and it is a point that ought to be considered by the Lords, or it is of general public importance. Accordingly, an application for leave to appeal must be made within fourteen days of the day that leave is refused.<sup>659</sup> If leave to appeal is granted, the appeal must be made within twenty eight days, starting from the date of leave being granted.<sup>660</sup>

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<sup>658</sup> Where the person lodges an appeal and the High Court does not commence the appeal hearing before the end of the relevant period; then in accordance with s.31 (6) of the 2003 Act, the appeal will be deemed to have been allowed. The same remains the position if a Category 1 territory has lodged an appeal which does not commence within the relevant period. However, as Section 31 (5) of the 2003 Act allows the High Court to extend the time-limits even when the relevant period has expired, this may prevent the discharge of the person.

<sup>659</sup> Extradition Act 2003, n.39, s.32 (6).

<sup>660</sup> *Ibid*, s.32 (7). Under s.33, the House of Lords may either:

- (a) Allow the appeal; or
- (b) Dismiss the appeal.

In the event of the House of Lords allowing the appeal to the person in respect of whom the Part 1 warrant was issued, the House will:

The appeal procedure and relevant criteria for Category 2 territories are set out in sections 103 to 116 of the 2003 Act. They are largely identical to those for Category 1 territories, but there are some differences.<sup>661</sup> Nonetheless, when the Secretary of State makes a decision, the following considerations are taken into account:

- (a) Extradition for more than one offence. Where a request is received under either Part 1 or Part 2 and it comprises more than one offence, the Secretary of State “may by order provided for this Act to have effect with specified modification.”<sup>662</sup>

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- (a) order the person’s discharge;  
(b) quash the order for his extradition, if the appeal was against a decision of the High Court to dismiss an appeal under s.26.

On the other hand, if the High Court allows an appeal under s.26 by the person in respect of whom the Part 1 warrant was issued, and if the authority which issued the warrant brings an appeal under s.32 against the decision of the High Court and the House of Lords allows the appeal, the House must:

- (a) quash the order of the High Court discharging the person;  
(b) order the person to be extradited to the Category 1 territory in which the warrant was issued.

<sup>661</sup> First, given that the Category 2 territories are essentially the same as the ‘schemes’ under the 1989 Act, the same parties remain involved, namely:

- The Secretary of State (at the commencement of proceedings and the surrender stage). The primary difference under the 2003 Act is that the Secretary of State issues a certificate at the start of the extradition proceedings, in contrast to the 1989 Act under which he would issue an ATP/OTP).
- The Magistrates’ Court; and
- The High Court.

Following the extradition hearing, the matter is sent to the Secretary of State to consider surrender of the person. While the person is informed of his right to appeal to the High Court, this right may only be exercised once the Secretary of State has decided whether or not he is to be extradited. Under s.100 (1) (a), the Secretary of State notifies the person of his decision to surrender and at the same informs him of his right of appeal to the High Court. It is worth pointing out that this marks a shift from the 1989 Act where the fugitive could apply for a writ of *habeas corpus* at the conclusion of the committal hearing, and following a decision of the Secretary of State he could challenge the decision to extradite by way of judicial review. This modification apparently aims to cut down the appeal time by postponing the appeal hearing until the Secretary of State has made a decision.

Second, the ‘required period’ for extradition to a Category 2 territory is twenty-eight days starting from the date of the decision of the relevant body, and failure to surrender within that time frame will lead to the discharge of the fugitive unless reasonable cause is shown for the delay.

Third, for the purposes of surrender, the Secretary of State must decide whether he is prohibited from ordering the person’s extradition on any one or all of the following grounds: the death penalty, specialty, and earlier extradition to Britain from another territory. Again this departs from the 1989 Act which required the Secretary of State to consider all the arguments *ab initio*, coupled with any further representations. The defence may submit representations to the Secretary of State at the surrender stage and must do so within six weeks starting from the ‘appropriate day’, that is, the day that the case was sent to the Secretary of State by the appropriate judge. Under the 1989 Act, the defence was given a statutory right to make representations to the Secretary of State, but no time-limits were set by the Act. This is no longer the case.

Fourth, unlike Category 1 territories, it is for the Secretary of State to decide on competing requests, consent to other offences being dealt with, and re-extradition to a Category 1 or 2 territory. For further information refer to: Extradition Act 2003, n.39, s.93-s.96, s.102, Extradition Act 1989, n.39, s.6, s.13 (2).

<sup>662</sup> Extradition Act 2003, n.39, s.207.

(b) National security.<sup>663</sup> The application of this provision purely rests with the Secretary of State. The provision allows him to issue a certificate directing that the request is not to be proceeded with, provided the following conditions are satisfied:<sup>664</sup>

- The person's extradition is sought or will be sought.
- Either that:
  1. in engaging in the conduct alleged the person was acting for the purpose of assisting in the exercise of a function conferred by or imposed under an enactment; or
  2. Following an authorisation given by the Secretary of State the person is not liable under the criminal law of Britain.
- The person's extradition would be against the interests of national security.

It is entirely unclear what effect provision (a) will have, or is indeed expected to have, given that most extradition requests relate to more than one offence.<sup>665</sup>

As regards the national security issue, the Act does not provide objective criteria as to who will determine or what tools may be used, to guide objectively what constitutes an issue of 'national security'. Therefore, the Act, despite many improvements, does not provide an instrument which can guard against subjectivity on the part of government functionaries or unnecessary delays.

It is, however, important to remember that the issue of national security takes priority over any other considerations for all sovereign nation-states. It is not surprising that the Act does not provide a clear definition of what constitutes national security. National security is foremost a state's national interest. British law dealing with terrorism, after the 9/11 attacks in the U.S., and the July London bombings quickly shaped the judicial system and speeded up the process. The process of extradition in Britain is generally slow and lengthy. Patrick Barkham wrote in an article on extradition that "exemptions depend upon the complex treaties agreed. Extradition

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<sup>663</sup> Extradition Act 2003, n.39, s.208.

<sup>664</sup> *Ibid*, s.208 (2)-(4).

<sup>665</sup> Jones and Doobay, n.78,7.44, at 94.

from Britain is reputed to be difficult to secure although, as Pinochet discovered, this is often simply because of the complex judicial procedure an extradition request must go through.”<sup>666</sup> Nonetheless, with the security situation that was felt to exist after the terrorist attacks of the 11<sup>th</sup> September 2001 and subsequently, the slower and more complex procedures loosened, and became more flexible.

#### 4.6.11 Surrender

The remaining stage relating to extradition is surrender. This is when a person is deemed to be extraditable at the conclusion of the judicial proceedings and must be surrendered within the required period. This is further broken down into two parts: First, dealing with instances when the person does not appeal,<sup>667</sup> and second, when an appeal is lodged.<sup>668</sup>

When a person does not lodge an appeal following a decision to extradite, (he or she), must be extradited to the Category 1 territory within ten days, starting from the date of the order, unless the judge and the issuing authority agree a later date, in which case it is ten days starting from the date agreed (referred to as the ‘required period’).<sup>669</sup> The provision is similar for Category 2 territories, except that the required period is 28 days.<sup>670</sup> If the person has not been extradited by the end of the required period, he may apply to the appropriate judge to be discharged, and the judge must order his discharge unless reasonable cause is shown for the delay.<sup>671</sup> Bearing in mind that the same time period applies when a person lodges an appeal - in which case the ten days commence from the date of the decision of the relevant court. Further, while a person may be extradited within the required period, no extradition may take place when the person lodges an asylum claim under s.39, until the outcome of that application is known. A person may claim asylum at any time from the commencement of the proceedings until the final stage.<sup>672</sup> Thus, if a claim for asylum is not made until the end of the proceedings, then this would necessarily have the effect of delaying surrender and frustrating the extradition process.<sup>673</sup> This delay, does not,

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<sup>666</sup> See Barkham, n.27, at 55.

<sup>667</sup> Extradition Act 2003, n.39, s.35.

<sup>668</sup> *Ibid*, s.36.

<sup>669</sup> *Ibid*, s.35 (3) and (4).

<sup>670</sup> Jones and Doobay, n.78, 7-40 and footnote 25, at 93.

<sup>671</sup> Extradition Act 2003, n.39, s.35 (5).

<sup>672</sup> *Ibid*, s.39 (1).

<sup>673</sup> Jones and Doobay, n.78, 7.35, at 92.



however apply if the Secretary of State certifies either that the Category 1 territory to which the person would be returned is the state which would be responsible for determining the asylum claim<sup>674</sup> or that the person would not be discriminated against by the state.<sup>675</sup> Except in accordance with the Refugee Convention of 1951, in both circumstances, the person must not be a national of the requesting state.<sup>676</sup> Then, once a decision on asylum is made, the person may appeal against the findings of the Secretary of State.<sup>677</sup> This however, does clearly bring a separate set of proceedings, and will only be upon the conclusion of the asylum application that the person may be extradited to the Category 1 territory.

#### **4.7 Extradition and the Human Rights: importance and impact**

As a reaction to the horrors of the Second World War, a rapid development in the proliferation of human rights' treaties and international human-rights law took place.<sup>678</sup> This in turn led to a dramatic impact on the domestic law of the U.K., to the extent that U.K. law is now permeated by consideration of human rights as well as extradition law itself. The U.K.'s human rights obligations under international conventions will likely be the single biggest concern it will have in entering into an extradition treaty with Saudi Arabia, and other similar Islamic countries. The source of this concern, as discussed in Chapter 5, is that Saudi Arabia is not a signatory to most, if not all, of the human rights conventions the U.K. must follow. This section discusses in detail U.K.'s human rights obligations and its impact on the U.K. extradition system.

Britain's ratification of treaties and conventions on human rights placed it under an obligation to observe their provisions. Under U.K. law, these instruments have been used as an aid to inform the exercise of judicial discretion and to establish the scope of the common law whenever ambiguity exists,<sup>679</sup> even before the advent of the Human Rights Act 1998 (HRA). This incorporates the provisions of the European Convention on Human Rights (ECHR)<sup>680</sup> into

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<sup>674</sup> Extradition Act 2003, n.39, s.40 (2) (a).

<sup>675</sup> *Ibid*, s.40 (3) (b).

<sup>676</sup> *Ibid*, s.40 (3) (a).

<sup>677</sup> *Ibid*, s.40 (6) and (7).

<sup>678</sup> Jones and Doobay, n.78, 8.01, at 95.

<sup>679</sup> *Ibid*, , 8.10, at 97-98.

<sup>680</sup> Council of Europe, 'The European Convention on Human Rights', see n.41.

domestic law. The adoption of the law constitutes the “most significant development in English human-rights law.”<sup>681</sup>

The *Soering* case is perhaps the most influential case, directly pertinent to the U.K., on the relationship between extradition and human rights.<sup>682</sup> The court in *Soering* stated that the U.K. was responsible for foreseeable consequences to extradition that violates human rights.<sup>683</sup> In *Soering*, the court applied Article 3 of the ECHR and held that there was a real risk that the West German national would be subjected to prolonged inhumane and degrading treatment in death row.<sup>684</sup> The prohibition on extradition for foreseeable human rights violations was also followed in *Ng*. In *Soering*, the court essentially held that the ECHR, to which the UK was a party, trumped the U.S.-UK Extradition Agreement of 1972.<sup>685</sup> The *Soering* court, thus, gave primacy to human rights norms over extradition. A possible support for the *Soering* holding is that human rights receives a higher status from the notions of *jus cogens*, and “the superiority of multilateral human rights conventions that form part of the *ordre public* of the international community.”<sup>686</sup> When states must choose between competing treaty obligations, however, the deciding point will be the interest of the requested state.<sup>687</sup> For the U.K., the interest seems to fall in favour of protecting human rights obligations, especially in light of the HRA and the ECHR, and because “the U.K. does not have any specific legal regulations concerning the obligation to extradite.”<sup>688</sup>

Section 2 (1) of HRA 1998 provides that a court, when determining an issue involving ECHR rights, must take into account the following, whenever made or given, if they appear to be relevant to the case at hand:

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<sup>681</sup> Jones and Doobay, n.78, 8.11, at 98.

<sup>682</sup> *Soering*, for example, influenced the decision in *The Netherlands v. Short*, HR 30 Mar. 1990, NJ 249 (A.H.J. Swart), excerpted and translated in 29 ILM 1375 (1990), and in 22 Neth. Y.B. Int'l L. 432 (1992), cited in Dugard, n.3, at 193 (stating that *Short* “shows the influence of *Soering*.”). Interestingly, many of these case like *Soering*, *Ng*, and *Short* involved extradition to the U.S., where the death penalty may be imposed.

<sup>683</sup> See Dugard, n.4, at 91.

<sup>684</sup> *Soering*, 161 Eur. Ct. H.R. (ser. A) (1989).

<sup>685</sup> June 8, 1972, 28 UST 227, 1049 UNTS 167. See Dugard, n.4, at 195.

<sup>686</sup> See Dugard, n.4, at 195.

<sup>687</sup> *Ibid.* (explaining that international human rights courts do not face the problem of competing treaty obligations because they simply follow the treaty to which they owe an obligation).

<sup>688</sup> See U.N. International Law Commission, n. 196, at 11.

- Any judgement, decision, declaration, or advisory opinion of the European Court of Human Rights (ECrHR).
- Any opinion of the Commission given in a report adopted under Article 31 of the Convention.
- Any decision of the Commission in connection with Articles 26 or 27 (2) of the Convention.
- Any decision of the Committee of Ministers taken under Article 46 of the Convention.

These decisions are only of persuasive character and not a binding authority, however.

Section 3 (1) of HRA 1998 places an obligation on judges that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in such a way which is compatible with the Convention rights."<sup>689</sup>

The implication of this provision is that the 1989 and the 2003 Extradition Acts have to be interpreted, so far as it is possible to do so, in such a way so as not to violate the Convention rights.<sup>690</sup>

The 2003 Act actually incorporates HRA 1998 into section 21 (for Category 1 territories) and section 87 (for Category 2 territories). It states that "[i]f the judge is required to proceed under this section...he must decide whether the person's extradition would be compatible with the Convention right within the meaning of the Human Rights Act 1998 (c.42)."<sup>691</sup> These provisions leave no room for incompatibility with HRA 1998.

Section 4 of HRA 1998, provides that if it is not possible for a judge in any given case to interpret legislation in a way that is compatible with the Convention rights, then he does not possess the ultimate sanction of being permitted to strike down the law, unlike, say, a judge in the U.S. who might declare a U.S. law unconstitutional and therefore invalid.<sup>692</sup> In those circumstances, the only recourse is for a court - in England and Wales, the High Court, Court of

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<sup>689</sup> Human Rights Act 1998, s.3(1).

<sup>690</sup> Jones and Doobay, n.78, 8.16, at 99.

<sup>691</sup> *Ibid*, 8.17, at 99.

<sup>692</sup> *Ibid*, 8.19, at 99.

Appeal, House of Lords or Privy Council - to make a declaration of incompatibility in accordance with the Act.<sup>693</sup>

Section 6 (1) of HRA 1998 bars any public body from acting in any way incompatible with the provisions of the Convention. It sets forth that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right.”<sup>694</sup> A court or a tribunal is a ‘public authority’ for these purposes, which includes Bow Street Magistrates’ Court, district judges, the High Court, the Court of Appeal and the House of Lords. Under the provisions, none of these bodies can act in a way that is incompatible with ECHR rights while dealing with extradition cases.

The exception to this provision is that it would not apply to the situation in which, due to primary legislation, “the authority could not have acted differently.”<sup>695</sup> In such circumstances, the court of tribunal - if it is High Court, the Court of Appeal, or the House of Lords - may only issue a declaration of incompatibility.<sup>696</sup>

This provision is also binding on the Secretary of State as he is also a public authority. Thus under Section 6 of HRA 1998, in deciding whether to issue an Authority to Proceed under the 1989 Act and whether to surrender a fugitive, he too must not act incompatibly with ECHR rights, unless primary legislation obliges him to do so.<sup>697</sup>

However, protected human rights under ECHR fall into three categories: (1) absolute rights, (2) derogable but unqualified rights, and (3) qualified rights. Absolute rights are those covered in Article 3, which prohibits torture, and which cannot be restricted in any circumstances, even in times of war or other public emergency, and that are not to be balanced with any general public interest. Furthermore, there are other absolute rights given in Articles 2 (except for death resulting from lawful acts of war), 4 (1) and 7 of the ECHR.

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<sup>693</sup> Jones and Doobay, n.78, at 99.

<sup>694</sup> Human Rights Act 1998, s.6(1), see n. 689.

<sup>695</sup> Jones and Doobay, n.78, 8.16, at 99.

<sup>696</sup> Human Rights Act 1998, s.3 (s) and s.4, see n. 689.

<sup>697</sup> *Ibid*, s.6 (2).

Derogable but unqualified rights are those from which states may derogate in time of emergency, as provided for by Article 15 of the ECHR. Article 5 (the right to liberty and security) are examples of such rights. Articles 4 (2) and 6 also fall into this category.

Qualified rights are on the other hand, those which are expressly made subject to limitations, or restrictions in the ECHR, as endorsed in the Article on the right to respect for private and family life. This type of right was set out in unqualified terms in Article 8:

1. “Everyone has the right to respect for his privacy, family life his home and his correspondence,”<sup>698</sup> which is made subject to the qualifications in Article 8.
2. “There shall be no interference by a public authority with the exercise of this right except such as in the accordance with the law and it necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”<sup>699</sup>

Similar qualifying provisions are found in Articles 9, 10 and 11 of the ECHR.

The ECHR does not include a right not to be extradited. On the contrary, Article 5 (1) (f) of the ECHR expressly allows a person’s detention for the purposes of their extradition. It recognises that “everyone has the right to liberty and security of person”<sup>700</sup> and that no one will be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

“(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country of a person against whom action is being taken with view to deportation or extradition.”<sup>701</sup>

Article 6 of the ECHR does not cover extradition proceedings as they are not a retrial of a person charged with a criminal offence. The European Commission on Human Rights views that:

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<sup>698</sup> ECHR, see n. 41, art. 8.

<sup>699</sup> *Ibid.*

<sup>700</sup> *Ibid*, art. 5(1) (f).

<sup>701</sup> *Ibid.*

“the word ‘determination’ involves the full process of the examination of an individual’s guilt or innocence of an offence, and not the mere process of determining whether a person can be extradited to another country... and that [the Commission] find, therefore, that the extradition proceedings in question did not involve the determination of a criminal charge against the applicant within the meaning of Article 6 (1) of the Convention.”<sup>702</sup>

In *H v. Spain* (1983), the Commission stated that “the words ‘determination of any criminal charge’ concern the process of examining whether the individual is guilty or innocent and do not refer to proceedings in which the judicial authorities of a state decide whether the individual in question should be extradited to another country.”<sup>703</sup>

Arguably, Article 6 (1) would still apply to extradition proceedings if those proceedings were to be regarded as a determination of the fugitive’s ‘civil rights’ i.e. the civil rather than human rights, not to be removed from the country.<sup>704</sup> Sambei and Jones explain that if so, then extradition proceedings would still have to conform to the minimum requirement that they be a “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>705</sup>

If, on the other hand, the fugitive’s human rights are violated as a result of him being returned to the requesting state, the ECHR, and therefore, HRA 1998, might be engaged (see the *Soering* case).<sup>706</sup> Both the ECHR and the Canadian Supreme Court, for example, have “developed jurisprudence that in most (if not all) cases prohibits extradition of capital defendants to the United States without assurances that the death penalty will not be sought.”<sup>707</sup> To Sambei and Jones, on the other hand, the *only* logical interpretation is that *whenever* a state risks putting the

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<sup>702</sup> *E.M. Kirkwood v. U.K.*, Council of Europe: European Commission on Human Rights, 12 March 1984, available at <http://www.unhcr.org/refworld/docid/3ae6b6fc1c.html> (last accessed 10 March 2010).

<sup>703</sup> *H v. Spain* (1983) 37 DR 93

<sup>704</sup> See generally Jones and Doobay, n.78, at 99.

<sup>705</sup> Jones and Doobay, n.78, 8.29, at 102.

<sup>706</sup> *Soering v. U.K.*, (1989) 11 EHRR 439.

<sup>707</sup> V. Jackson, ‘World Habeas Corpus,’ (2006) 91 Cornell L. Rev. 303, citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989); *United States v. Burns*, [2001] 1 S.C.R. 283; and *Judge v. Canada*, U.N. Human Rights Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/829/1998 (Oct. 20, 2003).

fugitive at risk of one of his human rights being violated by returning him to another state, then the returning state is itself acting in violation of that human right.<sup>708</sup>

Another case of interest in this regards is *Ng v. Canada*,<sup>709</sup> where the HRC found that Canada had violated the petitioner's right under Article 7 of the ICCPR to be free from "torture or ...cruel, inhumane or degrading treatment of punishment" since *Ng* was to face the death penalty by gassing. The form of death may be such as to render expulsion inhumane.<sup>710</sup>

The HRC, in a more recent case, also made a similar decision in *Judge v. Canada*,<sup>711</sup> where Roger Judge was deported back to Pennsylvania's death row in 1998. Although *Judge v. Canada* was a deportation case and not an extradition case like *Ng v. Canada*, making *Ng v. Canada* more pertinent to this thesis, the HRC in *Judge* likewise expressed the view that Canada violated its obligations under the ICCPR by deporting a U.S. citizen facing the death penalty to the United States without receiving assurances that the individual would not be executed.<sup>712</sup> These two cases show a strengthening of the HRC's position that extraditing an individual to a country which imposes the death penalty violates the ICCPR.

It is interesting to point out that the ECHR does not itself abolish the death penalty. Nor does it state that carrying out the death penalty is a violation of the right to life. In fact, Article 2 (1) of the ECHR expressly contemplates the death penalty by stating that "...no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."<sup>713</sup> However, the Sixth Protocol to the ECHR, which was ratified by Britain, does abolish the death penalty, at least in times of peace. Article 1 ('Abolition of the Death Penalty') stipulates that "the death penalty shall be abolished. No one shall be condemned to such penalty or executed."<sup>714</sup> Yet Article 2 ('Death Penalty in Time of

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<sup>708</sup> Jones and Doobay, n.78, 8.30, at 102.

<sup>709</sup> *Ng v. Canada* [1991] 2 SCR 858.

<sup>710</sup> *Ibid.*

<sup>711</sup> *Judge v. Canada* (No. 829/1998), U.N. Doc. CCPR/C/78/D/829/1998, decision date August 13, 2003.

<sup>712</sup> *Ibid.*

<sup>713</sup> ECHR, see n.41, art. 2(1).

<sup>714</sup> Council of Europe, 'Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty,' see n.257.

War’) of the Sixth Protocol contemplates that ”a State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war...”<sup>715</sup>

Therefore, extradition of a person to a state where he might face the death penalty is not in itself a contravention of the ECHR, although it would violate the Sixth Protocol. Hence, prior to 1999, English extradition law did not place any restriction on the return of a person to a state where he might be executed.

However, the situation changed with the European Convention on Extradition, as Article 11 provides that a state may turn down the request to extradite a person when the offence for which extradition has been requested is punishable by death in the requesting state but not in the requested state, unless the latter receives assurances from the former that the sentence will not be carried out. The 1989 Act clearly states that:

“the Secretary of State may decide to make no order for the return of a person accused or convicted of an offence not punishable with death in Great Britain if that person could be or has been sentenced to death for that offence in the country by which the request for his return is made.”<sup>716</sup>

The 2003 Act prohibits extraditing a person when he may face the death penalty. Under the Act, a state will cease to be designated as a Category 1 territory “if a person found guilty in the territory of a criminal offence may be sentenced to death for the offence under the general criminal law of the territory.”<sup>717</sup> The provision for Category 2 territories (s.94) states that:

1. The Secretary of State *must not* order a person’s extradition to a Category 2 territory if he could be, will be, or has been sentenced to death for the offence concerned in the Category 2 territory.
2. Subsection (1) does not apply if the Secretary of State receives a written assurance which he considers adequate that a sentence of death:

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<sup>715</sup> ECHR, see n.41, art. 2. It is important to add here that Britain has now abolished the death penalty also in times of war.

<sup>716</sup> Extradition Act 1989, n.39, s.12 (2) (b).

<sup>717</sup> Extradition Act 2003, n.39, art. 2.



- (a) will not be imposed, or
- (b) will not be carried out (if imposed).<sup>718</sup>

Article 3 of the ECHR covers torture, deliberate inhuman treatment causing very serious and cruel suffering; inhuman treatment, treatment that causes intense physical or mental suffering; and degrading treatment, treatment that arouses in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim and possibly breaking his or her physical or moral resistance.<sup>719</sup>

In view of the laxity of definition associated with these terms, they are liable to be interpreted variously. However, their definitions are evolving as a matter of international national case law.<sup>720</sup>

Britain has not only refused to extradite suspect territories to the U.S. (despite the existence of an extradition treaty), but has remained firm in not sending back alleged offenders to the Kingdom of Saudi Arabia. This dual rejection is for a number of reasons. Some were directly related to the lengthy and complex system of extradition as well as the lack of witness testimony and proof, whereas others were subject to a lack of an existing extradition treaty.<sup>721</sup> More important is the growth of human rights organisations and their pressure (occasionally backed by other non-governmental organisations).<sup>722</sup> For example, when King Abdullah of Saudi Arabia visited Britain (the first by a Saudi monarch in twenty years), British protesters, coming from a number of political and human rights circles, were enraged. In other instances, Britain has refused to hand over a number of Islamic militant to Egypt in the past, by fear that they would be executed. One example is Anwar Sadat.<sup>723</sup>

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<sup>718</sup> *Soering* (1989) 11 EHRR 439. *Soering* could not take benefit from this provision as his extradition to the U.S. was carried out before Britain ratified the Sixth Protocol (see n.624). Now the U.K. has to seek assurances from the requesting state that the returned person will not be executed if the offence for which his return is sought is punishable by the death penalty.

<sup>719</sup> ECHR, see generally n.41.

<sup>720</sup> *Jones and Doobay*, n.78, 8.43, at 105.

<sup>721</sup> Discussed in more detail in section 4.8 of this chapter.

<sup>722</sup> See *Alotaibi*, n.73, at 327.

<sup>723</sup> See generally *Bazzi*, n.28. (explaining that “a former leader of Islamic Jihad, the group that assassinated President Anwar Sadat in 1981. Al-Sirri, who was granted asylum in Britain, has been sentenced to death in absentia by an Egyptian military court. Abu Hamza al-Masri is another leading Egyptian militant who won asylum in Britain. He was arrested last year at the request of U.S. officials, and he is fighting extradition to the United States. Egypt has also sought to extradite al-Masri from Britain.”)

The existence of a formal extradition treaty with a country does not necessarily guarantee the handing over of the alleged offenders to the requesting country. This, as has been discussed earlier,<sup>724</sup> is for a number of legal, administrative, judicial, and human rights considerations, as well as economic pressures. This is discussed later in this chapter. For example, there are some instances of failed extradition requests between Britain and the U.S., despite the existence of an extradition treaty.

On the prohibition of torture, Article 3 of the ECHR provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>725</sup> Article 3 is a fundamental human right from which no deviation is allowed under the ECHR.

The United Nations Convention against Torture 1984 entered into force on 26 June 1987. The provision was incorporated into English law by virtue of s.134 of the Criminal Justice Act 1988 which applies to torture wherever committed by any offender irrespective of his nationality. In this way, the crime of torture knows no bounds and has universal jurisdiction. This was of central relevance in the case of *Pinochet*.<sup>726</sup> The House of Lords reheard Spain’s appeal against the Divisional Court’s decision to grant judicial review and to quash the provisional warrant issued by Bow Street magistrates for Pinochet’s arrest. The issues before the House were whether Pinochet, who was accused of committing acts of torture in the capacity of a public official or person, was charged with an extradition crime within the meaning of s.2 of the 1989 Act. The House ruled that “only those parts of the conspiracy to torture and the torture charge relating to the period after 29 September 1988 (the date when Section 134 (1) of the 1988 Act came into force) were extradition crimes.”<sup>727</sup> The House also ruled that Pinochet, who was a senator, did not enjoy immunity in respect of acts of torture and conspiracy to torture which he had allegedly committed after the Torture Convention had been ratified by Spain, Chile, and Britain. The case is important in that it establishes the universality of the crime of torture and renders it an extraditable crime in English law, in conformity with the human rights law. However, there is a

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<sup>724</sup> See, for example, Chapter 2 and the discussion of the background to the 1843 treaty between Britain and the U.S.

<sup>725</sup> ECHR, see n.41, art. 3.

<sup>726</sup> *Pinochet (No 3)* [2000]1 AC 147.

<sup>727</sup> *Ibid.*

loophole in cases where offenders are ill or pretend to be so. The *Pinochet* case was a good example.<sup>728</sup>

What it implies is that extraditing a person to a state where it is likely that he would be subjected to torture or inhuman or degrading treatment of punishment would be in violation of ECHR provisions. *Soering* is an illustration of this phenomenon.<sup>729</sup> As a general practice, the courts do not pay particular deference to the Secretary of State's factual conclusion if there is a risk of torture if the fugitive is returned.<sup>730</sup>

The burden of proving that there is a real risk of treatment in the requesting state which would reach the Article 3 threshold is on the fugitive. Another string attached is the risk is to be assessed at the time when the court considers the case. Under the 2003 Act, the judge hearing the case must decide whether the extradition would be compatible with the ECHR.<sup>731</sup>

Article 5 of the ECHR exists to protect citizens from arbitrariness. Subsection (1) (f) of the Article does contemplate the lawful arrest and detention of a person for the purposes of extraditing him subject to certain safeguards. Article 5 (4) of the ECHR establishes the right to challenge the legality of the arrest and/or detention by providing that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."<sup>732</sup>

Challenging the legality of detention is a "self-standing right."<sup>733</sup> What this means is that even if a person has in fact been lawfully detained for extradition proceedings, if he is not able to *challenge* his detention before a court, Article 5 (4) is violated. Another question raised by

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<sup>728</sup> See generally Barkham, see n.27. ("In March 1998, Jack Straw used this power to block the German government's demand to return Roisin McAliskey - then imprisoned in Britain - to stand trial in Germany for the bombing of a German barracks. He ruled she was too ill; General Pinochet hopes to benefit from a similar appeal to ill-health, which could yet see Mr Straw blocking his extradition to Spain.")

<sup>729</sup> *Soering v. U.K.*, (1989) 11 EHRR 439.

<sup>730</sup> *R v. Secretary of State for the Home Department*, [2007] All ER (D) 304 (May), [2007] EWHC 1109 (Admin), [2007] EWHC 243 (Admin), [2007] All ER (Q) 411 (Mar).

<sup>731</sup> Extradition Act 2003, n.39, s.21 (1).

<sup>732</sup> ECHR, see n. 396, art. 5(4). This protection is equivalent to the protection afforded by the writ of *habeas corpus* in Anglo-American law. As it applies to all challenges to the legality of a detention, therefore, it also applies to extradition proceedings.

<sup>733</sup> *Jones and Doobay*, n.78, 8.47, at 106.

Sambeil and Jones is whether the challenges to extradition that may be raised by a person detained in Britain satisfy the requirements of Articles 5 (4) of the ECHR, as the scope of the review in these cases is somewhat limited.<sup>734</sup> For example, for a judicial review the challenge to the decision taken must fall within certain grounds which may not be broad enough for the purpose of Article 5 (4) of the ECHR.

“Detention for the purposes of extradition has to be in good faith.”<sup>735</sup> Extradition cannot be achieved through deportation or other form of disguised extradition. It has to be conducted with due diligence, or it will cease to be lawful.<sup>736</sup>

The right to a fair trial is another fundamental right which is dealt with in Article 6 of the ECHR. This basically has to do with the criminal law within the country. Although extradition proceedings are concerned with whether or not a fugitive should be returned to the requesting state, the proceedings are characterised as criminal for the purpose of domestic law. Hence the Article interacts with English extradition law, as the U.K. is likely to violate the provisions of Article 6 “if it were to return a fugitive to a requesting state where he would not receive a fair and public trial.”<sup>737</sup>

This consideration led the ECHR to hold in *Soering* that:

“the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.”<sup>738</sup>

Article 8 protects the human right to respect for a person’s “private and family life, his home and his correspondence.”<sup>739</sup> However the right has been qualified by providing that:

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<sup>734</sup> Jones and Doobay, n.78, 8.48, at 106.

<sup>735</sup> *Ibid.*

<sup>736</sup> *Ibid.*

<sup>737</sup> *Soering v. U.K.*, (1989) 11 EHRR 439.

<sup>738</sup> *Ibid.*

<sup>739</sup> *Ibid.*, citing ECHR, n.41, art. 8.

“there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”<sup>740</sup>

Circumstance like “disproportionate infringement of his right to family life, or that returning him to the scene of traumas suffered in the requesting state would infringe his psychological integrity, which has been recognized as part of the right to private life”<sup>741</sup> are the grounds often invoked by those claiming in immigration and asylum cases. These are also common grounds raised in extradition proceedings, mostly in applications for *habeas corpus* where the fugitive may claim that it would be oppressive to return him given the passage of time or because he has started a family life in this country. Despite the enormity of adopting these potential infringements of Article 8 of the ECHR, the chances of their success are not very high as it is hard to sustain such arguments. The European Commission in *Lauder* took the stance that “[the Commission] considers that it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life.”<sup>742</sup>

The 2003 Act makes explicit reference to human rights in sections 21, 87, and 195. In particular, section 21 of the Act is unequivocal in providing that “[i]f the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person’s extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.”<sup>743</sup>

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<sup>740</sup> ECHR, n.41, art. 8.

<sup>741</sup> See I. Macdonald and F. Webber (eds.), *Macdonald’s Immigration Law and Practice*, 5<sup>th</sup> ed. (London: Butterworth, 2001), at 296.

<sup>742</sup> *Lauder v. U.K.* [1997] 25 EHRR CD 67.

<sup>743</sup> Extradition Act 2003, n.39, s. 21.

#### 4.8 Extradition arrangements with other countries

This section considers, as a cautionary note before continuing to discuss the possibility of a U.K.-Saudi extradition treaty, how even the closest of allies can have disagreements over extradition and refuse to co-operate. The United Kingdom and the United States are very close allies and have collaborated intimately in dealing with international situations in Afghanistan and Iraq. The union for the so-called war on terrorism has been subject to criticism at home and abroad. Despite this willingness and readiness to co-operate, the two countries are very different when it comes to the legal systems they practice. Britain has a common law traditions shaped by her various roles as a sovereign state in her own right, a former colonial power, a member of the Commonwealth and more recently a member of the European Union. By contrast, the United States practices civil law, which disallows the handing over of its nationals to other countries. In particular, the extradition of political criminals and diplomatic immunities has been stumbling blocks in the smooth functioning of extradition requests from either side. This has always been a matter of political dispute between governments for various reasons. These differences appear to stem from the approach taken to viewing political offences. There is a wide gap between the laws and systems of these two countries based on their different cultures, traditions and customs. Theoretically, these differences should be a source for inspiration, building on their experiences in order to create an effective mutual co-operation in the extradition of criminals, but that does not seem to be the case. These arguments often block extradition of political criminals, as states either cite their sovereignty or human rights as causes preventing them from extraditing political criminals, regardless of the existence of treaties of extradition between them. The following cases illustrate the point.

In *Mackin*,<sup>744</sup> the British government requested the U.S. government in 1972 to extradite Mackin, who was a member of the Irish Republican Army (IRA), and was accused of injuring a British soldier.<sup>745</sup> The U.S. government rejected the British request, arguing that the crime was a political crime, citing in this respect, the precedent in *Castioni*.<sup>746</sup> The court explained that (1) Mackin was involved in a political uprising in Belfast where the crime was committed, (2) he

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<sup>744</sup> *U.S. v. Mackin*, (1981) 668 F.2d 122.

<sup>745</sup> M. Leich, *Digest of the United States Practice in International Law 1980*, (Washington: Legal Adviser to the Department of State, 1985), at 233.

<sup>746</sup> T. Molner, 'Extradition: Limitation of the Political Offence Exception', (1986) 27 Harv. Int'l L. J. 270.

was an active member of the PIRA, and (3) the crime committed against the British soldier was incidental to the role of Mackin's role in the PIRA's political uprising.<sup>747</sup>

*McMullen* illustrates how difficult extradition can be even among close allies.<sup>748</sup> The events of this case took place in 1979, when the United Kingdom requested the United States to extradite McMullen, a member of the IRA, who was accused of attacking a British military camp called Cloro. The U.S. court concluded in *McMullen* that the accused was involved in political violence that aimed to achieve political objectives.<sup>749</sup> Consequently, what he committed was a requirement of the uprising and, accordingly, the crime was a political offence that did not warrant extradition. The *McMullen* court held that “[a] political disturbance with terrorist activity spanning a long period of time cannot be disregarded even if, in fact, the PIRA lifted not one single finger in either Northern Ireland or Great Britain...”<sup>750</sup>

No extradition case was as controversial as *Doherty*,<sup>751</sup> in which Britain requested the U.S. in 1984 to extradite Doherty, an IRA member, who was accused of murdering a British soldier and escaping his jail sentence.<sup>752</sup> The *Doherty* court held that the crime was of a political character and that the attack was not a random attack and did not target civil servants or cause indiscriminate injuries.<sup>753</sup> The court also noticed that there was no hostage taking involved and no flagrant violation of the basic principles of international law, and that the incident took place in a land experiencing political upheavals.<sup>754</sup> The court verdict caused immense anger in the United Kingdom, and even an American official described the verdict as being outrageous.<sup>755</sup>

Constant rejections by American courts of efforts to extradite accused members of the IRA to Britain prompted the latter to sign, in 1985, a protocol to the extradition treaty of 1972 with the United States. The main objective of the protocol was to tighten the principle of non-extradition for political offences. Article 1 of the Protocol stipulated that several crimes would not be

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<sup>747</sup> S. Lubet, 'Extradition Reforms: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists', (1982) 16 *Corn. Int'l L. J.* 285.

<sup>748</sup> *McMullen v. Immigration and Naturalization Service*, (1981) 658 F.2d 1312; (1986) 788 F.2d 591.

<sup>749</sup> *Ibid.*

<sup>750</sup> See Bassiouni, n.20, at 680.

<sup>751</sup> *Doherty*, 599 F.Supp. 270, (SDNY) 12 Dec 1984.

<sup>752</sup> See Bassiouni, n.75, at 687-692.

<sup>753</sup> See Molner, n.746, at 270.

<sup>754</sup> *Ibid.*, at 270.

<sup>755</sup> *Ibid.*, at 271.

covered by the principle of non-extradition for offences of a political character.<sup>756</sup> These offences are the following:

1. Any offence or crime that the parties agreed upon by virtue of the extradition treaty that require the extradition or the trial of the person concerned.
2. Homicide, any aggression with the intention to create dangerous physical injury, or crimes of rape.
3. Crimes of kidnap, hostage taking, or unlawful detention.
4. Crimes involving the use of bombs, missiles, automatic weapons, explosives, mail or parcels, if it put the life of others in jeopardy.
5. Commission of any of the above mentioned crimes or complicity with others attempting to commit these crimes.

It is clear from the cases cited here why there was an immense resentment in the United Kingdom at the lack of co-operation on the part of the American courts with respect to extradition; especially when the United Kingdom was fully co-operating and was duly responsive to United States' requests for extradition. In numerous cases, extradition requests from the United States were successful. The following case is an illustration of British co-operation with the United States.

In 1972, the U.S. requested the U.K. to extradite individuals who were accused of theft and burglary from the offices of the U.S. Internal Revenue Services and the Ministry of Justice, from where they stole secret government documents relating to the church of which the accused were members. The accused argued that their crime was a political one and they should not be extradited. However, the court found that the church was involved in a long dispute with the Internal Revenue Service in order to be exempted on the grounds that it was a religious organisation. The church also had a dispute with the Food and Drugs Standards Agency regarding the use of unauthorised materials for praying purposes. There was also additional evidence that the church and its members were involved in criminal activities. Accordingly, the

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<sup>756</sup> M. Bassiouni, 'The "Political Offence Exception" Revisited: Extradition Between the U.S. and the U.K.: a Choice Between Friendly Co-operation Among Allies and Sound Law and Policy', (1987) 15 *Denv. J. of Int'l Law and Pol'y* 261.



court concluded that the theft and other crimes committed did not qualify as political offences. Thus, the court stated that:

“The applicants did not order these burglaries to take place in order to challenge the political control or the government of the United States; they did so to further the interest of the Church of Scientology and its members...it would be ridiculous to regard the applicants as political refugees seeking asylum in this country.”<sup>757</sup>

If the arguments and the position of the British court in the previous case are as legal as they seem, it should be noted that this is not always the case, as the personal convictions of the politicians or government might affect the outcome of an extradition request. This is exemplified by a case in which the government of Israel requested the U.S. to extradite Ziad Abu Eain in 1979. Abu Eain was a member of the Palestine Liberation Organisation. He was accused by Israel of placing a bomb in a market, causing the death of two persons and injury to thirty-six in 1971.<sup>758</sup> The Judge presiding over the proceedings allowed the extradition of Abu Eain and rejected his arguments that his offences were of a political character. The court said that “there is no link between the method used and the intended objective, where the act does represent an aggression against the state.”<sup>759</sup> The court went on to say that:

“the exception does not make a random bombing intended to result in the cold blooded murder of civilians incidental to a purpose of toppling a government, absent of a direct link between the perpetrator, a political organization’s political goals and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger political objective of the person who sets off the bomb may be to eliminate the civilian population of the country.”<sup>760</sup>

Furthermore, the court emphasised that the position of the United States depended on the following tests:<sup>761</sup>

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<sup>757</sup> *Bassiouni*, see n.756.

<sup>758</sup> See *Leich*, n.745, at 230-233.

<sup>759</sup> *Abu Eain v. Wilkes*, (1981) 641 F.2d.504; citing *Abu Eain v. Adams*, (1980) 529 F.Supp. 685.

<sup>760</sup> See *Bassiouni*, n.20, at 697.

<sup>761</sup> *Ibid*, at 949-950.

1. The existence of a war, revolution, civil strife, or civil upheavals.
2. The ideological motivation of the actor.
3. The target is the state or its political structures.
4. The existence of a link or nexus between the motive of the actor and the target of the act.

Abu Eain appealed to the Supreme Court of the United States to reverse the decision, but his appeal was rejected, and he was extradited on 12<sup>th</sup> December 1981, according to the American Israeli extradition treaty of 1963.<sup>762</sup> The extradition caused huge anger and resentment in the Arab diplomatic community in the United States, and prompted ambassadors from the Arab world and other countries to condemn it. In this context, the Spanish ambassador said: “the extradition of Abu Eain is illegitimate and begs questions about the American judicial system,”<sup>763</sup> while the Jordanian ambassador considered the extradition as an insult to human rights and international law and dignity.<sup>764</sup>

The U.N. General Assembly “strongly deplored” the extradition.<sup>765</sup> The American representative to the U.N. General Assembly made a statement defending the fairness and integrity of the American judiciary. He stressed that all legal procedures had been exhausted in this case and that the accused was given full and independent judicial review.<sup>766</sup>

Although the extradition decision in the Abu Eain case was a judicial one, it is clear that when a state adopts a particular ideology or political stance, it inevitably bears upon its judicial decisions, directly or indirectly. This has always been the case with the U.S. *vis-a-vis* Israel, where the U.S. does not consider Israel to be a country that occupies Palestinian land and, therefore, does not recognise resistance activities by the Palestinians as political offences. This view would influence decisions on extradition requests. It is inconceivable to believe that the court, which was entertaining the case of Abu Eain, took its decision in isolation of the general political stance of the U.S. *vis a vis* Israel. This also proves that decisions relating to extradition are not always purely judicial. In fact, it has always been informed by the political position of the state concerned. Similarly, in the *Ahmad* case, extradition of the defendant was sought by Israel

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<sup>762</sup> See Molner, n.746, at 272.

<sup>763</sup> See Lubet, n.747, footnote 233, at 287.

<sup>764</sup> *Ibid*, at 286.

<sup>765</sup> United Nations General Assembly, Resolution 36/171, (16 Dec 1981) UN Doc A/RES/36/171.

<sup>766</sup> See Lubet, see n.747, at 286 and footnote 231, at 286.

for actions against settlers on the West Bank.<sup>767</sup> Initially, this was blocked on the basis that his actions were those of a political offence.<sup>768</sup> After three years and repeated extradition requests, the original decision was reversed and the defendant was extradited.<sup>769</sup> As the case took place during the Palestinian *intifada*, clearly there was a political element at work in the resolution of the case.

The case of the Bondelwarts natives provides an excellent example of the situation in which political considerations dominate decisions regarding extradition requests. The events of the case took place in 1904, when the German Consul General in the Cape requested the governor of the Cape to extradite twelve persons from the indigenous tribe of Bondelwarts. They were accused of committing homicide, intending to commit homicide, burglary, and burning of properties. The governor of the Cape colony rejected the extradition request, arguing that these persons were, according to the description cited in the extradition request, in an uprising against German rule and, therefore, their offences were of a political character. Both the Ministry for the Colonies and the Ministry of Foreign Affairs supported the decision of the governor.<sup>770</sup> It is notable that this case did not go through the normal procedures which are followed in such cases, and that the judiciary was not involved in the process. Thus, the decision on the extradition request in this case was obviously a political one.

In the next chapter, the extradition system operating in the Kingdom of Saudi Arabia is examined, before the British and Saudi systems are compared and contrasted in Chapter 6.

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<sup>767</sup> *Ahmad (also known as Atta) v. Wigen* (1990) 910 F.2d 1063 (U.S. Appellate Court).

<sup>768</sup> *Ibid.*

<sup>769</sup> *Ibid.*

<sup>770</sup> C. Parry, *The Application of the Political Offence Exception in Extradition Proceedings: the Doctrine of Political Convenience in International Legal Process* (Chicago: College of Law, De Paul University, 1988), at 674.

## Chapter Five

### Extradition in Saudi Arabia

#### 5.1 Introduction

This chapter explores the Saudi judicial system and investigates, more specifically, its extradition system. Sources of legislation in *Islamic Shari'a* (henceforth *Shari'a*) as well as its tenets and schools are discussed. Without this diagnosis it would be difficult not only to understand the extradition mechanisms and process but to comprehend the context of Saudi law as a whole. This chapter argues that *Shari'a* law implicitly allows for extradition, as evidenced by the existence of extradition treaties with other Arab countries.

There is, thus, a section dedicated to a number of extradition treaties and memoranda on extradition which Saudi Arabia has already concluded with other countries. Extradition procedures, as recorded in the Islamic tradition, of alleged offenders and criminals are presented and discussed, in theory as well as in practice, in order to test to what degree the Saudi approach is authentic to the tenets of Islamic *Shari'a*. Throughout this discussion, other crucial issues are examined: the role of the King and Islamic scholars (*Ulamas*) and their impact on matters of extradition and the interpretation of pertinent *Shari'a* texts. There follows an investigation of the impact of these factors on extradition, and reflection on the significance of these factors on the signing of formal agreements with other countries. At the same time, sight is not lost of important controversies over, for example, human rights, the death penalty, national security, as well as economic and national interests. Without these elements, it would be very hard to reach any understanding of the Saudi systems, and thus of the necessary issues to be considered in any future extradition treaty.

This chapter argues that an important obstacle for Saudi Arabia on entering into an extradition treaty with the U.K. is the *Shari'a* prohibition on the extradition of Muslim individuals to a non-Muslim state, and vice versa, as argued by some Islamic law scholars. Saudi Arabia's adherence to this prohibition may explain largely why Saudi Arabia has entered into extradition treaties with many Muslim countries, but only a memorandum on extradition with non-Muslim

countries. This paper argues that this *Shari'a* principle, however, could be overcome, as explained by competing schools of Islamic law scholars, through another *Shari'a* law, where the Prophet Mohammad encourages the fulfillment of obligations like treaties. Saudi Arabia, thus, could legally enter into an extradition agreement with the U.K. In turn, under Saudi Arabia's already existing U.N. obligations, Saudi Arabia could also enter into an international extradition agreement.

Another concern for Saudi Arabia and the U.K. both is the difference between the countries in their extradition systems. Saudi Arabia follows the administrative system, while the U.K. follows the judicial system. As argued generally by this paper, such differences could be overcome through the adoption of a dual judicial-administrative system—one that could be designed to fit with Saudi Arabia's existing system under Islamic law.

There have been several difficulties in the achievement of this particular chapter, due to the lack of study into extradition – as we comprehend it today - in the Kingdom of Saudi Arabia, and the lack of secular, legal tools as understood in the West. This, as a result, has had an impact on the availability of materials which tackle the Saudi-British comparative case with international agreements, or with the jurisprudence of international, criminal law.

However, to overcome this difficulty, investigation of key factors related to extradition and its tenets, exploration of the Saudi Islamic heritage, as well as the interviewing of a number of key personalities in the field has been undertaken. By looking thoroughly, for example, at an overview of the Saudi context of law-making, with particular reference to extradition, at Islamic sources of law for the extradition of criminals, at bilateral and multilateral agreements to which Saudi Arabia is party, as well as an examination of extradition in practice in the Kingdom, it has been possible largely to compensate for the lack of materials referred to earlier. This examination is also significant for the hypothetical questions asked in Chapter 1. The all-encompassing nature of *Shari'a* on all aspects of life is a source of much misunderstanding in the West. The following sections are a necessary description of the role, scope, and relevance of *Shari'a* in law-making in general, and extradition in particular.

## 5.2 An overview of the Saudi Arabian context for extradition

The Kingdom of Saudi Arabia, by virtue of implementing *Shari'a* law is strictly committed to the application of *Shari'a* rules to every aspect of the country's life. Thus, the *Shari'a* forms the basis for all kinds of legislation, be it administrative or judicial through the Shoura Council, by Royal Decree, or through the legislative body in the Kingdom.<sup>771</sup> Any legislation which clashes with the basic principles of the *Shari'a* is invalid. The royal decrees and formulation of legislatives have to be within the bounds of the *Shari'a*. In this sense, the *Shari'a* is the overarching concept and the source of all legislation.<sup>772</sup>

As in other domains, Islamic principles also govern criminal legislation and the penal code in the Kingdom. This is why Saudi Arabia has not issued internal regulations to organise the extradition of criminals and suspects, as is the case in other parts of the world. These have to be decided in the light of the provisions of the *Shari'a*.<sup>773</sup> However, this has not prevented the authorities from signing several bilateral and multilateral agreements on the extradition of criminals (discussed later in this chapter), so Saudi Arabia does not lag behind in this area, but may even be considered to be a pioneer in the Islamic world. An important point to be emphasised is that in spite of signing such agreements, the Saudi government's over-riding rule is that these agreements may not conflict with Islamic *Shari'a* principles and the Islamic penal system.

Since the inception of the Kingdom, the Saudi government has been concerned about its security. This could explain why the Saudi government in 1931 signed its first agreement on the extradition of criminals and suspects with the Kingdom of Iraq,<sup>774</sup> followed by another in 1934

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<sup>771</sup> Kingdom of Saudi Arabia, *The Law of the Shura Council*, in Translation of Saudi Laws, Series II, (Riyadh: Bureau of Experts at the Council of Ministers, 2003), Article 18, issued under Royal Decree number A/91 dated 2 March 1992 (27/08/1412 AH). Dates are given in Common Era form, then in Islamic calendar form (dates AH).

<sup>772</sup> The over-riding authority of *Shari'a* is expressed, for example, in Article 7 of the See Basic Law, n.40, at 18.

<sup>773</sup> See Basic Law, n.40, Article 38, at 23.

<sup>774</sup> Treaty of Mecca, This Treaty was concluded between what were known at that time as the Kingdom of Hijjaz, Nagad and its annexes (now Saudi Arabia) and the Kingdom of Iraq. It was signed in Mecca on 8 April 1931. It contained eight clauses, which included articles dealing with the extradition of any subject from either of the two countries who committed a crime and fled to the other country. The two governments also committed to each other to extradite any of their own subjects who committed a crime and fled the country, which means that the Treaty was limited to the citizens of the two countries and did not include foreigners. Moreover, it excluded political crime from the extradition agreement, but did not regard an attack on the two royal heads of state and their families as a political crime. The Treaty included a numbered list identifying the crimes that extradition could be applied to.

of Islamic friendship and Arabic brotherhood with the Kingdom of Yemen, which *inter alia* included the issue of extradition of criminals and suspects<sup>775</sup> and in 1942, another agreement was signed with the Mashikhat of Kuwait,<sup>776</sup> In 1953, Saudi Arabia was one of seven states to sign an Arab League agreement on the extradition of criminals between the member states.<sup>777</sup>

Saudi efforts continued with the signing of extradition agreements with the Gulf states, namely the Kingdom of Bahrain, the State of Qatar, the Sultanate of Oman, and the United Arab Emirates in 1981-1982.<sup>778</sup> Beyond the Gulf area, Saudi Arabia signed an agreement with the Islamic republic of Pakistan in 1984,<sup>779</sup> in addition to the Riyadh Arab Agreement on Judicial Co-operation signed in 1983.<sup>780</sup> Moreover, the Saudi government signed the United Nations agreement on combating the illegal trading of drugs in Vienna, in December 1988.<sup>781</sup>

Furthermore, the Kingdom participated actively in several conferences held in different parts of the world aimed at combating organised crime, and has been fully active in all international efforts aimed at providing security and stability world-wide through bilateral or multilateral

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See A. Al-Enazy, 'The International Boundary Treaty (Treaty of Jeddah) Concluded Between the Kingdom of Saudi Arabia and the Yemeni Republic on June 12, 2000,' (2002) 96 AJIL 161 (explaining that "[t]he long-running boundary dispute between Saudi Arabia and Yemen can be traced back to the controversial Mecca agreement signed in 1926 under which the territory of the south west Arabia Idrisi emirate, long claimed by Yemen, came under the sovereignty of the newly established state of Saudi Arabia."); N. Chaterji, *Muddle of the Middle East*, (Egypt: Abhinav Publications 1973), at 198.

<sup>775</sup> Treaty of Al-Taif, This Treaty was concluded on 20 May 1934 in the city of Al Taif between the Kingdom of Saudi Arabia and the Kingdom of Yemen. It was called a Treaty of Islamic Friendship and Arabian Brotherhood. The main objective of the Treaty was to end the war that broke out between the two kingdoms and to establish a permanent strong relationship, in addition to demarcation of the boundaries. The agreement included some rules relating to the extradition of criminals. It named the crimes for which extradition was possible, allowed for non-extradition of nationals, and did not exclude political or military crimes. Citizens of third countries were to be expelled as undesirables. For text of the Treaty of Taif and its annexes, see *Arabian Treaties 1600-1960*, at 336-345 (Penelope Tuson and Emma Quick eds., 1992) [hereinafter Treaty of Taif]. For the 1937 Saudi-Yemeni joint commission demarcation report, see *Annex To The Taif Agreement For The Demarcation Of Borders Between The Kingdom Of Yemen And The Kingdom Of Saudi Arabia, 1937*, in *20 Arabian Boundary Disputes* 643-672 (Richard Schofield ed., 1993).

<sup>776</sup> See Al-Enazy, n.774, at 161. Treaty of Jeddah, This Treaty was concluded on 20 April 1942, between the government of Saudi Arabia and the Mashika of Kuwait. It did not include the principle of extradition, but was more advanced than the previous treaties concluded with Iraq and Yemen. The treaty named the crimes for which extradition was allowed, but excluded political crimes (without defining them).

<sup>777</sup> See section 5.7.1 of this chapter for more details.

<sup>778</sup> See section 5.6.2 of this chapter for more details.

<sup>779</sup> See section 5.6.4 of this chapter for more details.

<sup>780</sup> See section 5.7.2 of this chapter for more details.

<sup>781</sup> United Nations, 'Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances', (Vienna 20 December 1988) UN Doc E/CONF.82/14.

agreements on extradition.<sup>782</sup> Even in the absence of such agreements, the Saudi government uses direct contact with the governments concerned to secure the extradition of criminals and suspects. More recently, the Kingdom, because of security and stability concerns in the region, and the implication of some Saudi nationals in the insurgency in occupied Iraq, approached the Iraqi government with the view of concluding a formal extradition agreement. It was noted in this respect, that:

“‘We have completed the drafting of an extradition accord which will be signed soon between the Kingdom and Iraq,’...treaty stipulates ‘the exchange of convicted prisoners ... so that they serve the rest of their sentences close to their families...’”<sup>783</sup>

Within the context of direct contact, the Saudi government, after a series of successful meetings with the British government, signed a memorandum of understanding on April 12, 1989, on the extradition and pursuit of suspects and criminals.<sup>784</sup> On a practical basis, the Saudi government uses diplomatic channels for the extradition of criminals,<sup>785</sup> provided, as noted previously for all aspects of Saudi life, that this does not contradict the *Shari’a*.

It should be noted that the ratification of all the agreements concluded by the Saudi government has been undertaken in accordance with Saudi laws, involving the relevant ministry (the Ministry of the Interior), the Council of Ministers, the *Shoura* Council, and finally the Monarch.<sup>786</sup>

What this suggests is that Saudi diplomacy and participation to reach various but diverse agreements with other countries on extradition and the return of alleged offenders, despite the Kingdom’s Islamic orthodoxy that appears somewhat rigid to the western and secular world,<sup>787</sup> is able to conclude and reach any sort of agreement or understanding as long as it does not

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<sup>782</sup> Reported in, for example, Saudi Arabia, ‘Initiatives and actions taken by the Kingdom of Saudi Arabia to Combat Terrorism’, September 2003, available at <http://www.saudiembassy.net/files/PDF/WOTSept03-2.pdf> (last accessed 10 March 2010).

<sup>783</sup> AFP, ‘Saudi to sign extradition treaty with Iraq’, available at <http://www.arabianbusiness.com/530801-saudi-to-sign-extradition-treaty-with-iraq> (accessed 10 March 2010).

<sup>784</sup> The Saudi/British Memorandum of Understanding, 12 April 1989, (Riyadh, KSA: Ministry of Internal Affairs Documents).

<sup>785</sup> See Alotaibi, n.73, at 273.

<sup>786</sup> See Basic Law, n.40, Article 70, at 28.

<sup>787</sup> See Alotaibi, n.73, at 276.



contradict its *Shari'a* principles. This only proves relatively controversial when issues of the death penalty, human rights, and the role of the King as the final decision maker, are involved.<sup>788</sup>

### **5.3 Sources for extradition in Islamic *Shari'a***

#### **5.3.1 Sources and principles of *Shari'a* law**

It is beyond the scope of this work to provide a detailed study of *Shari'a* law, as the source of Islamic jurisprudence. However, a brief summary is necessary for an understanding of the background to Islamic jurisprudence on extradition and its practice in Saudi Arabia. In the following, the primary and secondary sources of *Shari'a* are examined. Then, the appearance and development of Islamic legal schools of thought are discussed, and finally Islamic criteria for defining crimes according to the *Shari'a* are explained.

The *Shari'a* is an overarching concept covering all aspects of life. It primarily provides general principles and premises and may not specify details. For instance, on numerous occasions the Qur'an says 'Pray', but does not explain how exactly to do it. The *Sunna* (see below) elaborates and elucidates the ritual, as revealed by God to the Prophet, and was then taught to Muslims.<sup>789</sup> The *Shari'a* is not limited to the domain of law but is a more holistic concept. It covers wide areas of secular laws and ordinances. It is a complete code which provides for all areas of life. For example, it guides Muslims on behavioural matters, obligations and rights, such as how to deal with relatives, ageing parents, how to eat, instructions to pray, how to behave in public, do business, and what the duties of government functionaries and subjects are. In other words, the *Shari'a* is diverse and wide-ranging in its application and there is hardly any area of life which it does not touch upon.<sup>790</sup> It consists of both primary and secondary sources, and while the former are the ultimate authority for the law, the latter are in fact interpretations and methods of interpretation of the primary sources.

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<sup>788</sup> See section 5.5 of this chapter for discussion of these issues.

<sup>789</sup> S. Nasr, *The heart of Islam: enduring values for humanity* (San Francisco: Harper, 1994), at 130

<sup>790</sup> Different areas of life governed by the *Shari'a* are discussed in Chapter 5 of C. Horrie and P. Chippindale, *What is Islam,? A comprehensive introduction* (rev ed.) (London: Virgin, 1997).

### a. Primary sources

- i) The *Holy Qur'an* (henceforth the Qur'an) which for Muslims is the actual word of Allah, not created but revealed for the benefit of all humanity, is *the* major source of *Shari'a*. Its different verses contain much jurisprudence for all areas of life, whether spiritual, intellectual, political, social, or economic. It is divine and cannot be challenged. "The Qur'an announces that it lays down a law for mankind... The law is perfect."<sup>791</sup> Moreover, it is aimed at establishing standards for Muslim societies and leading them in terms of their rights and obligations. However, the Qur'an is a religious text and not a legal document *per se*. From over 6,000 verses, Nasr claims that 350 deal with legal topics, some of which pertain to specific issues and penalties for illegal acts.<sup>792</sup>
- ii) The *Sunna*, the model behaviour and tradition, as well as the practices of the Prophet Mohammed, is the second principle source of Islamic jurisprudence. It details and explains what is revealed in the Qur'an. The *Sunnah* cannot be incompatible with the strictures of the Qur'an in any conceivable way, as the Prophet could not possibly 'do' or 'say' anything which contradicts the injunctions of the Qur'an revealed through him. As noted above, a good example is the details of prayer explained by the *Sunna* itself. "The Quran orders Muslims to pray, but how to pray was learned from the model established by the Prophet."<sup>793</sup> The same goes for other legislative and behavioural matters.

The Prophet Mohammed can be said to be a prophet of law because it was he who concerned himself with giving the details and explanations of what God had revealed to him in the Qur'an. The *Sunna* of the Prophet Mohammed is recorded in the *Haddith*, which are his sayings, written down by his companions.<sup>794</sup>

### b. Secondary sources

As noted above, the Qur'an deals with broad general principles, not the specifics, which could possibly lead to more than one interpretation in certain cases. In particular, there is a strong

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<sup>791</sup> F. Vogel, *Islamic Law and Legal System* (Leiden: Brill, 2000), at 4.

<sup>792</sup> See Nasr, n.789, at 120.

<sup>793</sup> *Ibid.*

<sup>794</sup> *Ibid* at 36-38.

possibility of ambiguity arising when the original context is unclear. During his life, the Prophet was there to offer an explanation or remove any ambiguity. After his death, this important source was withdrawn. Farah refers to the “numerous obscurities in the Quran’s format,” and the actions taken as a result.<sup>795</sup>

Confronted with unprecedented situations for which no unambiguous guidance or analogy was available from the Qur’an or *Sunna*, and where there existed room for ambiguity and more than one interpretation was possible, considerable jurisprudential differences appeared amongst Islamic scholars. In order to deal with unprecedented and unforeseen situations for which the guidance from the Qur’an and Sunna was not convincing, the following secondary sources of Islamic jurisprudence were evolved to develop consensus and unity amongst Muslims:<sup>796</sup>

- a) *Ijima*, which means consensus. It is the vehicle of the Islamic nation to reach agreement and is important in the understanding and interpretation of the Qur’an and *Sunna*. It has become a very powerful source for conformity.
- b) *Qiyas*, which means application by analogy or deduction in the absence of concrete answers from the Qur’an and *Sunna*.
- c) *Ijtihad*, which means the use of independent legal reasoning in search of an opinion.

### **c. Islamic schools of legal thought**

Over time, differences arose in interpretations of the Quran and *Sunna* when there was room for ambiguity, and certain incidents and circumstances led to the development of different schools of thought by Islamic jurists. The two major branches are the Sunnis and the Shias.<sup>797</sup> This divergence appeared because of disagreement over the issue of succession of the Prophet. The *Shia* school believes that it was the right of honourable Ali, the fourth caliph, to succeed the prophet Mohamed after his death, whereas Sunnis favour Abu Bakar, who became the first caliph elected through democratic means.<sup>798</sup> The growth of differences between Sunnis themselves gave further rise to four diverse Islamic legal schools of thought:

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<sup>795</sup> C. Farah, *Islam: Beliefs and Observances*, 7<sup>th</sup> ed (New York: Barron’s, 2003), at 100.

<sup>796</sup> See Alotaibi, n.73, at 278.

<sup>797</sup> See Nasr, n.789, at 65-76.

<sup>798</sup> *Ibid*, at 65-66.

- a) The school of the *Hanafi* founded by Abu Hanifa around the year 767. It is regarded as less rigid in its doctrinal interpretations compared to the other three schools.<sup>799</sup>
- b) The school of the *Malikia*. This was established in Medina around the year 795 by Malik Ibin Anas. He was a supporter of living the life and tradition of Medina. The followers of this school regard juristic preferences and public interests as key sources for judicial decisions.<sup>800</sup>
- c) The school of the *Shafia* founded by Muhammed Ibin Idris al-Shafi around the year 820. The founder was a student of Malik but he concentrated more on the prophetic *Hadith*, rather than the living tradition of Medina as Malik did. This school established the Qur'an, the *Sunna*, *Ijima*, and *Qyas* as the four roots of law.<sup>801</sup>
- d) The school of *Hanabalia* founded by Ahmed Hanbal around 855. He was a strong believer in a rigorous interpretation of Islam. For this reason he is regarded as a traditionalist theologian.<sup>802</sup>

It is important to point out, however, that none of these sects challenge or dispute what has been said in the Qur'an or in the *Sunna*. There is a complete agreement over the primary sources of the *Shari'a*. They tend to differ only over the interpretations of the *Shari'a*, where different inferences can be drawn without compromising the basic principle. In other words, the secondary sources of *Shari'a*, *Ijima*, *Qiyas* and *Ijtihad* are the points at which differences of interpretation can potentially emerge. "It is important to note that these four rites are in agreement on all points vital to Islam."<sup>803</sup> Extradition of criminals is a good example in this context. Different sects have different views on whether a criminal can be extradited to a non-Muslim state. The signification for extradition of the differences between these schools is explored in more detail in the following section. However, it is worth noting from the outset that the Kingdom of Saudi Arabia adopted the *Hanbali* school of thought, which, as will be progressively revealed, favours the conclusion and honouring of treaties and agreements with non-Muslims states,<sup>804</sup> and thereby

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<sup>799</sup> See Farah, n.795, at 196.

<sup>800</sup> *Ibid*, at 196-197.

<sup>801</sup> See Farah, n.795, at 197-199.

<sup>802</sup> *Ibid*, at 199-201.

<sup>803</sup> *Ibid*, at 195.

<sup>804</sup> Exemplified by the fact that Article 70 of the Basic Law, see n.40, explicitly gives the King the right to conclude international treaties and agreements.

allows the extradition of criminals guilty of committing crimes elsewhere that flee to or seek refuge in the Kingdom.

### **5.3.2 Sources for extradition in the *Shari'a***

This section argues that extradition is allowed under the *Shari'a*. Since the Kingdom of Saudi Arabia is an Islamic country, it is bound to follow the *Shari'a* in its letter and spirit and to make sure that no government actions are in violation of its provisions. Naturally, the question of extradition is no exception. It is, therefore, essential to determine the status of extradition in the light of the *Shari'a*. In what follows, an attempt has been made to see how extradition is viewed from this perspective.

Although there is no explicit mention of extradition law as such in the *Shari'a*, there is also no provision which forbids the extradition of a criminal to where he has committed the crime, suggesting that extradition is allowable. In other words, there is nothing in the *Shari'a* that prevents legislation relating to extradition and penalising of criminals for the crimes they have committed.

In fact, there are a number of verses in the Qur'an which relate to the prevention of corruption and anarchy, indeed to protect human society from the spread of crime: it states "help ye one another in righteousness and piety, but help ye not one another in sin and rancour."<sup>805</sup> If extradition of those committing crimes and taking refuge at other places (in another 'territory') is viewed as a means of preventing and combating crimes in society, it indeed is permissible in the *Shari'a*, as one of the best methods of co-operating to help 'promote righteousness and piety' for the protection of society.

Another piece of evidence which has a bearing on the issue of extradition is one which is from the perspective of pursuing justice and the concept of forbidding evil, and that is the verdict in the Qur'an that "the Believers, men and women, are protectors, one of another; they enjoin what is just and forbid what is evil."<sup>806</sup>

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<sup>805</sup> Qur'an, *Sourat Al-Makeidah* (5), verse 2.

<sup>806</sup> Qur'an, *Sourat Al-Tauba* (9), verse 71.

The injunctions of the Qur'an are 'reinforced' by the *Haddith* which lends further support to the view that Islam places a great deal of emphasis in favour of extradition if it is essential for the prevention of crime and the promotion of 'righteousness and piety' in society. The Prophet Mohammed urged in favour of the handing over of criminals and was against giving any kind of protection or opposing punishment for the crimes committed. Imam Muslim refers to Ali Ibn Abi Talib quoting the Prophet Mohammed as saying that "curse upon any one who gives refuge to any criminal."<sup>807</sup> By this he meant obstructing justice by protecting wrongdoers.

Since the Qur'an warns of harbouring criminals and stresses severe punishment for this, no interpretation is possible other than that the handing over of criminals is not forbidden in Islam. However, 'handing over' or extraditing is closely tied to an act of reciprocity by the other party involved. In 'handing over' a criminal, a reciprocal behaviour is expected from others (states or territories). Reciprocity is, in fact, an ancient principle which is endorsed and stressed by Islam: "none of you is a believer as long as he does not wish his brother what he wishes himself."<sup>808</sup>

Reciprocity normally means justice in dealing with people regardless of whether they are Muslims or not. This was expressed by the Prophet Mohammed when he said "treat people the way you wish people to treat you."<sup>809</sup>

As a matter of fact, Islam allows Muslims to enter into arrangements and conclude agreements with non-Muslims, provided that this does not contradict the principles of the Islamic faith or Muslim interests or security. The *Shari'a* urges Muslims to respect and honour their agreements: "those who break Allah's covenant after it is ratified and who sunder what Allah has ordered to be joined, and to do mischief on earth, these cause loss (only) to themselves."<sup>810</sup> In another instance, it states that "Then anyone who violates his oath, does so to the harm of his own soul."<sup>811</sup> Though there is no specific mention of extradition, the returning of criminals can be safely included in permissible arrangements Muslims can conclude with non-Muslims.

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<sup>807</sup> Al Alshaikh, A R B H, *Fath Almajeed fi Sharh Kitab Altawheed* [The book of oneness], (Riyadh: Headquarters for Scientific Research, Iftaa and Darwaa and Guidance, 1991), at 112.

<sup>808</sup> Hadith 13 in An-Nawawi Y, 'An-Nawawi's 40 Hadiths', this work may be seen in <http://islamworld.net/docs/nawawi.html> (accessed 8 March 2010).

<sup>809</sup> See Al Alshaikh, n.807.

<sup>810</sup> Qur'an, *Sourat Al-Baqarah* (2), verse 27.

<sup>811</sup> Qur'an, *Sourat Al-Fat-h* (48), verse 10.

In the history of Islam, there have been significant instances demonstrating the Prophet Mohammed's emphasis on honouring a covenant. The following cases are notable in this regard. The first incident happened during the 'Houdibia Pact'<sup>812</sup> when Abi Jendel fled from the infidels to the Muslims as a believer. The prophet ordered him to return to the infidels' side and said to him "be patient and wait because God came as a way out for you and weak people like you. We have concluded with your people a reconciliation covenant. We gave them and they gave us an oath not to betray them."<sup>813</sup> This incident clearly points to the conclusion that (i) the Prophet returned a newly converted Muslim from Medina to the infidels in Mecca as provided by the 'pact', proving that 'extradition' is permitted in Islam and (ii) Muslims are allowed to conclude a covenant even with infidels and honour it as they would with a Muslim.

The second instance happened to Ibin Houzifa, one of the companions of the Prophet, who said the only cause preventing him from participating in the Badar Battle was the following incident. He [Ibin Houzifa] was with Abi Hassel when they were stopped by the infidels of Qouraish who asked them if they were on their way to join the Prophet Mohammed. To deceive them they told them that they were on their way to Al Medina, and they took an oath not to fight on the side of the Muslims. On hearing this, the Prophet, ordered them to keep their oath with the infidels and not to take part in the battle. This is further evidence of the importance the Prophet attached to covenants.<sup>814</sup>

The evidence provided by these incidents shows that the *Shari'a* permits concluding covenants (agreements or arrangements) with other 'parties' including non-Muslims and emphasises abiding by the provisions of such covenants. This would be the equivalent in modern times of concluding an agreement with a secular, non-Muslim country like Britain or the U.S., and dealing with all secular matters relating to extradition and the return of alleged offenders and criminals. In the Saudi case, an orthodox Muslim country, founded on *Shari'a* law and traditions, the situation would not be as difficult as it may seem.

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<sup>812</sup> The incident has been variously referred to as a 'Reconciliation', 'Pact' or 'Treaty'. In this study the term 'Pact' has been used.

<sup>813</sup> A. Bin Husham, *The Prophet's biography*, 3, (Riyadh: Riyadh Modern Library), at 204.

<sup>814</sup> Muslim I, *Saheh Muslim bsharh Alnawawe*, 6 Section 2, (Riyadh: Administration of Scientific Research and IFTAA), at144.

As discussed in section 5.6 of this chapter in the various modern treaties examined there, with the growing threats to security, states are turning to what has been termed fast-track responses through security as well as legal means. The fact is that with globalisation has come global crime (in all its forms, including international terrorism) which requires a global response. From this particular perspective, states find the need to meet and conclude agreements between themselves, and find themselves less reluctant to do so. As the world becomes better connected, joining cultural mix with ethnic and religious diversity, it is becoming a single global village. The more so with modern mobility and migrations, by which diverse people are settling in various continents and adopting shared factors. This is well illustrated in the case of Great Britain and Saudi Arabia, despite their apparent differences.

A good example of this unexpected commonality was revealed when Jack Straw (former Home Secretary) addressed an audience at an international conference stating those shared factors. He noted that:

“of course, the United Kingdom shares much with Saudi Arabia; above all it is the spiritual and religious home for the U.K.’s near two million British citizens of the Muslim faith. Tragically, this year’s Hajj has been marked by the death of over 350 pilgrims. The Saudi authorities have been working tirelessly to help those affected by the tragedy. The U.K. is the only Western country to send an officially sponsored and officially funded delegation to support its Hajj pilgrims – we expect more than 25,000 British people to go on the Hajj this year. This delegation, headed by Lord Patel of Blackburn, was on the ground quickly to do all it could to help British victims of the disaster. Our thoughts and prayers are with all those affected by this horrible accident.”<sup>815</sup>

### **5.3.3 Rules of extradition in *Shari’a***

Before awarding punishment, the *Shari’a* first considers protection, advice, guidance, education, example, and sermon. The *Shari’a* places a great deal of emphasis on combating crime, and as shown above allows extradition of criminals, should it be necessary for the elimination of crime from society.

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<sup>815</sup>See generally Straw, n.38.



It is advisable to discuss in this section traditional Islamic doctrine on international crime, and to outline the basic rules of extradition from an Islamic to an Islamic country as well as from a Muslim to a non-Muslim one. Traditionally Islamic scholars divide the world into two parts.<sup>816</sup> One is the House of Islam or *Salam* (House of Islam or Peace), and the other is the House of War (*Darul Harb*).

With regard to the former, the *Darul Salam* or *Al Islam* (House of Islam or House of Peace), there are some differences between scholars about its definition but generally agreement circles around one shared belief in the non-existence or insignificance of boundaries or geographical separations between Muslims. Based on this fact, they also believe that all Muslim countries must be governed by one system based on one constitution, which are the Qur'an and the *Sunna* of the Prophet Mohammed.<sup>817</sup> Islamic scholars tend to differ on the definition of an Islamic state. Some use the application of *Shari'a* rules as a yardstick; others use the number of Muslims in the country as a criterion: if the majority of the people of the country are Muslims then the country is to be defined as an Islamic country, regardless of whether *Shari'a* rules are applied. Turkey and Indonesia are good examples. Neither is ruled by Islamic *Shari'a* law but both enjoy a Muslim majority. Based on the above two definitions, it can be asserted that the House of Islam or *Salam* includes all countries where Islamic laws are applied and any country under the control and governance of Muslims, even if the majority of people are not Muslims, in addition to any country under the control of non-Muslims but in which Muslims can observe their religion and follow its rules.

In contrast, Islamic scholars defined the "House of War" as including all the lands which are not under the authority or control of Muslims, regardless of whether this is one country or more.<sup>818</sup> On this basis, authority or sovereignty is the criterion in designating the two houses. If Islamic sovereignty is achieved in a country, it is the "House of Islam;" if not; it is the "House of War."

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<sup>816</sup> A. Zeedan, *Ahkam Ethimmieen Wa Mustamaneen Fi Dar Elislam* [The rules of extradition of the contracted and secured person in the home of Islam], (Beirut: Al Rasalla Corporation, 1982), at 18.

<sup>817</sup> A. Awdah, *Altashreea Alginaee Alslami* [Criminal legislation in Islam] 1, (Beirut: Al Resalla Corporation, 1985), at 275.

<sup>818</sup> *Ibid*, at 277.

### **a. Application of Islamic law in places where the *Shari'a* is used**

Due to the sensitiveness of *Shari'a* as a concept and practice as to where and upon whom it should be applied, a number of diverse schools of thought have tackled the issue while focusing on its application.<sup>819</sup> Amongst the first of these is the doctrine of the majority of Muslim scholars, including the Imam Malik, who was of the opinion that *Shari'a* should be applied in any case of crimes committed within the House of Islam, regardless of whether the perpetrator was Muslim or not.<sup>820</sup>

Their argument is based on the premise that the Muslim is bound to the rules of *Shari'a* and the *Dhimy* (non-Muslim citizens who enjoy protection of money and property in return for the payment of a levy to an Islamic state) are also bound to the same *Shari'a* rules for the full protection that they enjoy of themselves and their property.

The second school is the doctrine of the imam Abu Hanifa who believes that Islamic legislation is applicable in the case of crimes committed in the House of Islam, regardless of the religion of the wrongdoer, because Muslims have no rules other than *Shari'a*, and the *Dhimy* accept the rules of Islam primarily by accepting the protection agreement.

However, Imam Abdu Hanifa makes a distinction between crimes against God and crimes against a person. According to him, the non-Muslim (*moustaman*) is not subject to the rules of *Shari'a* if he commits a crime in connection with God's rights, but he has to be punished by *Shari'a* rules if he commits a crime against a person's rights, as he is temporarily living in the House of Islam for trade or other purposes. His request for security and safety is not sufficient to bind him to the rules of the *Shari'a*.<sup>821</sup>

### **b. Application of Islamic legislation in non-*Shari'a* places**

Islamic jurists agree that the rules of *Shari'a* are not to be applied to non-Muslims, the people of the House of War. The dispute among them is whether, if a Muslim or *zimmi* commits

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<sup>819</sup> Abu Zahra M, *Algareemah Wa lugooba Fi Alfigh Elislami* [Crime and punishment in Islamic doctrine], (Cairo: Dar al Feker al Arabi, 1976) at 343.

<sup>820</sup> F. Al Nadi, *Mawsuat Alfigh Asiasi Wa Nitham Alhukum Fi Elislam* [The encyclopaedia of political doctrine and the system of governing in Islam], (Cairo: del al Keetab Al Jamiie, 1980), at 57.

<sup>821</sup> See Awdah, n.817, at185.

a crime in areas that do not apply the rules of *Shari'a*, he should be punished upon his return to the House of Islam.

Experts in Islamic jurisprudence hold two positions on this matter.<sup>822</sup> The first is that of the majority, who have decided that *Shari'a* should be applied in the House of War to those who are eligible for this in the House of Islam. An exception is the *al harbi al moustaman*, 'an entrusted warrior who is not a Muslim but enjoys an agreement with an Islamic country to live in peace and protection', who will not be judged for any crime he committed before embracing Islam. In the case of the Muslim and the *Dhimy*, the difference between the two houses will not affect them, as the rules of Islam apply.

The majority of experts also agree on the application of *Shari'a* where an activity is not a crime in the House of War but is not permissible in Islam, as with usury; but if the action is permissible in the House of Islam, there is no punishment.

The second position is that of imam abu Hanifa and his colleague Abu Yousif, who held that *Shari'a* is *not* applicable in the case of crimes committed in the House of War, even if such crimes are committed by residents of the House of Islam. Their argument is that criminal legalisation does not extend outside the House of Islam. In the light of this, no Muslim or *Dhimy* or *Harbbi moustaman* will be punished if a crime is committed in the House of War.

Based on the above discussion, the rules of extradition in the *Shari'a* vary according to whether it is a) between two Islamic countries; or b) between an Islamic and non-Islamic country.

#### **i. Extradition between two Islamic countries<sup>823</sup>**

Fundamentally, all Muslim countries are viewed as one country, in spite of differences in regions and the separations of states. Islamic scholars address the rule of extradition of criminals in the light of two instances. First is when a Muslim commits a crime in an Islamic country and flees to another Islamic country without being prosecuted. In this case, the punishment is to be in proportion to the crime committed, in accordance with the view of the prosecution initiated in the

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<sup>822</sup> See Abu Zahra, n.819, at 314.

<sup>823</sup> See Awdah, n. 817, at 185, and see Abu Zahra, n.819, at 316-19.

country fled to, and to be subject to the rules of the *Shari'a* if convicted by the judge. Should a country requesting extradition wish to prosecute a suspect on the basis of the *Shari'a* but does not implement or intend to use the *Shari'a* law of limits (or *Hudood*), it is the right of the receiving state to refuse the extradition.

The second instance includes two variations. The first is if the culprit is prosecuted and convicted in his own country, and flees to another Islamic country to avoid the execution of the verdict, and if the country where he committed the crime then requests his extradition to fulfill the verdict. The country he flees to must extradite him if the verdict passed on him is based on the *Shari'a*. In the case of a non-Islamic verdict, extradition is not allowed.

The second variation is if the criminal commits a crime in his own country and flees to another Islamic country, and if his own country does not ask for his extradition but only requests that he should serve the verdict passed against him. In such a case, there is no reason for refusing the request since it is compatible with the rules of the *Shari'a*.

## **ii. Extradition between an Islamic and non-Islamic country<sup>824</sup>**

Essentially, it is *not* permitted in principle for any Islamic country to extradite any of its Muslim or *Dhimy* subjects to be prosecuted in a non-Islamic country for a crime they have committed there, as those subjects, from the legislative point of view, are the subjects of the Islamic country. Moreover, the power of Islamic criminal legislation is valid to deal with such crimes. “This is based on the divine principle, there is no guardianship of a non-Muslim over a Muslim (and Allah will never grant the unbelievers a way [to triumph] over the believers).”<sup>825</sup>

The issue of extradition of criminals between Muslims and others arises in two ways. In the first, a Muslim or *Dhimy* commits a crime of murder or theft in the House of War and then flees to the House of Islam. There is a dispute among scholars, as noted above, as the majority argues that punishment should take place in the House of Islam if such crime is evident. However, the *Hanafi* argue that no punishment is applicable, because the Islamic guardianship is not valid.

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<sup>824</sup> See Awdah, n.817, at 347.

<sup>825</sup> Qur'an, *Sourat al-Nissa* (4), verse 141.

In the second, case a Muslim or a *Dhimy* commits a crime in the House of Islam and escapes to the House of War. In this circumstance, the Islamic country is allowed to ask for extradition when a treaty or an agreement exists between the two countries. This reveals a new argument among scholars about the possibility of a covenant or agreement between Muslims and non-Muslims, by which Muslims should extradite any criminals who commit a crime in other countries and then flee to the House of Islam. The issue is whether this condition can occur in practice. In fact the condition is fulfilled in the case of non-Muslims who live for a short period in the House of Islam without relinquishing the right of guardianship of their non-Islamic state within the context of fulfilling the oath “...and fulfill (every) engagement, for every engagement.”<sup>826</sup>

Nevertheless, no Islamic state is permitted to extradite any of its Muslim or *Dhimy* subjects to any non-Islamic country for prosecution. Similarly, no Islamic state is permitted to extradite any subject of another Islamic state to a non-Muslim state. Moreover, no Islamic state is allowed to extradite anyone who immigrated to the state and converted to Islam for prosecution of a crime committed before conversion.<sup>827</sup>

Where an agreement on extradition between two countries can exist, scholars disagree on the issue according to the following points of view. The *Hanifa* and some of the *Maliki* schools maintain that this condition is invalid, because extradition of a Muslim to a non-Muslim state is not allowed. Moreover, the process of extradition clashes with the execution of the verdict, because this comes under the issue of guardianship of the Muslim over the Muslim.

The *Hanbilis* and others of the *Malikis*, however, maintain that this condition is valid, and extradition of a Muslim or *Dhimy* is permissible, as long as there is an agreement or treaty, because an agreement is a covenant and a covenant is to be honoured and respected. This is in accordance with the instructions of Allah in the Qur’an, affirming that “O ye, who believe, fulfill all obligations.”<sup>828</sup> They also support this argument by referring to what the Prophet agreed to in the Al Houdibia pact, noted above.

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<sup>826</sup> Qur’an, *Sourat al-Israa (17)*, verse 34.

<sup>827</sup> *Ibid.*

<sup>828</sup> Qur’an, *Sourat Al-Maidah (5)*, verse 1.

The *Shafi* School differentiates between two cases. For one who has family members to protect him in the non-Islamic state, the condition of extradition becomes valid and correct. In such a case, extradition is permissible. However, someone who has *no* family protection may not be extradited. In all cases and circumstances, extradition of a Muslim woman to a non-Muslim state from which she has emigrated is not allowed, even if her husband and children are there.

Any condition or agreement which states otherwise is invalid, because of what Allah said in the Qur'an:

“O ye who believe when come to you believing women refugees, examine them; Allah knows best their faith; if ye ascertain that they are believers, and then send them not back to the unbelievers. They are not lawful wives for neither the unbelievers nor the unbelievers lawful husbands for them, but pay to unbelievers what they have spent and there will be no blame on you if you marry them on payment of their dower to them. But hold not to the ties of unbelieving women; ask for what you have spent on their dowers and let the unbelievers ask for what they have spent on the dowers of women who came over to you. Such is the command of Allah. He who judges with justice between you and Allah is full of knowledge and wisdom.”<sup>829</sup>

Furthermore, extradition of anyone who is subject to the jurisdiction of an Islamic state is not permissible, even if he is a foreigner. However, he should not be set free; he rather should be tried for the crime he has committed under the existing law.

The scholars state clearly that a non-Muslim cannot prosecute a Muslim. Also, a Muslim should not be subject to trial under non-Islamic laws.<sup>830</sup> Scholars do not agree about warriors who flee from the House of War to the House of Islam. Some scholars argue that if the crime is committed before converting to Islam, the charge should be dropped, on the basis that what happened before conversion is invalid, in accordance with the holy verse “say to the unbelievers, if now they desist from unbelief their past would be forgiven them, but if they persist the punishment of those before them is already.”<sup>831</sup> Other scholars argue that after conversion to Islam, the

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<sup>829</sup> Qur'an, *Sourat Al-Mumtahana* (60), verse 10.

<sup>830</sup> See Abu Zahra, n.819, at 450.

<sup>831</sup> Qur'an, *Sourat Al Anfal* (8), verse 38.

perpetrator is punished if he is aware of his wrongdoing, but if he is not, then he will not be punished.

### c. Extradition of criminals in *Shari'a*

The *Shari'a* is the basic reason why a Muslim should not be extradited from the House of Islam, to avoid being subject to sedition in his belief, or, if he is *Dhimy*, to avoid breaking his agreement. However, there is an argument on the possibility of exiling Muslims on exceptional grounds of necessity and to drive evil works away from the Islamic state. This argument is under reconsideration, because in Islamic legislation there is adequate provision of measures for reformation and adjustment. These help the rulers of Muslims to maintain security and order.<sup>832</sup>

For the *Harbbi*, a warrior or warlike individual whose presence represents any threat to stability or risks becoming a traitor, it is confirmed that his deportation is allowed. Allah said in the Qur'an that "if thou fears treachery from any group throw back their covenant to them so as to be on equal terms, for Allah loved not the treacherous."<sup>833</sup> It is stipulated that the warrior is to be deported to a safe place from whence he came to avoid any threat to his life. Allah said that "...and then escort him to where he can be secure...."<sup>834</sup>

This review of rules of the *Shari'a* demonstrates that in spite of the fact that extradition was not directly dealt with in books of Islamic doctrine, it has been dealt with indirectly. This is because at that time in the House of Islam, there was pressing need for extradition rules. The *Shari'a* can be shown to include basic principles which serve as a source of useful rules and procedures for dealing with the issue of the extradition of criminals. The seeming conflict between the concept of extradition of a Muslim to a non-Muslim country and the absolute interdiction of this expressed in section 5.3.3 (b) (ii) above, is resolved by the fact that "Muslims could make treaties of peace and live at peace with countries outside of *dar al-islam* if they themselves were not threatened by them."<sup>835</sup>

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<sup>832</sup> A. Khidir, *Annitham Aljinaaee ossosoh Alamah fiA litijihat Almoasirah wal Figh Elislami* [Criminal rule: its basis in contemporary trends and Islamic doctrine], Part 1, (Riyadh: Institute of General Administration, 1982), at 175.

<sup>833</sup> Qur'an, *Sourat al Tawba* (9), verse 6.

<sup>834</sup> *Ibid.*

<sup>835</sup> See Nasr, n.789, at 164.

## 5.4 Treaties in *Shari'a*

As noted above, Muslims have – according to Islamic rules and traditions – the right to conclude agreements as well as, treaties with others, provided they do not contradict the principles of Islam, and do not harm the interests of Muslims, or their security. When treaty<sup>836</sup> or an agreement is concluded between two or more parties, the conditions that bind them do not contradict the *Shari'a* and its principles.<sup>837</sup> For this reason, the term “treaty” in Islam includes all agreements between countries, or between countries and individuals, as in the case of a safety agreement.<sup>838</sup>

The fact that Muslims are allowed to have a truce with enemies under *Shari'a* means there is no reason why, for instance, they cannot conclude a long term treaty with non-Muslim countries. If a truce is to stop a war or fight with a non-Muslim tribe or country, a treaty aims to prevent and forestall the crime from happening or extradite those criminals who have committed a crime elsewhere. There is no explicit mention in the *Shari'a* of Muslims not being allowed to conclude a treaty with a non-Muslim country. However, permission is qualified with the condition that no provision of the treaty should violate the provisions of the *Shari'a*.

### 5.4.1 The legality of treaties in *Shari'a*

The evidence for the legality of concluding agreements can be found in the Qur'an and the *Sunna*, in addition to the consensus of Islamic scholars. In the Qur'an this can be seen in, for instance, “except those who join a group between whom and you there is a treaty (of peace).”<sup>839</sup>

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<sup>836</sup> Scholars of Islamic doctrine have given different definitions to ‘treaty’. The *Hanafi* defined this as an agreement to stop fighting for a fixed period of time. The *Malikia* defined it as a contract for peace between a Muslim and a warrior, for a period of time when the latter is not under the rule of Islam. For the *Shafia*, however, it is reconciliation with the warring party, to stop fighting for a certain period, with or without compensation. These agreements are mainly concerned with warring situations and the arrangement seems to be for a short time, for which reason some scholars define them as truces. For more information refer to the Qur'an, *Sourat al-Israa (17)*, verse 34.

<sup>837</sup> T. Thomas, ‘Jihad's Captives: Prisoners of War in Islam,’ 12 USAFA J. Leg. Stud. 87 (2002/2003) (stating that “[a]ccording to the *siyar* of treaties, as derived from the *shari'a* law of contracts, treaty adherence is obligatory for the Muslim nation.”).

<sup>838</sup> M. Shokri, *Almadkhal lilganoon Alawli Elam* [Introduction to public international law during peace time], (Damascus: Dar Al Fiker, 1983), at 370.

<sup>839</sup> Qur'an, *Sourat An Nissa (4)*, verse 90.



### 5.4.2 Sources for extradition in Saudi Arabia

Apart from the first basic government law issued in 1982, and amended in 1992, the Kingdom of Saudi Arabia, as an Islamic state, does not have a formal constitution as understood in the west and the world at large. Viewing itself as purely Muslim, it has adopted the holy book of the Qur'an as its first and ultimate official constitutional document.<sup>840</sup> Nonetheless, the Basic Law addresses a number of fundamental legal issues. Its importance is that it represents the first man-made law in the country. However, it remains subordinate to the *Shari'a*. Further, it outlines the general functions and duties of the courts in the Kingdom.

It is nevertheless vital to emphasise that the bulk of the legal system cited, including the criminal justice system, is based on the *Shari'a* and its interpretation, the Basic Law, and royal decrees. In practice – as will be seen – the role of the latter proves to be the most influential on the whole system. Also, in matters of extradition, besides what is stipulated through the *Shari'a*, royal decrees tend to have direct or indirect implications for Saudi practice. A good example of this is Article 42 of the Basic Law,<sup>841</sup> which deals with asylum and extradition. There are other articles in this Law which relate to extradition practices. For example, Article 81 states that the enforcement of the law will not prejudice treaties and agreements to which Saudi Arabia is committed.<sup>842</sup> In addition, it contains articles dealing with the rights of individuals accused of crimes – Article 38 says that there can be no punishment without the “effectiveness of a statutory provision.”<sup>843</sup> In spite of the absence of a right to legal representation, it contains some articles on the basic right of residents and citizens to be heard in the justice system, such as Article 47, which grants a right of litigation to all citizens and residents.<sup>844</sup>

Based on this legal framework, the Saudi government uses the following to decide on extradition:<sup>845</sup>

1. Bilateral and multilateral treaties and agreements with other countries.

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<sup>840</sup> Unsurprisingly, this is proclaimed in Article 1 of the Basic Law, see n.40, also Article 7.

<sup>841</sup> See Basic Law, n.40, Article 43, at 23.

<sup>842</sup> *Ibid*, Article 82, at 30.

<sup>843</sup> *Ibid*, Article 38, at 23.

<sup>844</sup> *Ibid*, Article 47, at 24.

<sup>845</sup> See Alotaibi, n.28, at 272.

2. Reciprocity, especially in the absence of an agreement, or treaty.

Nonetheless, the role of the King is crucial. In order to better portray this, it may perhaps be helpful to examine his relationship in relation to the constitution, as well as his effect on extradition treaties and human rights.

### **5.5 The relationship between the King and the Saudi constitution and the impact and effects on extradition treaties and human rights**

Alotaibi noted that “Saudi Arabia does not have a separate constitution in the traditional sense of most other nations. Saudi Arabia’s Basic Law... addresses a number of fundamental legal issues, but it is not a constitution.”<sup>846</sup> According to Article 1 of the Basic Law of Governance, “the Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the *Sunnah* (Traditions) of His Messenger,”<sup>847</sup> and the system of governance shall be monarchical<sup>848</sup> whereby citizens shall pledge allegiance to the King on the basis of the Book of God and the *Sunnah* of his Messenger, and on the basis of submission and obedience in times of hardship and ease, fortune and adversity.<sup>849</sup>

Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the *Sunnah* of his Messenger, both of which govern the Basic Law and all other laws of the State,<sup>850</sup> which are also based on justice, *shura* (consultation), and equality in accordance with Islamic *Shari’a*.<sup>851</sup>

Governance in the State consists of judicial, executive and regulatory authorities. The promulgation of regulations or other forms of legislation is always subordinate to the divine rules; hence the term ‘regulatory authority’ is used, rather than ‘legislature’.<sup>852</sup> The Law requires these authorities to co-operate in the discharge of their functions in accordance with this and other laws. The judiciary are a quasi-independent authority in that the Basic Law says that there is no power over judges in their

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<sup>846</sup> See Alotaibi, n.73, at 273.

<sup>847</sup> See Basic Law, n.40, Article 1, at 17.

<sup>848</sup> *Ibid*, Article 5, at 18.

<sup>849</sup> *Ibid*, Article 6, at 18.

<sup>850</sup> *Ibid*, Article 7, at 18.

<sup>851</sup> *Ibid*, Article 8, at 18.

<sup>852</sup> *Ibid*, Article 44, at 24.

judicial function other than the power of the *Shari'a*,<sup>853</sup> but Article 44 makes it clear that the King is the final authority<sup>854</sup> and he delegates his judicial powers to the judicial authority in accordance with the previous article of the Basic Law of Governance. The most notable of the King's interventions are pardons. For example, the recovery of King Fahd from illness in 2005 was marked by the pardoning of prisoners guilty of petty offences.<sup>855</sup>

The right of litigation is guaranteed equally for both citizens and residents in the Kingdom, and the Law shall sets forth the procedures required thereof.<sup>856</sup>

The courts have to apply the provisions of *Shari'a* to cases before them, as indicated by the Qur'an and the *Sunnah*, and any legislation not in conflict with the Qur'an and the *Sunnah* which the authorities may promulgate.<sup>857</sup>

Subject to the provisions of Article 53 (which refers to the Board of Grievances, which is a body whereby citizens may gain redress), the courts have jurisdiction to adjudicate all disputes and crimes.<sup>858</sup> The King or whomever he deputises shall be responsible for the enforcement of judicial rulings.<sup>859</sup>

The Basic Law declares that the King shall run the affairs of the nation in accordance with the dictates of Islam. It is his duty to supervise the implementation of the *Shari'a* and the general policies of the State, and the protection and defence of the country.<sup>860</sup> "The King and the Council of Senior Scholars (who are appointed by the King) are the only legal interpreters of the constitutional rules implicit in the *Shari'a*."<sup>861</sup>

The King presides over the Council of Ministers. He is assisted in the discharge of his functions by the members of the Council of Ministers in accordance with the provisions of this and other

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<sup>853</sup> See Basic Law, n.40, Article 46, at 24.

<sup>854</sup> *Ibid*, Article 44, at 24.

<sup>855</sup> 'Some prisoners pardoned in Saudi Arabia', Samirad (28 July 2005), available at <http://www.saudinf.com/main/y8449.htm> (accessed 15 March 2010).

<sup>856</sup> See Basic Law, n.40, Article 47, at 24.

<sup>857</sup> *Ibid*, Article 48, at 25.

<sup>858</sup> *Ibid*, Article 49, at 25.

<sup>859</sup> *Ibid*, Article 50, at 25.

<sup>860</sup> *Ibid*, Article 55, at 25.

<sup>861</sup> See Alotaibi, n.73, at 274.

laws. The Law of the Council of Ministers<sup>862</sup> sets forth the power of the Council with respect to internal and foreign affairs, and to the organisation of the agencies of the Government and co-ordination among them. It also sets forth the requirements ministers must meet, their powers, accountability, and all their affairs. The Law of the Council of Ministers and the powers of the Council can be amended only in accordance with this Law.<sup>863</sup>

Members of the Council of Ministers are appointed, relieved of their posts, and their resignations accepted by Royal Order. Their responsibilities are specified in accordance with Articles 57 and 58 of the Basic Law of Governance. The internal regulations of the Council set forth its rights,<sup>864</sup> whereas the Basic Law sets out its structure.<sup>865</sup>

(a) The King shall appoint vice presidents of the Council of Ministers and member ministers of the Council of Ministers and shall relieve them by Royal Order.

(b) The vice presidents of the Council of Ministers and the member ministers of the Council of Ministers shall be considered collectively responsible before the King for the implementation of the Islamic *Shari'a* and the laws and the general policies of the State.

(c) The King may dissolve the Council of Ministers and reconstitute it.

Ministers and heads of independent agencies are considered responsible before the King for the ministries and agencies they head.<sup>866</sup> A minister is the direct head and has the final authority in running the affairs of his ministry, and carries out his duties in accordance with provisions of this Law as well as other laws and regulations.<sup>867</sup>

The constitution of the United Kingdom is a mixture of written laws, historical precedents, and written accepted practices: “the U.K. constitution is an untidy mixture of different kinds of law practices and customs, and has a substantial informal element.”<sup>868</sup> The House of Commons has

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<sup>862</sup> Kingdom of Saudi Arabia, *The Law of the Council of Ministers*, in Translation of Saudi Laws, Series II, (Riyadh: Bureau of Experts at the Council of Ministers, 2003).

<sup>863</sup> See Basic Law, n.40, Article 56, at 26.

<sup>864</sup> *Law of the Council of Ministers*, see n.862, Article 8, at 36.

<sup>865</sup> See Basic Law, n.40, Article 57, at 26.

<sup>866</sup> *Ibid*, Article 58, at 26.

<sup>867</sup> *Law of the Council of Ministers*, see n.862, Article 10, at 36.

<sup>868</sup> See Alder, n.13, at 17.

claimed sole sovereignty and there is nothing in theory to prevent any and all of these existing constitutional elements being replaced by new (man-made) laws. “The ultimate authority in the English Constitution is a newly-elected House of Commons....a new House of Commons can despotically and finally resolve.”<sup>869</sup>

By contrast, however, in Saudi Arabia the *Shari'a* is, in effect, the constitution, and being the Word of God can never be replaced, revised, amended, or discarded. The most that can happen is that its application can be refined, but always upholding its basic truths.<sup>870</sup>

So, despite the fact that the King is the only interpreter and decision maker on a number of matters (helped by Islamic scholars and council), he is not viewed as an absolute monarch. He does not have unlimited authority, only that bestowed by the *Shari'a*,<sup>871</sup> although his opponents, at least from outside the Kingdom, still see him as the sole decider in all matters of life. Nonetheless, the role of the King is to be, literally, the Defender of the Faith.<sup>872</sup> It is because the King is subservient to the *Shari'a* that the executive, legislative, and judicial functions of the state are not separated in a manner familiar to the western world (expressed by Bagehot, in describing the British constitution as idealised as “the legislative, the executive, and the judicial powers are quite divided – that each is entrusted to a separate person or set of persons – that no one of these can at all interfere with the work of the other”<sup>873</sup>). Because of this he not only has a right but also a duty to be involved in all matters that concern the nation. The administrative arrangements in the Kingdom are designed to assist him in this role. No one person could run a modern state single-handedly; hence the King has a Council of Ministers to advise him and to provide him with a forum for debate on important matters that affect the Kingdom.<sup>874</sup> The Ministers, like ministers in Western governments, deal with specific aspects of government, including extradition.

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<sup>869</sup> W. Bagehot, *The English Constitution*, (London: Fontana, 1993), at 221.

<sup>870</sup> See Basic Law, n.40, Article 45, at 24.

<sup>871</sup> *Ibid*, Article 5b, at 18.

<sup>872</sup> *Ibid*, Article 55, at 25.

<sup>873</sup> See Bagehot, n.869, at 62.

<sup>874</sup> See Basic Law, n.40, Article 56, at 26.

The state grants political asylum if public interest so dictates. Laws and international agreements specify the rules and procedure for the extradition of ordinary criminals.<sup>875</sup> Hence, the international agreements and treaties that have been approved by the Saudi State are considered part of its basic law. This involves a positive recommendation from the Council of Ministers and the *Shura* Council, as laid down in the Basic Law of Governance.<sup>876</sup>

The Ministry of the Interior is the body responsible for the procedures for requesting or extraditing criminals, as well as the signing of the official papers. These are undertaken according to Act 83 dated 13 February 1975 (1/2/1395 AH), which states that the Ministry of the Interior is responsible for finding suspects and criminals and requesting them from outside the Kingdom using official processes and procedures. The Extradition Requests' Committee consists of three consultants from the Ministry<sup>877</sup> and carries out the investigation of requests for those who are wanted from abroad or for extradition, as well as dealing with the necessary documents. These activities are carried out according to the relevant regulations so that the Committee can fulfill the legal requirements agreed to in the extradition treaties. The regulations also guide them in deciding whether to accept or reject requests and whether additional documentation is needed. They also govern the procedures for arrest or investigation within the Ministry of the Interior and how to communicate with specific countries, by diplomatic means or Interpol.

The investigation of extradition files were delegated later to the General Bureau of Investigation and Prosecution. Article 54 of the Basic Law of Governance indicates the link between the Bureau, its organisations, and its authority.<sup>878</sup>

The Saudi procedure in requesting recovery or extradition of criminals is of the administrative kind, which is quick and efficient in combating crimes. However, the guarantees granted to the accused are closely aligned to the requirements of justice. Extradition authorities follow the required judicial procedures to ensure the accuracy of the charge attributed to the person required for recovery and to provide basic guarantees for him. Human rights are protected in accordance

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<sup>875</sup> *Ibid*, Article 42, at 23.

<sup>876</sup> See Basic Law, n.40, Article 67, at 28.

<sup>877</sup> Order of His Royal Highness the Under-Secretary of the Interior Minister No.749 date 25 January 1977 (4/02/1397 AH).

<sup>878</sup> See Basic Law, n.40, Article 54, at 25.

with the *Shari'a*.<sup>879</sup> To fulfill this, authorities are keen to call any one who is requested for extradition on important or dangerous issues for questioning, to make sure of the facts of the charge and to ascertain whether he had been tried before for this crime and whether there are hidden motives that would argue against this extradition.

Extradition requests are usually dealt with by the Ministry of the Interior, both requests from other countries and requests to other countries. In all cases, the King as the supreme authority and as the chair of the Council of Ministers has the right to intervene and make decisions or measures and directives in all sectors and sections of state affairs.<sup>880</sup> He may, therefore, elect to sanction a request or to decline it.<sup>881</sup> The Basic Law, as well as *Shari'a*, has guaranteed him this right; hence he can intervene by accepting or refusing extradition. This is not considered to be interference in judicial matters because extradition decisions, in Saudi law, are administrative and not judicial.

Hence, the wide authorities of the King are not practised except in accordance with Islamic *Shari'a*. The enforcement of the Law of Governance should not prejudice treaties and agreements with states and international organisations and agencies to which the Kingdom of Saudi Arabia is committed.<sup>882</sup> The Kingdom is a member of many international organisations and linked by good political and economical relationships with many countries for many decades. Because “the Islamic view of international law... regards all law – municipal and international - as resting on a unified set of higher norms,”<sup>883</sup> the *Shari'a* has never been an obstacle for any developments, including extradition of criminals. There is nothing in the *Shari'a* that prevents the signing of agreements and treaties in these matters. Even when there is no treaty, reciprocity and international norms through normal channels which do not contradict with *Shari'a* are available solutions that can be used effectively and efficiently.

Subject to the provisions of the *Shura* Council, laws, treaties, international agreements and concessions shall be issued and amended by Royal Decrees after being reviewed by the Council

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<sup>879</sup> See Basic Law, n.40, Article 26, at 21.

<sup>880</sup> See Basic Law, n.40, Articles 55, 56, 57b, 60, 62, 67, and 70, at 25-28.

<sup>881</sup> Interior Minister Order, see n.877.

<sup>882</sup> See Basic Law, n.40, Article 81, at 30.

<sup>883</sup> See Alotaibi, n.73, at 280.

of Ministers.<sup>884</sup> The *Shura* Council shall express its opinion on the general policies of the State referred to it by the President of the Council of Ministers.<sup>885</sup>

The Kingdom is linked with many international charters and respects human rights, ensured by the *Shari'a* more than 1400 years ago. As noted above, Article 26 of the Basic Law of Governance states that “the State shall protect human rights in accordance with Islamic *Shari'a*.”<sup>886</sup>

Some countries refrain from signing extradition agreements with Saudi Arabia because it applies the death sentence. The description above of *Shari'a* shows why the death penalty cannot simply be abolished in Saudi Arabia. It is not in the remit of anyone, from the King downwards, to change mandatory parts of the *Shari'a*, particularly those in the Qur'an itself. The fact is that these are imposed by the *Shari'a* and this renders them an immutable element in justice. However, the degree of punishment may be optional. The granting of an amnesty or pardon is in the prerogative of the King, who can modify certain legal rulings, for example by remitting or reducing sentences, or imposing lighter punishments, or by pardon. However, in the *Shari'a* law of limits (*Hudood*), crimes concerning personal rights, such as murder, cannot be forgiven by the ruler because this is the right of God and the relatives of the murdered person, so the decision is theirs.<sup>887</sup> They may forgive the murderer completely or through reconciliation on payment of a certain amount of money more or less than *Ad-Diyat* (blood money) or exile the murderer to another city. They also have the right to accept or refuse the compensation and adhere to the right of *Qisas* or death penalty as granted by the *Shari'a*. Against this, the King does have the duty to consider the best interests of the state,<sup>888</sup> as shown by the pardon extended to U.K. citizens accused of terrorist-like activities, following a series of explosions in Riyadh related to alcohol-smuggling gangs.<sup>889</sup> The news report reveals that the King extended his pardon on the basis of best serving the interests of Saudi Arabia and maintaining good relationships with the United Kingdom.

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<sup>884</sup> See Basic Law, n.40, Article 20, at 39.

<sup>885</sup> Law of the Shura Council, see n.771, Article 15, at 47.

<sup>886</sup> See Basic Law, n.40, Article 26, at 21.

<sup>887</sup> A. Khalid, *Aligtisadia* [The International Arabic Economic Newspaper], Issue No.5312, (Syria 27 April 2008).

<sup>888</sup> See Basic Law, n.40, Article 62, at 27.

<sup>889</sup> BBC, 'Saudis deny torture claim', <<http://news.bbc.co.uk/1/hi/uk/3158555.stm>> accessed 12 March 2010.



The UN General Assembly's resolution of 2007<sup>890</sup> regarding the freezing of executions paving the way to cancel them completely may be noted here. The UN General Assembly previously adopted a resolution of the second optional protocol on 15/12/1989 at the International Institute of Civil and Political Rights to cancel the death penalty. However, this new resolution of 2007 clearly interferes with the internal affairs of the member states. Although the resolution is non-binding for the member states, it also contradicts section seven of the second Article of the United Nations Charter ("there is nothing in this charter that justifies interference in matters which are the internal affairs of a country. The members are not required to resolve their problems according to this charter").<sup>891</sup> It is clear that the disciplinary subjects of criminal legislation and laws of personal circumstances are not suitable to unify provisions between different countries other than trade, investment, and work that express financial and economic interests and are not reflections of philosophies of laws or religions and privacy of communities.

It is unlikely that there would be agreement between all countries about the cancellation of the death penalty, since each country adopts what suits its national security, which is its responsibility.<sup>892</sup>

There is no doubt that the problem of the death penalty can be solved in a way which does not conflict with the *Shari'a*, but which fulfils the need of the Kingdom and other countries to combat crime. The agreement between Saudi Arabia and Bulgaria is a good example.<sup>893</sup> In September 2003 the two countries co-operated but Bulgaria set conditions of exception concerning the death penalty. It refuses to extradite for crimes that can end only with a death sentence. Other European countries can do the same and set such conditions in their agreements with the Kingdom for more and greater security co-operation. All parties would benefit both in terms of security as well as the effects at the political and economic levels. One such effect may be seen in that the goodwill generated by the agreement with Bulgaria led to a general treaty of co-operation. This treaty – covering many areas such as economic interests, culture, tourism, and

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<sup>890</sup> United Nations General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment', Resolution 362/148 (18 December 2007) UN Doc A/RES/62/148.

<sup>891</sup> United Nations Charter, see n.390, Chapter I, Article 2, Section 7.

<sup>892</sup> See generally, Khalid, n.887.

<sup>893</sup> See Alotaibi, n.73, at 303.

trade - between Saudi Arabia was signed on 14 April 2007, after a resolution of the Council of Ministers, acting in turn upon a resolution of the *Shura* Council.<sup>894</sup>

As can be seen from what has been stated above, the relationship between the King and the *Shari'a* is very strong, because he draws his authorities, rights, responsibilities, and commitments from it, and exercises all his duties within its framework because the Qur'an and *Sunnah* together (the *Shari'a*) in effect are the Saudi constitution, and adopted in all aspects of life.

As noted above, the King has a wide role in the extradition of criminals, in accepting or refusing it, as the head of state and head of the Council of Ministers. This is his right according to the law and the *Shari'a*, and he has a particular duty when there is danger to the security and interests of the country.<sup>895</sup> This does not affect the extradition of criminals negatively because there are channels other than treaties, such as reciprocity and international norms, through which extradition can happen.

Perhaps one of the most sensitive issues in relations between Saudi Arabia and the West are human rights (which also includes the death penalty), for which a number of countries, as well as human rights and women's rights organisations criticise the Kingdom. These pressures, portrayed in a number of spoken and printed media, directly criticise Saudi Arabia for violating human rights (discussed in more detail below), despite its commitment to the spirit as well as the letter of international charters on these sensitive issues. In part, these critiques may be related to the fact of poor monitoring and mechanisms in the Kingdom of Saudi Arabia itself, giving an impression of uncompromising harshness with the severe punishment – as it may appear from a Western point of view – of the execution of genuine criminals. These stringent punishments are, as noted above, part of Islamic *Shari'a* law, which neither the King nor the *Shura* council could cancel or suppress. Nonetheless, pressures on the Kingdom from important countries and human rights organisations are still being maintained. For example, a report of Human Rights Watch (World Report 2009) wrote that:

“Human rights conditions remain poor in Saudi Arabia. International and domestic pressures to improve human rights practices remained feeble, and the government

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<sup>894</sup> *Shura* Council Resolution No.60/84 dated 6 January 2008 (27/12/1428 AH).

<sup>895</sup> See Basic Law, n.40, Article 62, at 27.

undertook no major reforms in 2008. The government systematically suppressed the rights of 14 million Saudi women and an estimated 1 to 3 million members of minority *Shia* communities, and failed to protect women and the rights of foreign workers. Thousands of people received unfair trials or were subject to arbitrary detention. Curbs on freedom of association, expression, and movement, as well as a lack of official accountability, remain serious concerns.”<sup>896</sup>

The report continues with:

“The government continues to treat women as legal minors, denying them a host of fundamental human rights. The government requires women to obtain permission from a male guardian to work, study, marry, travel, and even receive a national identification card. The Ministry of the Interior did not implement a cabinet recommendation from July to abolish the requirement for a guardian’s permission to issue ID’s to women.

In addition, the government neither set a minimum age for marriage nor adopted any comprehensive policies to combat forced and early marriages. Marriages of Saudi girls as young as 10 to much older men were reported in 2008, although the human rights commission intervened in one such case to delay marriage for five years.

Strictly enforced sex segregation hinders a Saudi woman’s ability to participate fully in public life. Women are prohibited working in offices or entering government buildings that lack female sections, or pursuing degrees in disciplines not taught in women’s colleges. The Ministry of Labour places prohibition on mixed workplaces with vaguely worded obligations to respect Islamic law on the matter, and so the current workplace environment remains highly segregated. The Ministry of Justice denies women the right to be judges or prosecutors, or to practice law. In February 2008 religious police arrested a 36-year-old Saudi businesswoman for ‘illegal mingling’ while meeting with a male colleague in a Starbucks in Riyadh... [On foreign workers’ status and treatment went on to note that]... An estimated 8 million foreign workers, primarily from India, Indonesia, the Philippines, and Sri Lanka, fill jobs in the construction, domestic service, health, and

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<sup>896</sup> Human Rights Watch, ‘World Report 2009: Saudi Arabia’, <http://www.hrw.org/en/node/79258> (accessed 14 March 2010).

business sectors. Many suffer a range of abuses and labour exploitation, sometimes rising to slavery-like conditions.

Despite renewed announcements in July, the Ministry of Labour did not implement its commitment to end the restrictive *kafala* (sponsorship) system. The policy ties migrant workers' residency permits to their employers, fuelling abuses such as employers confiscating passports, withholding wages, and forcing migrants to work for months, or years against their will.”<sup>897</sup>

Further, the report went on to include serious violations of human rights in a number of domains, including arbitrary detention and unfair trials, the detention of children, lack of freedom of speech, lack of freedom of religious practice and discrimination, especially towards the *Shia* minority.<sup>898</sup>

Within this environment, Saudi Arabia was forced to reform in a number of ways in order to defend its external image abroad and to placate its own citizens. However, these reforms began to show faults also. In the aftermath of the events of 9/11, it was noted that Saudi Arabia saw increased pressure for reform in the 21<sup>st</sup> century. In May 2002 a revised criminal justice system was instituted.<sup>899</sup> The following year there were small-scale demonstrations calling for reform. These were broken up by the police.<sup>900</sup> It was announced that there would be municipal elections held within the year. These were tentatively scheduled for October 2004 and represent the first democratic elections in the country's history. There was even conjecture that women would be able to both vote and stand as candidates. King Fahd also gave wider powers to the *Majilis as-shura* (the consultative assembly). In the event, the municipal elections were delayed

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<sup>897</sup> *Ibid.* For more information on these issues refer to Amnesty International, <http://www.amnesty.org> (last accessed 10 March 2010). Also in United States, Bureau of Democracy, Human Rights and Labor, '2008 Human Rights Report: Saudi Arabia', (25 February 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119126.htm> (accessed 14 March 2010).

<sup>898</sup> *Ibid.*

<sup>899</sup> Noted, with criticisms by Human Rights Watch, 'Universal Periodic Review of Saudi Arabia', (11 June 2009), <http://www.alertnet.org/thenews/newsdesk/HRW/3afa594207c87d6b5f04b78346e3c832.htm> (accessed 14 March 2010).

<sup>900</sup> Amnesty International, 'Document – Crackdown on Demonstrators Deals another Blow to Human Rights', (24 October 2003), <http://www.amnesty.org/en/library/asset/MDE23/010/2003/en/dda8eaeef-d677-11dd-ab95-a13b602c0642/mde230102003en.html> (accessed 14 March 2010).

until February 2005. Women were not allowed to vote, but the authorities described the exclusion as one based on logistical problems rather than policy.<sup>901</sup>

Among the more flexible moves of recent years by the Saudis was when the King granted a pardon to two British women. In May 1997 two British nurses working in Saudi Arabia faced possible severe penalties for the murder of an Australian nurse in a Saudi hospital: 500 lashes and eight years in jail for the first (Lucille McLaughlin) and beheading for the other (Deborah Parry), unless the victim's family in Australia granted mercy in exchange for money (in Saudi law, *diya*). Several months were spent, following the arrest in December, in deciding whether the brother of the murdered woman had the right to insist on the death penalty or exercise clemency if the two nurses were found guilty. That right is established under *Shari'a* law. The nurses' trial opened on May 19 before an Islamic religious court in Khobar. The court upheld the right of the victim's brother, Frank Gilford, to decide whether to call for the death sentence for Deborah Parry. On November 16 Gilford agreed to accept the *diya* and thus effected the waiving of the death penalty for Parry. On May 18 1998, both nurses were granted a pardon by King Fahd and their sentences were commuted.<sup>902</sup>

Another, more controversial, example was when the Saudi Arabian government passed an amnesty to former Al Qaeda operatives, and which as a result, attracted further criticism from mainly American politicians, lawyers, and the general media.

It should be noted that as well as the paucity of legal materials for the study of extradition in Saudi Arabia that has been referred to previously, there is also a corresponding shortage of commentary supporting and defending the Saudi Arabian position. The above examples should therefore be understood to be principally from a Western perspective. A refutation of the more extreme views of Saudi Arabia as an unremittingly barbaric country may be seen in the Gilford case above. The Kingdom of Saudi Arabia is trying hard to balance its orthodox Islamic rule (usually coming from the powerful, religious establishment) and current pressures and events. Its active diplomacy and participation in a number of international gatherings are points in case. In

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<sup>901</sup> Ahmed Al-Omran, 'Saudi Arabia's Municipal Elections', Global Voices Online, (2 May 2005), <http://globalvoicesonline.org/2005/05/02/saudi-arabias-municipal-election/> (accessed 14 March 2010).

<sup>902</sup> C. Pennell, 'Law as a Cultural Symbol – the Gilford Murder Case and the Presentation of Saudi Justice', (Lebanese American University, 2004), <http://inhouse.lau.edu.lb/bima/papers/Pennell.pdf> (accessed 14 March 2010).

the domain of religious as well as international gatherings, the Kingdom has managed to conclude a number of friendship and extradition agreements. Some of these are historical (like the Mecca, Al Taif, and Jeddah treaties),<sup>903</sup> others are seen as modern.<sup>904</sup>

## **5.6 Modern treaties**

Saudi Arabia continued its efforts to sign extradition agreements at bilateral and multilateral levels. These efforts resulted in several modern treaties of a more advanced form than previously. None are recorded in the United Nations Treaty Series.

### **5.6.1 Agreement on co-operation between the Ministries of the Interior of Saudi Arabia and Iraq**

This Agreement was signed in Riyadh in 1977.<sup>905</sup> It covered scientific, technical, and administrative issues and consisted of sixteen articles. One part referred to the two parties agreeing to co-operate in pursuing suspects and criminals for extradition upon request. The Agreement stipulated the establishment of a joint committee to draft an agreement for extradition, taking into consideration the following guidelines<sup>906</sup>:

- Search and stopping of criminals and suspects to take place upon direct communication between the two liaison offices for the Arab criminal police in the two ministries. Name, description, nationality of the wanted person and accusations directed at him to be included in the application.
- Extradition request to come directly from the Minister to his counterpart in the other country. The application to include details of the crime.

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<sup>903</sup> Saudi Arabia was one of the first countries to sign bilateral treaties and agreements with its neighbours, with the Mecca, see n.676; Al Taif, see n.677; and Jeddah Treaties (see n.678).

<sup>904</sup> The Kingdom of Saudi Arabia managed to conclude a number of key bilateral agreements as well as multilateral ones. Amongst these one could count for example, the agreement on co-operation between the Ministers of the Interior of Saudi Arabia and Iraq in Riyadh 1997, bilateral agreements for co-operation on security with the Gulf States in 1981 and 1982; agreement on security with Yemen July 27 1996 as well as others with Pakistan in 1984 and Iran in April 2001.

<sup>905</sup> This agreement ratified by the Decree of the Council of Ministers number 256, dated 19 September 1979 (26/10/1399 AH) and Royal Decree number M/45 dated 3 October 1979 (11/11/1399 AH), hereafter the Iraq Agreement.

<sup>906</sup> *Ibid*, Article 11 of the Iraq Agreement.

The Agreement did not stipulate specific rules for extradition, but was a hopeful nod towards the conclusion of an extradition treaty. The joint committee referred to in the agreement was not established and subsequently the proposed extradition treaty between Saudi Arabia and Iraq has not been concluded to date.

### **5.6.2. Bilateral agreements for co-operation on security issues with the Council of Gulf States.**

In 1981 and 1982, the Kingdom of Saudi Arabia concluded individual bilateral agreements with some of the Gulf States including the Kingdom of Bahrain, the State of Qatar, the United Arab Emirates and the Sultanate of Oman.<sup>907</sup>

These Agreements cover co-operation on security issues. The second part of the Agreements contains sixteen articles on the extradition of criminals. The Agreements stipulated that the extradition of criminals is mandatory if the crime constitutes in the requesting country a crime for which the punishment is a minimum period of imprisonment for six months. They also stipulated extradition for cases in which the crime was committed outside the territories of the two countries and the two countries would punish such crime. Extradition includes the subjects of the state requested to extradite the criminal.<sup>908</sup> These aspects of the Agreements were decided on the principle of the seriousness of the crime, as well as the principle of the regionalisation of criminal law, without objecting to the extradition of subjects.

The Agreements also covered the conditions under which extradition would not be allowed. These are:

- Where charges are dropped in accordance with the judicial system of the requesting state.<sup>909</sup> In addition, consideration must be made of the principle of the application of an appropriate law for the suspect.

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<sup>907</sup> Details of these Agreements were obtained by private communication. The Agreement with the United Arab Emirates was used to provide the details in this section (see n.825). These Agreements are hereafter called the Gulf States Agreements.

<sup>908</sup> Article 1 paragraphs A and B of the Gulf States Agreements.

<sup>909</sup> Article 2 of the Gulf States Agreements.

- In cases of a political nature, the agreements do not define the concept or the limits of political crimes and follow the manner of exclusion for crimes of treason as not being political and allowed the extradition of those who commit it.<sup>910</sup>
- When a crime is committed in the territories of the state requested to extradite.<sup>911</sup> In this case, the agreements give the priority to the principle of criminal law regionalism.
- When the person to be extradited enjoys diplomatic immunity, in accordance with international law or any other international treaties or conventions.<sup>912</sup>
- When more than one request for extradition is received, for the same person or where that person is on trial. The agreements covered three possibilities.
  - If more than one application is received for extradition for a person for the same crime from different states, the priority is given to the state where the crime caused the most harm and then after that to the state where the crime was committed.<sup>913</sup>
  - If multiple extradition requests are received for the same person for different crimes, the agreements give priority to the seriousness of the crime, the date of the crime, and the date of receipt of the extradition applications, as well as requiring an undertaking from the requesting state to return the suspect after his trial.<sup>914</sup> However, the agreements did not specify which state has priority. In the case of judicial pursuit of a wanted person or if he is convicted for another crime, the state receiving the request has to decide on the extradition and to retain it until the pursuit has ended or the judicial system has cleared or convicted him. His extradition to the requesting state is then permissible, for him to stand before its judicial system, on condition that it will return him after his trial and passing sentence.<sup>915</sup>

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<sup>910</sup> Article 3 paragraph A of the Gulf States Agreements.

<sup>911</sup> Article 3 paragraph B of the Gulf States Agreements.

<sup>912</sup> Article 3 paragraph C of the Gulf States Agreements.

<sup>913</sup> Article 3 paragraph D of the Gulf States Agreements.

<sup>914</sup> Article 4 paragraph A of the Gulf States Agreements.

<sup>915</sup> Article 5 of the Gulf States Agreements.



However, the agreements do not oblige the parties to comply with a specific system for the submission of an extradition application. The documents required for extradition are listed in the agreements and the relevant authorities in the two countries were named as channels for transactions.<sup>916</sup> Where an extradition file is absent, the consent of the suspect is needed.<sup>917</sup> The decision to extradite is the responsibility of the authorities in the two countries, providing that the requested state informs the requesting one of its decision, and a full explanation given in cases of rejection, within a period of two months.<sup>918</sup>

In addition, the agreements allowed for requests for extradition by cable or telephone in exceptional circumstances. It is then the duty of the country responsible for extradition to keep the wanted person under surveillance until the extradition procedures are completed, which must be within thirty days, with the right to release him if the complete file is not received. The agreements permit an extension of this initial period to another thirty days, all such periods to be deducted from the term of sentence.<sup>919</sup>

The agreements oblige the country requested to extradite the wanted person to hand over to the requesting country all belongings which the suspect has upon him at his arrest.<sup>920</sup> With regard to the financial cost of extradition, the agreements oblige the requesting country to bear all the costs.<sup>921</sup> In addition, they fixed a period of thirty days for the requested country to extradite the suspected person. The requested country has no right to release the suspect or extradite him to another country.<sup>922</sup>

These agreements do comply with those concluded on the principles of international law, and they did strike a balance between the right of the requesting and the requested states. At the same time, they did not disturb the rights of the suspects and gave them a guarantee of justice.

By way of demonstrating that the Kingdom is *actively* participating in respecting and honouring its commitment to such treaties, thus setting an example for other Islamic states to follow, a few

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<sup>916</sup> Article 6 of the Gulf States Agreements.

<sup>917</sup> Article 7 of the Gulf States Agreements.

<sup>918</sup> Article 8 of the Gulf States Agreements.

<sup>919</sup> Article 9 of the Gulf States Agreements.

<sup>920</sup> Article 10 of the Gulf States Agreements.

<sup>921</sup> Article 12 of the Gulf States Agreements.

<sup>922</sup> Article 14 of the Gulf States Agreements.

cases of extradition of criminals between the Kingdom of Saudi Arabia and the Gulf States are described. The handling of these cases was in accordance with the bilateral extradition agreements.

The first case was a request from Saudi Arabia to the UAE for the extradition of an Emirates national to Saudi Arabia accused of owning and drinking alcohol and smoking opium, and also driving a car under their influence while in Saudi Arabia. The request was based on the fact that the crime committed by the Emirates national was in accordance with the first article of the second part of the agreement.<sup>923</sup> This Article stipulated that extradition is obligatory if the two following conditions were fulfilled.

- If the crime is one which carries a penalty of physical punishment or carries a minimum imprisonment period of not less than six months.
- If the crime was committed within the requesting state or outside the two countries but the rules in the requesting country punishes for the crime, even if committed outside its territory. Extradition is allowed for the wanted person even if he is not a subject of the requesting country.<sup>924</sup>

The second case between Saudi Arabia and the UAE was the case of a Syrian citizen whose extradition was requested by the UAE when he was in Saudi Arabia. He was accused of issuing a cheque without supporting funds. The suspect accepted the accusation and agreed to his extradition to the UAE without an extradition file. The Kingdom agreed to his extradition.

The UAE based its request on Article 1 of Part 2 of the Agreement in accordance with Article 7,<sup>925</sup> which reads:

“if the arrested suspect admits that he is the wanted person, and agrees to the accusation directed to him, And if the concerned authorities in the two countries find the crime is

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<sup>923</sup> Kingdom of Saudi Arabia, Department of Investigation and the Attorney General, Extradition Department, Case number 135.

<sup>924</sup> Agreement on Security Co-operation and the Extradition of Criminals between Saudi Arabia and the United Arab Emirates, Article 1 Part 2, (22 February 1982) (27/4/1402 AH), ratified by the Council of Ministers on 24 March 1982 (28/5/1402 AH), hereafter United Arab Emirates Agreement.

<sup>925</sup> Kingdom of Saudi Arabia, the Department of Investigation and the Attorney General, Extradition Department, Case number 344.

one of the crimes that allow extradition according to the Articles of the Agreement, with the consent of the suspect to his extradition without a request for an extradition file, the appropriate authority is to extradite him.”<sup>926</sup>

The third case concerns the extradition of an Indonesian suspect who was living in Saudi Arabia. The United Arab Emirates requested her extradition with an accusation of betrayal of trust in accordance with Article 1 of the agreement between the two countries. The extradition was filed in accordance with paragraph B of Article 6 of the agreement.<sup>927</sup> Under the same articles, an Egyptian national who was living in Saudi Arabia was extradited to the United Arab Emirates, accused of issuing a cheque with criminal intent.<sup>928</sup>

The fourth case was between Saudi Arabia and the Sultanate of Oman. The latter requested the extradition of a Portuguese national accused of circulating fake banknotes and sentenced to five years, reduced by half. The request was based on Article 1 of Part 2 of the agreement between the two countries. The Kingdom agreed to the extradition, in accordance with paragraph B of Article 6 of the agreement.<sup>929</sup> The same articles were used for the extradition of an Egyptian citizen, accused of theft, to the State of Qatar, again in accordance with Article 1 of Part 2 of the agreement.<sup>930</sup> The documents were submitted in accordance with Article 6/B.

The similarities in the articles of the various agreements between Saudi Arabia and the Gulf States are evident. As with the Syrian noted in the second case above, there was a similar case of a Saudi citizen who issued cheques without supporting funds and was therefore accused of embezzlement and cheating. The Office of Settlement of Commercial Bonds convicted him and he fled the country to Bahrain. The Kingdom of Saudi Arabia based its request for his extradition

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<sup>926</sup> United Arab Emirates Agreement, see n.924, Article 7.

<sup>927</sup> Kingdom of Saudi Arabia, the Department of Investigation and the Attorney General, Extradition Department, Case number 208.

<sup>928</sup> Kingdom of Saudi Arabia, the Department of Investigation and the Attorney General, Extradition Department, Case number 47.

<sup>929</sup> Kingdom of Saudi Arabia, the Department of Investigation and the Attorney General, Extradition Department, Case number 380.

<sup>930</sup> Kingdom of Saudi Arabia, the Department of Investigation and the Attorney General, Extradition Department, Case number 333.

upon Article 1 of Part 2 of the agreement. The necessary documents were filed by the Saudi side in accordance with Article 6 of the same agreement.<sup>931</sup>

### **5.6.3 Agreement for security co-operation with the Republic of Yemen**

The Kingdom of Saudi Arabia and the Republic of Yemen signed in the city of Jeddah on 27<sup>th</sup> July 1996 an agreement for co-operation on security and the combating of crime. The Agreement was ratified on 8<sup>th</sup> January 1997.<sup>932</sup> The main thrust of the Agreement is co-operation on security, and consists of 25 articles. Section 2 covers co-operation on the extradition of criminals, Articles 11 to 25. These included the following provisions:

- The terms are identical to those of the agreements that Saudi Arabia signed with the Gulf States.
- Extradition of a wanted person is permissible if he is a subject of the country requested to extradite.<sup>933</sup>

An example of the application of this latter provision is the case of a Yemeni citizen who was living in Saudi Arabia and accused of killing another Yemeni national living in the Kingdom. The government of Yemen requested the extradition of the suspect in accordance with Article 11 of the Agreement, which reads “the extradition of criminals is obligatory if the application fulfils the following conditions:

- a) if the crime according to the details provided by the requesting country is one of the *Hudood* or *Qusas* crimes or the minimum punishment for the crime is not less than six month of imprisonment.
- b) If the crime is committed in the land of the requesting country or committed outside the territories of the two countries and the law in the requesting country punishes for the crime if committed outside its territory, extradition of

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<sup>931</sup> Kingdom of Saudi Arabia, the Department of Investigation and the Attorney General, Extradition Department, Case number 212.

<sup>932</sup> Decree of the Council of Ministers number 1, dated 14 May 1997 (6/01/1418 AH), and Royal Decree number M/1 dated 16 May 1997 (8/1/1418 AH) [hereafter referred as the “Yemen Agreement”].

<sup>933</sup> *Ibid.* Article 11, Section B.

the citizen in such case is permissible if he is a national of the country requested to extradite.”<sup>934</sup>

In accordance with Article 11 of the Agreement, the Saudi government requested the extradition of a Yemeni national<sup>935</sup> who was involved in a crime. The extradition file arranged by the Saudis was in accordance with Article 16 of this Agreement.<sup>936</sup> In accordance with these articles, the Saudi government requested the extradition of several Yemeni citizens suspected of other crimes. A good example is the case of a Yemeni citizen who was accused of breach of trust.<sup>937</sup>

Another case was that of a Yemeni national who was accused of embezzlement of the sum of two hundred and five thousand eighty Saudi Riyals when he was working in Saudi Arabia. The Kingdom requested his extradition in accordance with Article 11 of the Agreement and the extradition was arranged in accordance with Article 16.<sup>938</sup>

The outcome of this agreement is well reflected in more serious crimes, such as terrorism, that the Kingdom suffered greatly from for a long period, in particular after September 11 2001. Security co-operation has been very fruitful under the umbrella of this Agreement. Of late, the two countries have exchanged the extradition of groups wanted for security reasons. A number of commentators have noted the volume of extraditions between the two countries. For example, Yemen and Saudi Arabia have exchanged numerous suspects pursuant to a security agreement between the two countries in 2004.<sup>939</sup> The government of Yemen has extradited to Saudi Arabia more than 37 suspects in the last two years. The latter has extradited to the former more than 35 suspects, including some suspected of taking part in the attack on the French oil tanker (the

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<sup>934</sup> Royal Decree number M/1, n.902, Article 11.

<sup>935</sup> Case number 170, the Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

<sup>936</sup> Yemen Agreement, see n.932, Article 16.

<sup>937</sup> Case number 407, the Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

<sup>938</sup> Case number 276, the Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

<sup>939</sup> Mohit Joshi, ‘Yemen extradites 5 suspected terrorists to Saudi Arabia’, *TopNews* (28 March 2009), <http://www.topnews.in/regions/yemen?page=5> (accessed 10 March 2010).

*Limborg*) along the Yemeni coast in October 2002.<sup>940</sup> On 21<sup>st</sup> March 2004, the Saudi extradited 8 suspects to Yemen and in return, Yemen, extradited 5 Saudi nationals to Saudi Arabia.<sup>941</sup>

The success of this Agreement between Saudi Arabia and Yemen may be attributed to many factors. Primarily, it is the harmony in the security policies of the two countries and similarities in the punishment systems. Because the Yemeni punishment system contains severe punishments for the seven *Huduud* crimes, which are considered to be offences against God, each crime carries a specific, severe punishment.<sup>942</sup> These crimes are:

- Apostasy - the rejection of Islam by word. The punishment is death.
- Theft - the punishment is severing the right hand.
- Transgression - the punishment is death.
- Highway robbery - punishments include execution, crucifixion, or exile.
- Adultery - the penalty is flogging, with 100 strokes for the unmarried, and flogging plus stoning for the married.
- Slander or defamation - the penalty is flogging with 80 strokes.
- Drinking alcohol - the penalty is flogging, the number of strokes not being specified.

This means Yemen has the right to receive criminals for most of these crimes. The punishment for these crimes is only limited to Yemeni and Saudi nationals. This condition is disadvantageous to the Agreement, because it is not enough for extradition if the penalty for the crime upon which the extradition case is built exists in the law of the requesting country but does not exist in the law of the of the country to which the suspect belongs.<sup>943</sup>

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<sup>940</sup> See Alotaibi, n.73, at 298.

<sup>941</sup> SPA, 'Kingdom and Yemen Extradite Detainees', Samirad (21 March 2004), <http://www.saudinf.com/main/y6987.htm> (accessed 3 March 2010).

<sup>942</sup> A. Al-Sarafie, *Altaawun Algadaee Aldawli Fi Almagal Alginaee Fi Alaalam Alarabi* [Extradition of criminals in the Yemeni law system], Arab Forum workshops, Syracuse, Italy, 5-11 December 1993, (Beirut: Dar al Ielm lilmalaien , October 1995), at 125-126

<sup>943</sup> J. Hisiey, Arab Forum Workshops, Syracuse, Italy, 5-11 December 1993, (Beirut: Dar al Ielm lilmalaien , October 1995).

It can be seen that the Agreement between the two countries does not add anything with regard to the non-extradition of nationals, because this was the case in the Riyadh Agreement, in accordance with Article 39 of the Agreement signed by Saudi Arabia and Yemen in 1983. Before the signing of this latter, Yemen in several cases rejected the extradition of its own citizens to Saudi Arabia, sticking to the principle of non-extradition of its nationals. Amongst these examples was one of a Yemeni, suspected of involvement in a murder case, and another who was suspected of theft while working in Saudi Arabia. The Yemeni government decided not to extradite them, but also decided not to allow them to escape justice.<sup>944</sup> In accordance with the Riyadh Agreement, it was the duty of the government of Yemen to put them on trial. The legislation of the Yemen government does not allow the extradition of any national, stated in Article 29 of the constitution, which reads: *it is not allowed to extradite any Yemeni citizen to any foreign authority*. Article 16 of the Law of Criminal Procedure in Yemen indicates that it is not allowed to extradite any Yemeni subject for a crime committed abroad. This is in line with the Riyadh Agreement, which in Article 39 stipulates the permissibility of non-extradition of subjects.<sup>945</sup>

The same goes for the agreement between Saudi Arabia and Yemen in Article 11 Section B of the more recent Agreement, which referred to the permissibility of the extradition of nationals.<sup>946</sup> Despite the provisions for both the Yemen and Saudi Arabia using the right of non-extradition of their subjects, neither party has exercised this right and has adhered to the international principle of permissibility of extradition of their own nationals.

Some scholars argue that there are three sources<sup>947</sup> for this international principle. Firstly, a direct text could be found in the constitution of the state requested to extradite, leaving no space for argument or discussion. Secondly, although there might not be a direct article in the constitution on the matter, but a continuity of rejecting extradition of national subjects over a period of years will allow reference in such cases to there being a customary law. This practice is

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<sup>944</sup> See Al-Sarafie, n.942, at 127.

<sup>945</sup> Article 39 of the Riyadh Agreement. An unofficial translation, but endorsed by the Council of Arab Ministers of Justice, can be seen at 'Riyadh Arab Agreement for Judicial Co-operation', (6 April 1983), <http://www.unhcr.org/refworld/publisher,ARAB,,,3ae6b38d8,0.html> (accessed 3 March 2010). (Hereafter called the Riyadh Agreement).

<sup>946</sup> Yemen Agreement, see n.932, Article 11 paragraph B.

<sup>947</sup> See generally Alrousi, n.188.

based on the principle of maintaining the sovereignty of the state requested to extradite. Thirdly, in international and bilateral agreements, part of the text of the agreement might be the permissibility of extradition of criminals between the two countries or the contracted countries. In such cases, a request for the extradition of a national from the other country is only a request to bring the citizen who holds the nationality of that country to trial according to the judicial system of that country and no extradition is forced in these cases.

It is much easier, therefore, to request the extradition of, say, a Yemeni living in Yemen than requesting the extradition of a Yemeni citizen living in another country, to avoid the application of the principle of permissibility of subjects referred to above. One example is that the Saudi authorities made a request on 17<sup>th</sup> May 1985 to the Egyptian government for the extradition of a Yemeni national who was living in Egypt and wanted in Saudi Arabia for issuing cheques without credit when living in Riyadh. The Egyptian authorities arrested the said Yemeni national and the Attorney General agreed to his extradition to Saudi Arabia. While the extradition file received from Saudi Arabia was being investigated, the Egyptians discovered that there were outstanding charges against him in Egyptian police stations in 1986, a short time after his arrest. He was convicted in front of the Egyptian courts upon his confessing, in an attempt to avoid extradition to Saudi Arabia. After passing sentence, the Egyptians informed the Saudi side that extradition would take place on 28<sup>th</sup> March 1990. Before the arrival of the representatives of the Saudi government to finalise the extradition, the Egyptians discovered a new judicial verdict against the same national from the Egyptians courts. The date of extradition was amended on April 8, 1990. The suspect was finally extradited to Saudi Arabia on July 11, 1990.<sup>948</sup>

Perhaps, amongst the most important extradition and security agreements the Kingdom of Saudi Arabia has concluded are those signed with Pakistan and Iran. Regionally, in the context of the Middle East, and Asia, these two meetings represented both a step forward and a development in the field of extradition to reaching out to non-Arab states. However, it is important to add that both countries (Iran and Pakistan) do share with Saudi Arabia an Islamic heritage and interests. Both Pakistani and Iranian workers are to some degree very visible in the Arabian Gulf, and in

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<sup>948</sup> Egypt, Ministry of the Interior, Department of General Security, Interpol Information Centre, File number 123/2Ex.



Saudi Arabia itself. These shared factors probably contributed to the genesis of such agreements and understanding with Saudi Arabia.

#### **5.6.4 Agreement for the extradition of criminals between Saudi Arabia and the Republic of Pakistan**

This Agreement was concluded between Kingdom of Saudi Arabia and the Islamic Republic of Pakistan in 1984.<sup>949</sup> It consists of 19 articles, including the following important provisions. The Agreement listed twenty-two crimes for which extradition would be permitted,<sup>950</sup> on the condition of dual incrimination in the systems of the two countries and the crime would be penalised by not less than one year in jail.<sup>951</sup>

The Agreement stipulated non extradition in the following cases:<sup>952</sup>

- If the crime was of a political nature, leaving the criteria for deciding that to the country requested to extradite. The Agreement referred to specific crimes which would not be regarded as political crimes and for which, therefore, extradition would be permissible.<sup>953</sup>
- If the crime was committed in the territory of the country requested to extradite. Here, the Agreement adopts the regional principle for the application of the criminal script.
- If the person wanted for extradition was tried or is under investigation for the same crime in the requested country, or if his trial took place in a third country for the same crime. The wording of this paragraph is lacking in precision, in spite of so many details. The Agreement allows for extradition in cases in which the person had been on trial previously or under investigation in the same country. With regard to third countries, this was covered only in the case of the trial of a wanted person. This gives the possibility of

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<sup>949</sup> Decree of Council of Ministers number 222, dated 9 July 1984 (10/10/1404 AH) and Royal Decree number M.46 dated 5 August 1984 (8/11/1404 AH). (Hereafter called the Pakistan Agreement.).

<sup>950</sup> *Ibid*, Article 2.

<sup>951</sup> *Ibid*, Article 2, at par. 1.

<sup>952</sup> *Ibid*, Article 3.

<sup>953</sup> *Ibid*, Article 3, at par. A.

extradition if he is under investigation. The Agreement stated the right of every country to decline the extradition of its subjects provided that it would take responsibility for dealing with the crimes committed.<sup>954</sup>

The wording of the text gives the possibility of each party waiving its right of non-extradition, just as the text gives the right of declining extradition.

With regard to an application for extradition and the documents requested, the Agreement stated that requests for extradition are to be submitted by the relevant authorities in the requesting country to the requested party through diplomatic channels.<sup>955</sup> The request could be sent either through those channels or directly by post or through Interpol. When it is important to temporarily hold a suspect, the Agreement permits the use of any means of communication, provided that the basis for the decision to hold, or a court decision, is attached to the application. Moreover, the application should include the type and description of the crime, such as date, place, and description of the suspect.<sup>956</sup>

In addition, the Agreement detailed the documents to be included in the application. If the documents not be received within thirty days, it is the right of the requested country to cancel the holding or to extend it to a maximum of another 15 days. The cancellation of the holding of a suspect will not affect the right of extradition when the documents are received. Any holding period is to be deducted from the punishment period in the requesting country.<sup>957</sup>

The Agreement follows typical bilateral agreements by giving the authority for deciding on an extradition application to the relevant authorities in the country requested to extradite. When an application is rejected, the reasons should be explained within 60 days. The Agreement added that where the information provided is inadequate for deciding on the extradition, it is the right of the receiving country to ask for more information to be provided by the requesting country within a month, unless this period can be extended under the terms of the bilateral Agreement for another month.<sup>958</sup> In the case of delay in the extradition, if a wanted person is under trial or

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<sup>954</sup> Decree of Council of Ministers number 222, n.949., Article 4.

<sup>955</sup> *Ibid*, Article 5, at par. 8.

<sup>956</sup> *Ibid*, Article 8, at par. 1-3.

<sup>957</sup> *Ibid*, Article 5, at par. B.

<sup>958</sup> *Ibid*, Article 6.

convicted of a different crime in the requested country, it is the right of the requested country to take a decision to delay the extradition up to the completion of the trial. It is also the right of the requested country in such a case to extradite the suspect temporarily for investigation or trial, with an undertaking from the requesting country to keep him under arrest or to re-extradite him within 90 days if the person in question is one of its subjects. With this, the Agreement established the principle of extradition for trial only.<sup>959</sup>

Furthermore, the agreement covered the handing over procedures by stating that the requesting country is to be informed of the date and venue of handing over of the suspect, which should take place within ten days unless the requesting country agrees otherwise.<sup>960</sup> The wording of this part of the Agreement fixes the minimum period for extradition without fixing a maximum period. This could be taken as a weakness.

According to the Agreement, if the requesting country fails to receive the extradited person within the fixed date, it is the right of the requested country to set him free, unless the requesting country requests a delay in the handing over, at least two days before the end of the fixed date, for a period not exceeding 15 days.<sup>961</sup>

When a person has already been set free for the same crime, it is the right of the requested country to reject the application. In the case of the escape of a suspect and his return to the territory of the country requested to extradite him, it is the right of the requesting country to submit an application for his extradition without attaching any documents with the application.<sup>962</sup>

The Agreement endorsed the principle of speciality by stating that the person is not to stand trial except for the crime for which the application is submitted or for crimes committed after extradition. Despite this, it is permitted to hold a trial if the opportunity of leaving the territory of the country he was extradited to was not taken within thirty days of the date of being set free or upon his voluntary return to it after his departure.<sup>963</sup>

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<sup>959</sup> Decree of Council of Ministers number 222, n.949, Article 9.

<sup>960</sup> *Ibid*, Article 10, at par. 1.

<sup>961</sup> *Ibid*, Article 10, at par. 2.

<sup>962</sup> *Ibid*, Article 10, at par. 3 and 4.

<sup>963</sup> *Ibid*, Article 12, at par. 1 and 2.

In the case of multiple extradition applications from more than one country, whether for the same or different crimes, the Agreement leaves it to the requested country to make a decision, taking into consideration the conditions and circumstances, including the nationality of the wanted person, the place of the crime, and the importance of the crime, in addition to the dates and sequence of the extradition applications. The Agreement permits the requesting country to delegate the right to re-extradite a person to a third country on condition it has submitted an application for extradition within the same period.<sup>964</sup>

It is clear that the Agreement gives priority to the principle of character in applying criminal law; followed by the principle of the regionalism of the application. Note that this is not in line with the standard bilateral agreements between Saudi Arabia and the Gulf states. The other area in which this agreement is different from that between the Saudi Arabia and other countries concerns properties, as this agreement obliges the requested country upon receiving the application for extradition to enumerate the tools used in the crime or preparation for it. Moreover, the requested country has to enumerate the property found with the suspect upon his arrest, including any obtained as a result of the crime. Such tools and properties are to be handed over to the requesting country, even if extradition fails or if the suspect escapes.<sup>965</sup> The Agreement also determines that in the case of large losses resulting from the handing over of any tools and properties, the cost is to be met by the requesting country. The cost of transporting these items is also the responsibility of the requesting country.<sup>966</sup>

The Agreement includes other provisions, covering matters such as obliging the two countries to permit transit through their territories for a wanted person the subject of an application by a third country, provided that the requesting country specifies the transit permission required without any obligation on the receiving country to grant transit facilities for its citizens or for individuals on trial in its territories.<sup>967</sup>

Furthermore, the Agreement arranged the details of extradition expenses:<sup>968</sup>

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<sup>964</sup> Decree of Council of Ministers number 222, n.949, Article 13, at par. 1 and 2.

<sup>965</sup> *Ibid*, Article 14, at par. 1 and 2.

<sup>966</sup> *Ibid*, Article 14, par. 3 and 4.

<sup>967</sup> *Ibid*, Article 15, at par. 1 and 2.

<sup>968</sup> *Ibid*, Article 16, at par. 2 and 3.

- The requested country to bear all costs up to the arrest of the wanted person. Apart from that, all other costs to be met by the country requesting the extradition, on condition that the extradition is fulfilled.
- The requesting country to bear transit costs.
- The requesting country to meet costs arising from the return of the person to the place he was in at the time of his extradition, if it becomes evident that he is innocent or not convicted of the crime for which he was extradited.

The Agreement obliges the requesting country to inform the requested country of the results of the investigation into the extradited person, and to send an authenticated copy of the final verdict on the conviction of the extradited person.<sup>969</sup> This is more detailed than previous agreements and includes provisions and articles not part of prior agreements.

One example of the practical application of the Agreement is the case of a Pakistani citizen who committed a murder in Saudi Arabia and fled to Pakistan. Based on Articles 1 and 2 of the agreement between the two countries, Saudi Arabia<sup>970</sup> applied for the extradition of the suspect.

Article 1 reads that the two countries agree to extradite criminals to each other, subject to the conditions specified in the Agreement, if the person is available within the boundaries of the country requested to extradite him and he is suspected of or indicted for one of the crimes listed in the annex to this Agreement, if the conditions provided in Article 2 are fulfilled.

Article 2 of the Agreement stipulates the crimes for which extradition is permissible:

- Crimes punishable by the laws of the two contracted countries and with imprisonment for not less than one year if the sentence has been issued, or with more punishment. The second case is imprisonment for not less than three

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<sup>969</sup> Decree of Council of Ministers number 222, n.949, Article 17, at par. 1 and 2.

<sup>970</sup> Case number 78, the Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia-Riyadh.

months, or with more punishment but in this case the sentence has not been issued yet.

- Crimes that the laws of the two countries punish for a period of not less than one year of jail.
- If the extradition application contains more than one crime punishable in the laws of the two countries. Some of these crimes are not covered under the provisions of paragraph A of this Article and extradition for crimes that fulfill the conditions of extradition.<sup>971</sup>

In addition to the detailed provisions and new principles not included in previous agreements, this is notable for the adoption of a mixed style in outlining the crimes that permit extradition. This combines the minimum punishment for such crimes and the listing of very serious crimes. No reference to the degree of seriousness or punishments is made. For example, Article 2 of the Agreement states the following “criminals are to be extradited for crimes that the laws of the two contracted countries punish with imprisonment for not less than one year, or with more punishment or imprisonment for not less than three months, or with more punishment.”<sup>972</sup> An appendix designating 23 serious crimes that require extradition was attached to the Agreement.<sup>973</sup> The details of this Agreement reflect the mutual interest of the two parties in combating crime. Such details are necessary to avoid any ambiguity arising from the fact that Pakistan is an Islamic country but not an Arab country, has its own languages and traditions, and does not border Saudi Arabia. Both English and Arabic were adopted as the official languages of the Agreement. This makes it different from the agreements with the Gulf and other Arab countries, which have a conformity and similarity in their articles.

This is mainly due to the fact that the six Gulf States are united under the umbrella of the Council for Gulf Co-operation. The member states of the Council live under the same security, economic, social, and religious conditions. The same can be said of countries like the Yemen. The historical, religious, and cultural ties between these countries are very helpful in solving problems, especially in security matters. Nevertheless, despite some political, social, and cultural

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<sup>971</sup> Pakistan Agreement, see n.949, Articles 1 and 2.

<sup>972</sup> *Ibid*, Article 2.

<sup>973</sup> *Ibid*, Appendixes of crimes which permit extradition according to Article 1.

differences between Saudi Arabia and other Islamic countries, common interests, especially in security matters, necessitates co-operation between them, to combat crime through bilateral security agreements. The last few years have witnessed the signing of several agreements aiming at combating terrorism, which has become wide-spread throughout the region after September 11, 2001. A good example is the security agreement between Saudi Arabia and Iran.

### **5.6.5 The security co-operation agreement between Saudi Arabia and Iran**

In response to new threats to security, Saudi Arabia, through Interior Minister, Prince Naif bin Abdulaziz (who justified the meeting between his country and Iran) emphasised the special relationship between the two countries and the necessity for dialogue and co-operation to reach a meeting point.<sup>974</sup> Moreover, he pointed out the importance of co-operation between the two sides to enhance security and stability in the region, taking into consideration the international agreements and treaties governing such co-operation. The Agreement was signed in Tehran on 11<sup>th</sup> April 2001.<sup>975</sup> It was approved by the Saudi Council of Ministers (Decree no 186 dated 18/09/2001 (29/06/1422 AH), issued by a Royal Decree M/31 dated 26/10/2001 (6/07/1422 AH)).<sup>976</sup> The Agreement comprises 12 articles.

From the above discussion, it can be asserted that this agreement with Iran was not as detailed as that, for instance, concluded with Pakistan. The detail in the latter was probably due largely to the religious similarity, with both Pakistan and Saudi Arabia being Sunni majority countries and the fact that there is a strong Pakistani workforce presence in the Kingdom, as well as other interests through this community. As for Iran, the Saudis probably thought a security agreement and co-operation would be a step forward towards a stronger arrangement in the near future. This is justified by the deterioration of the Iraqi situation and the indirect involvement of the two countries there. Further, with the existence of a Saudi minority of Shias, mainly concentrated in

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<sup>974</sup> *Asharq Alawsat* [The international newspaper of the Arabs], issue no 9617, (London 28 March 2005).

<sup>975</sup> 'Saudi Arabia and Iran sign security agreement', (18 April 2001),

<http://www.saudiembassy.net/archive/2001/news/page443.aspx> (accessed 12 March 2010).

<sup>976</sup> Decree no 186 of the Saudi Council of Ministers, dated 18/09/2001 (29/06/1422 AH).

the Eastern province, and which occasionally, protest, often publicly,<sup>977</sup> a good agreement with the Shi'ite Republic of Iran would help contain this trouble and ease it.

No doubt, the level of the relationship between Saudi Arabia on the one hand, and Pakistan and Iran on the other, has had its impact on the two agreements. The strong relationship between Saudi Arabia and Pakistan has been translated into a very detailed agreement. The political differences and atmosphere of non-confidence that characterised the relationship between Saudi Arabia and Iran after the Islamic revolution in the latter in 1979, has been translated into an agreement that is more general. Political developments in the international arena led to some co-operation between the two countries in the late 1990s and the beginning of the new millennium at the economic, political, and security levels. However, the American National Council on US–Arab Relations considers that despite the Iran Agreement, considerable difficulties still remain.<sup>978</sup> It is worth noting that Saudi Arabia has a considerable number of its subjects wanted for justice who fled the country to Afghanistan and made their way to Pakistan or Iran. The widening spread of terrorism after September 11, 2001 is one of the main reasons for regional co-operation on security issues, with bilateral agreements aimed at combating terrorism and the extradition of criminals and suspects.

Through its diplomatic efforts and activities, the Kingdom of Saudi Arabia managed to further conclude a number of multiple/multilateral agreements on extradition. There were both regional as well as international. The idea beyond the display and discussion of the said agreements and treaties is to show to what extent is extradition becoming an important issues, especially those concerning national and state security matters, and also, to further confirm the will as well as the ability of Saudi Arabia in making efforts in this area. As noted above, the tragic events of the 9/11 attack, and the London July bombings, succeeding a barrage of terrorist sabotage incidents in Saudi Arabia, the security factor therefore became a subject of concern not only in the Kingdom, but in the Arab region and internationally. For example, on Friday November 16 2007, the Kingdom embarked on providing a tough and high tech security force to secure the oil

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<sup>977</sup> For example in Al Taif in early 2009, Arab Network for Human Rights Information, 'Shia reformist Nimr Bakir al-Nimr persecuted by security forces for criticising government policies, (22 March 2009), [http://www.ifex.org/saudi\\_arabia/2009/03/25/shia\\_reformist\\_nimr\\_bakir\\_al\\_nimr/](http://www.ifex.org/saudi_arabia/2009/03/25/shia_reformist_nimr_bakir_al_nimr/) (accessed 12 March 2010).

<sup>978</sup> Abdulaziz Sager, 'Saudi Arabia, Iran, and the Search for Regional Security', (28 June 2005) <http://www.saudi-us-relations.org/newsletter2005/saudi-relations-interest-06-28.html> (accessed 12 March 2010).



facilities in the country. It was noted in this respect that “Saudi Arabia is building up a special 35,000 strong rapid reaction force to protect its energy installations from attacks by militants targeting the world’s largest oil exporter.”<sup>979</sup>

This move brought both encouraging solidarity as well as expert help from other countries. This can be explained by both the shared, perceived threat of terrorism to the national and economic interests of those countries.<sup>980</sup>

Whether in the U.S., Britain, or the Middle East and North Africa, national and internal security as well as stability, became many countries’ highest priority, which as a result called for both multi- and bilateral agreements on extradition and the arrest of alleged or suspected terrorists and criminals and international organised crime. The latter had become, in a way, linked to terrorism through money laundering, illegal arms smuggling and trafficking. This called for an international response, and both Saudi Arabia and the U.K. were amongst the first initiators. Jack Straw (former British Home Secretary) noted that:

“In the coming year we want to see further progress: for example, agreement in the United Nations on a Comprehensive convention on Terrorism and agreement to a European Evidence Warrant. In my speech at the UN General Assembly last September, I called for an international Arms Trade Treaty which, among other things, would help to keep weapons out among other things, would help to keep weapons out of the hands of terrorists. The international community needs to continue to strengthen and uphold the international consensus against the proliferation of weapons of mass destruction...and also working to ensure the implementation of Security Council resolution 1373 which creates legal obligations on all states to crack down on terrorists, their supporters and their sources of finance. The swift extradition from Italy to the United Kingdom of a suspect in the attempted bombings on 21 July demonstrated the effectiveness of the new European Arrest Warrant. We are very grateful to the Italian government and authorities for implementing both the spirit as well as the letter of that warrant.”<sup>981</sup>

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<sup>979</sup> Simon Webb, Saudi builds security of 35,000 to guard oil’, (16 November 2007), <http://www.reuters.com/article/worldNews/idUSL1528115720071116> (accessed 12 March 2010).

<sup>980</sup> *Ibid.*

<sup>981</sup> See generally Straw, n.38.

But this shared, perceived threat, and its global response, required not only common will, but significant finances. For instance, the U.K. has acquired thousands of surveillance cameras, which have cost millions of pounds (10,000 in London alone, costing £200 million).<sup>982</sup> Recruitment for an expansion of security personnel has required further equipment, training, and therefore funding. In the Saudi case, the Kingdom dedicated to its oil companies' facilities millions of dollars in order to safeguard its own oil installations.<sup>983</sup>

But this shared threat from what has become termed “terrorists” is also controversial and debatable. This leads to a discussion of this term from different perspectives. Terrorism, like ‘political offence’ (discussed in more detail in Chapter 3, section 3.5.1), is seen differently by different states and is thus controversial. Where one country may, for instance, see an individual, group, or even a state as a terrorist, others may see a liberator, and a freedom fighter. Many views would not disagree that acts of terrorism might cause devastating consequences, destruction, and the killing innocent civilians.

“Terrorism refers to the use of violence for the purpose of achieving a political, religious or ideological goal the target of terrorist acts can be government officials, military personnel people serving the interest of governments, or civilians. Acts of terror against military targets tend to blend into a strategy of guerrilla warfare. However, one man’s terrorist is another man's freedom fighter. Random violence against civilians (noncombatants) is the type of action most widely condemned as ‘terrorism.’

Acts of terrorism can be perpetrated by individuals, groups or states, as an alternative to an open declaration of war. They are often carried out by states, or those who otherwise feel powerless. States that sponsor or engage in the use of terrorist tactics tend to use more neutral or positive terms to describe their own combatants, - such as freedom fighters, patriots or paramilitaries while the state or states become fought tend to use more negative terms like terrorism.”<sup>984</sup>

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<sup>982</sup> Justin Davenport, ‘Tens of thousands of CCTV cameras, yet 80% of crime unsolved’, *London Standard* (19 September 2007), <http://www.thisislondon.co.uk/news/article-23412867-details/Tens+of+thousands+of+CCTV+cameras%2C+yet+80+of+crime+unsolved/article.do> (accessed 13 March 2010).

<sup>983</sup> See generally Webb, n.979.

<sup>984</sup> Definition of terrorism, <http://www.wordiq.com/defenition/Terrorism> (accessed 20 March 2010).

Others see it differently. Noam Chomsky, the American intellectual, argues that terrorism is often sponsored by governments via funding of organizations that train paramilitary groups supposedly to counter terrorism.<sup>985</sup>

According to the 1937 definition of the League of Nations Convention, terrorism is about all criminal acts directed against a state and intended, or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.<sup>986</sup> But more recently, in November, 2004, a UN panel defined the term as: “any action intended to cause death or serious bodily harm to civilians, non-combatants when the purpose of such act, by its nature or context, is to intimidate a population or compel a government or an international organization to do or abstain from doing any act.”<sup>987</sup>

Perhaps the most comprehensive definition, covering aspects of this type of political violence, is that given by Truth and Justice. “Terrorism is destruction of people or property by people not acting on behalf of an established government for the purpose of redressing a real or imaginary injustice attributed to an established government and aimed directly or indirectly at an established government.”<sup>988</sup>

Not all cases of destruction of people or property are terrorism. The important definitive characteristics of terrorism are:

1. The act of destruction is performed by a person or group of persons not acting on behalf of an established government.
2. The act of destruction is performed to redress a real or imaginary injustice.
3. The act is aimed directly or indirectly at an established government, who is seen as the cause of the injustice.

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<sup>985</sup> Definition of terrorism from Economic Expert, <http://www.economicexpert.com/a/Terrorism.htm> (accessed 10 March 2010).

<sup>986</sup> League of Nations Convention definition of terrorism, 1937, [http://terrorism.about.com/od/whatisterroris1/ss/DefineTerrorism\\_2.htm](http://terrorism.about.com/od/whatisterroris1/ss/DefineTerrorism_2.htm) (accessed 20 March 2010).

<sup>987</sup> Definition given by Kofi Annan when addressing the Closing Plenary of the International Summit on Democracy, Terrorism and Security – ‘A Global Strategy for Fighting Terrorism’, available at <http://www.un.org/apps/sg/prints/gstats.asp?nid=1345> (accessed 20 March 2010).

<sup>988</sup> Truth and Justice, ‘Truth, Honesty and Justice The Alternative to Wars, Terrorism and Politics, What is Terrorism?’, (14 July 2002), <http://www.truth-and-justice.info/defterror.html#fn2> (accessed 2 March 2010).

Without these characteristics an act of destruction of people, or property is not terrorism. It is either an accident, or an act of war, or a matter internal, or an ordinary, common law crime (murder, arson etc).

- If destruction of people or property is caused unintentionally, it is an accident.
- If destruction of people or property is undertaken by or on behalf of an established government against another country it is considered war not terrorism
- If destruction of people or property is undertaken by or on behalf of an established government on its own territory, it is considered a matter of policy, not terrorism.
- If destruction of people or property is undertaken without justification, it is considered an ordinary common law crime, not terrorism.
- If destruction of people or property is not aimed against an established government, but is aimed at private individuals or groups, it is considered an ordinary common law crime, not terrorism, even if such act is aimed at redressing a wrong, because disputes between private individuals should be settled through an established legal system operated by an established government, not by taking the law into one's own hands.<sup>989</sup>

Regardless of the above definitions and controversies over the term 'terrorism', nation-states are still calling for global gatherings to combat terrorism, or are concluding bilateral and multi-lateral agreements on the subject. In the Saudi case, the Kingdom has concluded – besides those discussed above – bilateral and multilateral agreements on extradition and other related issues. It is relevant to this study to examine certain of these.

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<sup>989</sup> Truth and Justice, see n.988.

## 5.7 Multilateral agreements

### 5.7.1 The Arab League extradition agreement

The Council of the Arab League approved this agreement on 14<sup>th</sup> September 1952 in its sixteenth regular session. It was signed by six states.<sup>990</sup> The Agreement consists of 22 articles that included the following provisions.

Extradition is obligatory if the person is wanted, convicted, or on trial for one of the crimes stated in the Agreement when the crime for which extradition is requested was committed on the soil of the state requesting extradition, or committed outside the requesting and requested countries.<sup>991</sup> Also, extradition is obligatory if the crime for which extradition is requested is for a crime subject in the laws of the two states to punishment by imprisonment for one year or more.<sup>992</sup> The Agreement increased the minimum punishment of crimes for which extradition is permissible to one year, unlike the bilateral agreements with the Gulf States, which had a minimum punishment of 6-months imprisonment. Moreover, this Agreement followed the condition of dual incrimination.

With regard to the gravity of the crimes, the Agreement used a three-fold classification of misdemeanour, felony or violation. In spite of extensive discussion among the delegates on this point, the Saudi and Yemeni delegations registered their reservations about this article. They explained their position with the fact that the judicial systems in their countries do not follow such a system. In addition, in their criminal systems, the two countries include punishments of lashing and amputation that are more severe than imprisonment. To avoid disputes that might arise from this article, the Agreement stated that where there was no identical punishment for the crime in the requesting country, then extradition would not be obligatory unless the person wanted for extradition is a subject of the requesting country or a subject of another country applying the same punishment.<sup>993</sup> This is regarded as a violation of the condition of dual

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<sup>990</sup> The Agreement was signed by Saudi Arabia on 23 May 1953 (9/09/1372 AH). The ratification documents were deposited at the General Secretariat of the Arab League; see *The Arab League Collection of Treaties and Agreements*, (Cairo: Arab League 1978), at 95. Hereafter called the Arab League Agreement.

<sup>991</sup> *Ibid*, Articles of the Agreement.

<sup>992</sup> *Ibid*, Article 2.

<sup>993</sup> *Ibid*, Article 3.

incrimination, and is also taken as proof that this Agreement takes into consideration the laws of the country requested to extradite, stipulating as it does that the crime committed must be punishable according to the laws of the requested country.

This condition has always been seen as one of the hindering factors in the extradition of criminals for three reasons. Firstly, the crime could be one that could happen on the territory of the country requested to extradite because of its location or its own system. Secondly, the crime might be a dangerous one that has a direct connection with the country's interest, but this might not be true for the country requested to extradite. Finally, the condition that the crime must be punishable in the country requested to extradite is a real constraint. For instance, if someone committed a crime in Saudi Arabia and fled to another country where the crime was not considered to be of the same level of seriousness, the Saudi authorities would find real difficulties in extraditing the suspect to face justice.

The Agreement covered circumstances in which extradition would not be permissible.

- If the person requested for extradition was already on trial for the same crime and found not guilty or had sentence passed, or was under investigation for the same crime. In this case, extradition is to be postponed until the end of the trial. The agreement approves temporary extradition to the requesting country on condition that it will return him after the trial but before serving the sentence.<sup>994</sup> This is also the case in the bilateral agreements between Saudi Arabia and the Gulf States.
- If the case is dropped, based on the rules of the requesting and requested countries, the rules of Islamic criminal legislations being applied in those countries.<sup>995</sup>
- In cases of crimes of a political nature, the Agreement left the definition of a political crime to the country requested to extradite. This is taken to be one of the disadvantages of this Agreement, because it leaves the door open to include political crimes in the widest meaning.<sup>996</sup> In the bilateral agreements between Saudi Arabia and other Arab countries,

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<sup>994</sup> Arab League Agreement, see n.990, Article 5.

<sup>995</sup> *Ibid*, Article 6.

<sup>996</sup> Al Hamsahri M, *Mashrooa Ifagiat Tasleem Almugremeen Bain Al Dual Alarabia* [Arab agreement for the extradition of criminals], (1974) 65, *Journal of Egyptian Security*, at 151.

political crimes excluded aggression against Heads of State and their families, as well as murder or crimes of terrorism.<sup>997</sup>

- The agreement incorporated the principle of the non-permissibility of the extradition of subjects, although a decision to extradite is open to the requested state. When extradition is refused, the requesting state should take responsibility for trial and could make use of the investigations carried out by the requesting state.<sup>998</sup>

In the case of multiple requests for the extradition of the same person for the same crime from different countries, the Agreement stated that when the requested state received such multiple extradition requests, the priority was first the state *most affected* by the crime, then the state on *whose territory* the crime was committed, and then the state to which the *suspect belongs*.

When the extradition requests are for different crimes by the same person, the highest priority is to be accorded to the state requesting extradition first.<sup>999</sup> This agreement follows the same lines as the bilateral agreements between Saudi Arabia and the Gulf States, in which the regional principle comes before the principle of the personality. That is, the crime is tried at the place of the crime and not the country of the criminal. This Agreement is more precise in dealing with multiplicity of extradition requests. In the bilateral agreements, this was left to the circumstances and events surrounding the crime. The language of the bilateral agreements gives determination of the priority to the state requested to extradite.

It also decided on the *principle of competence*. According to this, the extradited person is only to stand trial for the crime he is extradited for, or that he commits after his arrest. Furthermore, the Agreement decided on the non-departure of the extradited for the territories of the requesting country within 30 days even if the chance is given to him to leave. In such a case, he would be eligible for trial for other crimes. This agreement contains only this exception, whereas the bilateral agreements added another exception to the principle of competence, for when the person extradited agreed to stand trial for other crimes.

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<sup>997</sup> Arab League Agreement, see n.990, Article 4.

<sup>998</sup> *Ibid*, Article 7.

<sup>999</sup> *Ibid*, Article 13.

The Agreement stipulated that extradition requests be made through diplomatic channels. The decision for each request is left to the relevant authority of the country requested to extradite, according to its rules.<sup>1000</sup> This procedure is seen as disadvantageous because it causes loss of time and might give the suspect the chance to leave the country before the arrival of the extradition request. Experience has shown this to be true. Going directly through the authority responsible for extradition or through Interpol is more effective. Article 8 of the Agreement stated that the decision on the extradition request is the responsibility of the relevant authority, without naming that authority. Each country has the choice of which of the four extradition styles to follow, whether administrative, judicial, mixed administrative-judicial, or optional. Every country has its own style, and appoints specific authorities to decide on applications. Such differences in style often cause difficulties in the extradition process. They, too, may give the suspect the opportunity to flee the country.

The Agreement stipulated that a number of key documents should be attached to the extradition request.<sup>1001</sup>

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<sup>1000</sup> Arab League Agreement, see n.990, Article 13.

<sup>1001</sup> *Ibid*, Article 8. Amongst these documents required are: The warrant for arrest, when the extradition request concerns a person under investigation, indicating the type of the crime and the relevant punishment for that crime. Another document, which should be attached, is the legal copy of the verdict. Also attached should be the investigation documents and full details and description of the wanted person and confirmation of his nationality. For extradition requests for people sentenced in their absence, an official copy of the sentence must be attached to the request. Also, a full description of the suspect and his nationality are part of the documentation authorised by the Minister of Justice or anyone on his behalf. In his response to a question about the most effective method of extraditing a suspect, a senior official from the Saudi extradition committee said requesting 'extradition through the police authority, in addition to the date of commitment of the crime and the bilateral relationships between the two countries are decisive factors.'

One of the officials in the same committee indicated that the most effective way to dispatch an extradition file is to send it directly from the security authority to its counterpart in the other country, adding that there is a difference between an extradition request and dispatching the extradition file. The Agreement permits the directing of an extradition request by post, wireless or telephone. It is the duty of the requested country to keep the suspect under surveillance or put him under arrest until it hands him over to the requesting country. If the extradition file is not received within 30 days, the Agreement does not permit the renewal of the precautionary locking-up period. The suspect is to be released and the locked-up period deducted from his penalty in the requesting country. This is the same as for the bilateral agreements. The Agreement obliges the requested country to hand over to the requesting country all the belongings of the suspect, in particular those that might be evidence for the crime.

The signatory states are to give safe transit and protection to the extradited persons. According to the Agreement, the requesting country is to bear the financial costs of extradition (and re-extradition of the suspect to the place where he was before extradition, if not convicted). If there is a contradiction between the bilateral agreements and this Agreement, the more flexible articles take precedence, to accelerate the extradition of the suspect. For further information refer to the following sources: Arab League Agreement, Articles 9-12.



This Agreement did not include any general provisions to make its execution obligatory, and this is why it is rendered impotent in many cases that face its member states. This has pushed the member states to sign bilateral agreements or to withdraw.<sup>1002</sup> Furthermore, this agreement did not touch on the issue of co-ordination of extradition requests between member states and the Arab Interpol. More recent agreements have overcome this disadvantage. A good example is the Riyadh Agreement on Judicial Co-operation (in section 5.7.2 following). Saudi Arabia is one of the signatory states and ratified it according to the rules and procedures of the Kingdom, which is obliged to adhere to its provisions. In many cases, Saudi Arabia has used Articles 2 and 3 from this Agreement as an official reference for extradition. Article 2 of the Agreement stated that extradition is obligatory if the person requested for extradition is under persuasion, suspected, or convicted of one of the crimes listed in Article 3 of the Agreement,<sup>1003</sup> if the crime was committed on the territory of the requesting country. If the crime was committed outside the territories of the two countries, extradition is not obligatory unless the laws of the two countries punish for such a crime if committed outside their territories. Moreover, Article 3 of the Agreement states that for extradition the offence must be of a criminal nature or its punishment at least one year's imprisonment or more severe punishment in the laws of both the requesting and requested countries, or the person requested for extradition has been sentenced for a minimum of two months imprisonment. If the crime is not punishable in the laws of the country requested to extradite, or the punishment for the crime in the country requesting the extradition has no equivalent in the requested country, extradition is not obligatory unless the suspect is a subject of the requesting country or another country that would give the same punishment.

A practical example of the execution of this agreement is a case of an Egyptian national. The Egyptian government requested his extradition from the Saudis with the accusation of squandering his wife's property. He was sentenced in his absence to 6 months. Egypt based its request on Articles 2 and 3 of the Arab League agreement on extradition. The Saudi government agreed to the extradition and executed it according to Article 9 of the agreement.<sup>1004</sup> In another case, the Saudi government did not extradite a Saudi national to Egypt, accused of possessing

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<sup>1002</sup> Arab League Agreement, see n.891, Article 2.

<sup>1003</sup> *Ibid*, Article 16.

<sup>1004</sup> Case number 71, Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

drugs. While Egypt based its request on Articles 2 and 3, the Saudi government based its rejection on Article 7.<sup>1005</sup> In such a case, extradition is optional, and the Saudis retained the right to try him themselves, with the help of the investigations undertaken by the Egyptians.<sup>1006</sup> Another example of the use of Articles 2 and 3 is the case of an Egyptian citizen accused of breach of trust, and the Saudi authority requested his extradition according to Article 3.<sup>1007</sup> There were four more cases in which there were extradition requests from both sides. For instance, Egypt requested the extradition of one of its nationals from the Saudi authorities for drugs-related crime, sentenced to ten years in his absence. The Saudis agreed to this extradition.<sup>1008</sup>

They also, agreed to the extradition of another Egyptian subject accused of possessing an unlicensed weapon, and who was sentenced to three years imprisonment *in absentia*.<sup>1009</sup>

But when Egypt requested the extradition of a Saudi Arabian national accused of possessing an unlicensed weapon and sentenced to two years imprisonment,<sup>1010</sup> the Saudi authorities declined on the basis of Article 7.<sup>1011</sup>

Despite the criticisms and observations directed at this Agreement above, it remains from the legal and drafting point of view one of the best Arab agreements available up to date. This is because it is widely used, and according to Article 4 of the Agreement is applicable to normal crimes as a basis and obliges extradition for four types of important crimes, such as terrorism.

### **5.7.2 The Riyadh Arab agreement on judicial co-operation**

This agreement was signed in Riyadh on 4<sup>th</sup> April 1983 by 23 Arab States, including Saudi Arabia.<sup>1012</sup> The Council of Arab Ministers of Justice adopted the draft bill of this agreement,

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<sup>1005</sup> Case number 81, Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

<sup>1006</sup> Arab League Agreement, see n.891, Article 7.

<sup>1007</sup> Case no. 361, Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

<sup>1008</sup> Case no. 267, Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

<sup>1009</sup> Case no. 299, Department of Investigation and the Attorney General, Extradition. Department, Saudi Arabia, Riyadh.

<sup>1010</sup> Case no. 364, Department of Investigation and the Attorney General, Extradition Department, Saudi Arabia, Riyadh.

<sup>1011</sup> M. Arafa, 'Almajallah Alarabiyah Lildirasaat Alamniyah wa Altadreeb', 15 *Arab Journal for Security Studies and Training*, at 264.

regarding it as a comprehensive bill for co-operation between Arab judicial organisations. Chapter 6 of this Agreement included provisions for the extradition of criminals and sentenced persons, from Articles 38 to 57.<sup>1013</sup>

The Agreement took into consideration the provisions of the 1952 Arab League Agreement on the issue of the optional extradition by member states of their subjects.<sup>1014</sup> This would include people committing a crime in the territories of any of the contracted states. In addition, the Agreement stipulated dual incrimination. The Agreement took into consideration the issue of specifying the nationality of the person requested for extradition and the date of committing the crime. In this respect, it is different from the 1952 Arab League Agreement.

- The Agreement decided the following would be subject to obligatory extradition.<sup>1015</sup> Anyone facing an accusation of committing a crime not punishable in the laws of the country requested to extradite; or the punishment in the laws of the requesting country is not the same in the country requested to extradite; or if the wanted person is a subject of the requesting country or a subject of another country party to the agreement that awards the same punishment.
- Any one facing an accusation of committing a crime punishable by locking-up for one year or more in the laws of both the requesting and requested parties.
- Any one sentenced in his presence or absence from the courts of the requesting country for one year of imprisonment or more, according to the laws of the requested country. Note that the Agreement is very strict about the possible punishment of the person wanted for extradition, unlike the 1952 Arab League Agreement, which stipulated a sentence of two months imprisonment minimum.
- Any one sentenced in presence or absence from the courts of the requesting country for a crime punishable in the laws of the requested country; alternatively, with a punishment that is not identical in its laws; alternatively, if he is a subject of the country requesting

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<sup>1012</sup> Riyadh Agreement, see n.945.

<sup>1013</sup> Shams M Z, *Alitifagiat Elgadaeia Aldawliah Wa tasleem Almugreemen* [Judicial international agreement and extradition of criminals from 1926-1985], (Damascus: Alasdiqa printing, 1986), at 105-107.

<sup>1014</sup> Riyadh Agreement, see n.945, Article 39.

<sup>1015</sup> *Ibid*, Article 40.

extradition or a subject of another country party to the agreement permitting the same punishment.

Extradition is not obligatory for all crimes.<sup>1016</sup> The Agreement followed the 1952 Arab League Agreement in making political crimes non-obligatory, with exemption for the crimes listed by the Arab League and the bilateral agreements between Saudi Arabia and the Gulf States. Moreover, the Agreement added crimes related to the disruption of military duties. This is seen as a new development. The Agreement also stipulated that extradition is not permitted if a final sentence is pronounced in the country requested to extradite.

The Agreement dealt with the delivery of pardon for the crime in the country requesting extradition. Furthermore, the Agreement adopted the principle of the regionalism of the criminal text. It did not support extradition in the case of suits served or dropped by prescription, which should be dealt with in accordance with the laws of the requesting country. When a crime is committed outside the territories of the requesting country by a person who does not hold its nationality and the laws of the requesting country do not allow the person to be sued, in this case extradition is not permitted.

On the issue of extradition applications, the Agreement followed the same procedures as the bilateral agreements between Saudi Arabia and the Gulf States, by stipulating that extradition applications are to be submitted by the competent authority in the requesting country to its counterpart. The Agreement did not impose a specific system for submitting applications to the signatory parties, leaving this to the discretion of each country. In this respect, the Agreement is different from that of the Arab League, which chose diplomatic channels for communication. In addition, the Agreement made the attachment of information and details about the suspect obligatory for extradition.<sup>1017</sup> Moreover, the Agreement gave the requested country the right to ask for more information about the suspect within a fixed period.<sup>1018</sup> With regard to the procedures for holding a suspect, his temporary extradition or release, the same path as the Arab

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<sup>1016</sup> Riyadh Agreement, see n.945, Article 41.

<sup>1017</sup> *Ibid*, Article 42.

<sup>1018</sup> *Ibid*, Article 45.

League Agreement was followed. In addition, there is deduction of the precautionary locking up period from the punishment.<sup>1019</sup>

For multiple extradition requests for one suspect, the Agreement took the principles of the Arab League and bilateral agreements. The only development is that this Agreement gives the requested country the right to decide how multiple extradition requests should be dealt with.<sup>1020</sup> The Agreement is more precise on the issue of the handing over of the tools used or connected with crime and uses the same language as in the Agreement between Saudi Arabia and Pakistan.<sup>1021</sup> The Agreement gave the right of deciding on an extradition request to the competent authorities in the country requested, according to its laws valid at the time of submission of the application. With a positive decision, the requested competent authority is to inform the requesting authority with its decision, and to fix the date and venue for finalising the extradition process. The release of the suspect is permissible after 30 days if the extradition did not take place after the date fixed for handing over, and his extradition for the same crime is not permissible except in unforeseen circumstances.<sup>1022</sup>

This Agreement does not oblige the requested party to give reasons to the requesting party for declining a request. Nor does it fix any period for the release of the suspect in exceptional circumstances, and left this for agreement and decision by each party separately. Furthermore, the Agreement follows the rules of the Arab League and the bilateral agreements in giving the right of deciding on extradition requests for suspects held temporarily, or under trial for another crime, to the country requested to extradite. It is to inform the requesting party of its decision. Extradition can take place after the trial.<sup>1023</sup> Moreover, the Agreement introduced a new article, one not included in the Arab League or the bilateral agreements with the Gulf States or Pakistan. This is the adaptation of flexibilities between the contracted countries about which crime under consideration should be tried first. This means the trial of the subject or directing an accusation

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<sup>1019</sup> Riyadh Agreement, see n.945, Articles 43 and 44.

<sup>1020</sup> *Ibid*, Article 51.

<sup>1021</sup> *Ibid*, Article 47.

<sup>1022</sup> *Ibid*, Article 48.

<sup>1023</sup> *Ibid*, Article 49.

at him is not permitted unless the components of the crime with its new adaptation permit extradition.<sup>1024</sup>

Dealing with the principle of competence, the Agreement took a position well known in international law. An extradited person cannot be put on trial, locked up, or be accused for a crime committed before extradition for a crime which is not related the crime which the person was extradited for. This also takes into consideration exceptions that are internationally recognised, such as the non-departure of the person to the country where he/she was extradited before 30 days, even if he had the opportunity or he chooses to return voluntarily to the country he was extradited from.<sup>1025</sup> The Agreement also dealt with cases of re-extradition, stating that the country receiving the extradited person is not permitted to re-extradite him to a third country, with two exceptions.<sup>1026</sup> One is when an extradited person is given the opportunity but does not leave the country within 30 days or return to it voluntarily. The other exception is with the consent of the extradited person on condition that the requesting country submits an application for re-extradition and that the documents submitted by the third country are attached to the extradition request.

In the general provisions, the Agreement stipulated the rules governing the transit of the extradited person through the territories of the signatory parties.<sup>1027</sup> It was decided that the consent of the signatory parties to the transit of extradited persons would be given upon a written request, supported with documents proving that a crime permitting extradition had been committed. Furthermore, the Agreement introduced an article without precedent, requesting the contracted parties to co-ordinate the procedures for extradition between themselves and the Arab Organisation for Social Defence against Crime (the Arab office of Interpol) through the relevant liaison department. The Agreement obliged the party requested to extradite to provide the Arab Office for Criminal Police with a copy of the extradition request.<sup>1028</sup>

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<sup>1024</sup> Riyadh Agreement, see n.945, Article 50.

<sup>1025</sup> *Ibid*, Article 52.

<sup>1026</sup> *Ibid*, Article 53.

<sup>1027</sup> *Ibid*, Article 54.

<sup>1028</sup> *Ibid*, Article 57. The Arab Office of Criminal Policing is in the Arab Organisation of the Prevention of Crime, which was agreed by the Arab League on 14 Sep 1952 and was ratified by Saudi Arabia on 23 May 1953 and the endorsed treaty was submitted to the Arab League on 5 Apr 1954. The organisation appoints its members by a general assembly and an executive office and consists of three offices which are: Office of the Prevention of Crime, Office of Criminal Police, and Office of Prevention of Drugs.

One example of this Agreement in practice is the case of a Moroccan woman whose extradition was requested by the Saudi government with an accusation of corruption, organising prostitution, and money laundering. The request was based on Article 40. The extradition documents were arranged according to Article 42. Based on the same articles, Jordan requested the extradition of a Saudi subject accused of forgery and sentenced in his absence to 3 years imprisonment. The Saudis declined the request, basing their decision on Article 39 of the Agreement.<sup>1029</sup> In another case, Saudi Arabia agreed to the extradition of one of its nationals upon a request from Syria, accused of a crime of killing. Here, Syria based its request on Article 40 of the Agreement.<sup>1030</sup>

### **5.7.3 The security agreement between countries of the Co-operative Council of the Gulf States**

This Agreement was concluded on 29 November 1994 in the city of Riyadh, and signed by five of the Council members.<sup>1031</sup> The Agreement was ratified by three states: Saudi Arabia,<sup>1032</sup> the Sultanate of Oman, and the State of Bahrain. For constitutional reasons, the states of Qatar and the United Arab Emirates did not ratify it. Chapter 5 of the Agreement devoted Articles 27-40 to the rules of the extradition of criminals. These are identical in their rules and principles to those of the formal bilateral agreements between Saudi Arabia and the Gulf States. The differences are in two articles. One allows the re-arrest of a suspect and the taking of extradition procedures against him. The second stipulates that its rules do not contradict or nullify the bilateral agreements signed between its parties.<sup>1033</sup>

### **5.7.4 The Arab Agreement for Combating Terrorism**

On 22<sup>nd</sup> April 1998, during their joint meeting in the headquarters of the Arab League, the Ministers for Justice and the Interior of the majority of Arab countries, including Saudi Arabia,

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<sup>1029</sup> Case no. 312, the Department of Investigation and the Attorney General, Department of Extradition, Saudi Arabia, Riyadh.

<sup>1030</sup> Case no. 341, the Department of Investigation and the Attorney General, Department of Extradition, Saudi Arabia, Riyadh.

<sup>1031</sup> This Agreement was signed by Saudi Arabia, the Sultanate of Oman, Qatar, Bahrain, and the United Arab Emirates.

<sup>1032</sup> Decree of the Saudi Council of Ministers no. 127 dated 28 March 1995 (26/10/1415 AH) and Royal Decree no. M/13 dated 28 March 1995 (26/10/1415 AH).

<sup>1033</sup> *Ibid*, Article 41.

signed the first Arab agreement for combating terrorism.<sup>1034</sup> The Agreement contained 41 articles divided into 4 chapters, to cover definitions, the bases of co-operation to combat terrorism, mechanisms for executing the rules, and concluding rules.<sup>1035</sup> The Agreement included several articles governing the extradition of criminals, including the crimes for which extradition would be allowed. According to the Agreement, the signatory countries are obliged to extradite criminals or those sentenced for terrorist crimes in accordance with the rules stipulated.<sup>1036</sup> The Agreement defined terrorism, and terrorist crimes, by stating that terrorism is any act of using or threatening to use violence under any circumstances, in an individual or collective manner, aimed at terrorising people and putting their lives at risk or destroying public and private properties by occupying or taking them over. This is in addition to damaging the environment or putting national resources at risk.<sup>1037</sup>

With regard to terrorism, the Agreement defined this as crimes committed for terror in any one of the signatory countries or against its subjects or interests and punishable under its national law.<sup>1038</sup> The Agreement focuses on terrorist crimes taking place in the signatory countries and aims to provide a means of combating this menace. Moreover, the Agreement considered in its listing of terrorist crimes all similar crimes included in international agreements, with exceptions for crimes already in the national laws of the signatory countries, but did not include such activities as armed struggle against foreign occupation or the right of self-determination.<sup>1039</sup>

The Agreement also stipulated the cases that do not permit extradition. First were political crimes, leaving the decision as to the nature of political crime to the country requested to extradite, based on its national laws. As in the 1952 Arab League and 1983 Riyadh agreements, this Agreement followed the pattern of exclusion by considering crimes of aggression against monarchs, heads of state, or their wives or families, and their ministers as political crimes, if committed for political reasons.<sup>1040</sup> The same is true of the terrorist crimes listed in this

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<sup>1034</sup> Decree of the Saudi Council of Ministers no. 135 dated 30 September 1998 (8/06/1419 AH) and Royal Decree no. M/66 dated 2 October 1998 (10/06/1419 AH).

<sup>1035</sup> The full text of the Agreement for Combating Terrorism was published in the *Daily Riyadh*. Issue no. 10868 dated 28 March 1998 (29/11/1418 AH). (Hereafter called the Agreement for Combating Terrorism).

<sup>1036</sup> *Ibid*, Articles 5, 7, and 8,19,22,28.

<sup>1037</sup> *Ibid*, Article 1 paragraph 2.

<sup>1038</sup> *Ibid*.

<sup>1039</sup> *Ibid*, Article 1 paragraph 3.

<sup>1040</sup> Agreement for Combating Terrorism, see n.1035, Article 2 paragraph A.



Agreement. Under the Agreement, exclusions from extradition for political crimes were further limited by permitting extradition for acts of violence against people enjoying international protection, i.e. the ambassadors and diplomats accredited to the contracted parties. The same applies also to cases of killing or armed robbery, sabotage of public utilities, manufacturing or possessing weapons, military crimes, crimes that happen in the territories of the state requested to extradite, and crimes for which a verdict has been proclaimed in the signatory country requested to extradite or a third signatory state.<sup>1041</sup> Furthermore, the exclusions include cases in which punishment has been dropped or pardon announced,<sup>1042</sup> crimes committed outside the territories of the requesting country by someone who is not its subject, and terrorist crimes committed by a subject of the country requested to extradite but whose national laws do not permit extradition.<sup>1043</sup>

In dealing with extradition requests, the Agreement used the same principles as in the previous multilateral or bilateral agreements, by giving the country requested to extradite the right to delay extradition up to the end of trial or investigation of the suspect. Moreover, the Agreement permits temporary extradition from the requested country even if the suspect is under trial or investigation, on condition that the requesting country returns him.<sup>1044</sup> This means the Agreement gives the right of temporary extradition to the discretion of the country requested to extradite. In dealing with the issue of adoption of specified crimes into the national laws of the contracted parties, the Agreement decided not to deal with these differences, stipulating that the crime committed is punishable in the two countries for a period of imprisonment of one year or more.<sup>1045</sup>

For the handling of extradition applications, this Agreement is more flexible than that of the Arab League. It stipulates the use of the appropriate authorities or the Ministries of Justice or diplomatic channels for the exchange of the extradition documents.<sup>1046</sup> The Agreement adds that a written application is needed and stipulates the necessary documents to attach to

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<sup>1041</sup> Agreement for Combating Terrorism, see n.1035, Article 6 paragraph A.

<sup>1042</sup> *Ibid.*

<sup>1043</sup> *Ibid.*, Article 2 paragraph B.

<sup>1044</sup> *Ibid.*, Article 6 paragraph B.

<sup>1045</sup> *Ibid.*, Article 6 paragraph C.

<sup>1046</sup> *Ibid.*, Article 6 paragraph D.

application.<sup>1047</sup> Moreover, the requested country is to notify the requesting country with its decision on the request.<sup>1048</sup> The Agreement allows the requesting country to ask, in writing, the requested country to put the suspect requested under temporary arrest until it receives the formal extradition request,<sup>1049</sup> the temporary arrest period not to exceed 30 days.<sup>1050</sup> If the requested country needs more clarifications or documents, it has to inform the requesting country. In all circumstances, the temporary arrest period is not to exceed 60 days.<sup>1051</sup> Equally, the Agreement permits the temporary release of a suspect during the precautionary arrest period on condition that the requested country takes all necessary measures to avoid the escape of the suspect from its territories.<sup>1052</sup>

The Agreement gives the right of deciding, if there are multiple applications for extradition, to the requested country, provided it takes into consideration all circumstances, such as the date of arrival of applications, the degree of seriousness of the crime, and the place where it was committed. Moreover, the Agreement stipulates that when the requested country agrees to extradition, then it becomes its responsibility to collect and hand over to the requesting country all the tools and material evidence related to the crime. The said tools and materials to be handed over, even if the suspect dies or is killed while carrying out the terrorist attack.<sup>1053</sup> This Agreement does not contain any articles on the principle of competency, the rules governing extradition costs, or the procedures for passing extradited people through the territories of the contracted countries.

Within this culture and environment of multiple agreements, the Kingdom of Saudi Arabia has not hesitated to be part of international agreements concluded on crime and other alleged offences. Amongst these may be mentioned the Hague agreement on the illegal taking-over of aircraft,<sup>1054</sup> the Montreal agreement on combating crimes against civil aviation safety 1971,<sup>1055</sup>

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<sup>1047</sup> Agreement for Combating Terrorism, see n.1035, Article 6 paragraph E.

<sup>1048</sup> *Ibid*, Article 6 paragraph F.

<sup>1049</sup> *Ibid*, Article 7.

<sup>1050</sup> *Ibid*, Article 8.

<sup>1051</sup> *Ibid*, Article 22.

<sup>1052</sup> *Ibid*, Article 23.

<sup>1053</sup> *Ibid*, Article 28.

<sup>1054</sup> See n.231. This Agreement came into being as a response to the decision of the General Assembly of the International Organisation for Civil Aviation who felt the weakness of the rules of the 1963 Tokyo agreement in facing the growing incidence of aircraft hijackings. The Agreement was adopted at an international conference

the United Nations Convention Against the Illegal Trade in Narcotic Drugs and Psychotropic Substances,<sup>1056</sup> as well as the Arab Declaration for Combating Illegal Activities against the Safety of Civil Aviation, signed in Baghdad.<sup>1057</sup>

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held in The Hague on 16<sup>th</sup>. December 1970. The Agreement contained several articles on the extradition of criminals:

- It adopted the universality of the criminal text by requiring of any of the signatory countries that anyone committing or suspected of committing the crime and living within its territories to arrest him or take the necessary arrangements to keep him under its control until the start of criminal or extradition procedures.
- The Agreement adopted the principle of extradition and trial by obliging signatory countries to extradite a suspect living on its soil regardless of whether or not the crime was committed in its territories. If they do not extradite, they are obliged to put suspects on trial, in accordance with their national laws.
- This Agreement took hijacking to be an extraditable crime. The signatory countries undertook to list it in any extradition agreements they may conclude in future.
- The Hague Agreement is the legal basis for any extradition request for hijacking aircraft between any two countries that treated at a bilateral level.
- For those countries that regard hijacking as an extraditable crime, the extradition procedure is subject to the laws of the requested countries.
- Hijacking, for extradition purposes among the signatory parties, is taken as if it did not happen where it did, but in the countries having competency according to the Agreement.
- All signatory parties are to inform the Council of the International Civil Aviation Organisation in the shortest possible time, with procedures taken in accordance with national laws towards the criminal, in particular extradition procedures. For more information refer to the following sources: Hague Agreement, Article 6 paragraph 1, Article 7, Article 8, and Article 11.

<sup>1055</sup> See n.231. This Agreement is complementary to the 1970 Hague Agreement and its rules of extradition are compatible with those of the Hague Agreement. Saudi Arabia signed the two agreements.

<sup>1056</sup> See n.781. Saudi Arabia joined the Convention on 9 January 1990. The Council of Ministers ratified it on 11 February 1990. The Convention contained several rules relating to the extradition of criminals. It stipulated each crime in a list of crimes for which extradition is permitted. The signatory parties decided to include all the crimes listed in any future agreements they may conclude in the future on the extradition of criminals. The Convention gave a numerical listing of crimes. If a country receives a request for extradition from a country not contracted with bilaterally, the requested country is to take this Convention as a legal basis for extradition for any of the crimes listed in it. Moreover, the Convention stipulated the right of any of the signatory parties to decline an extradition application if it sees that extradition is based on religious beliefs, ethnic background, nationality, or political beliefs. The Convention urged the contracted parties to ease and simplify the extradition procedures in particular with regard to proof. For further information on this subject refer to the following sources:

Decision of the Council of Ministers no 373 dated 6 June 1974 (15/05/1394 AH) and Royal Decree no. M/9 dated 13 June 1974 (22/05/1394 AH).

Decision of the Council of Ministers no. 98 dated 9 January 1990 (11/06/1410 AH) and Royal Decree M/19 dated 11 February 1990 (15/07/1410 AH).

UN Convention on Combating Narcotic Drugs, Article 18.

UN Convention on Combating Narcotic Drugs, Article 6 paragraph 5.

UN Convention on Combating Narcotic Drugs, Article 6 paragraph 6.

UN Convention on Combating Narcotic Drugs, Article 6 paragraph 10.

<sup>1057</sup> The Council of Arab Ministers of Transport in its fifth session in Baghdad on 11 December 1989 expressed its concern over the increasing security hazards resulting from illegal activities against the safety of civilian aircraft and the necessity for co-operation in co-coordinating the efforts of the Arab states to combat these activities. The Ministers signed therefore signed the Baghdad Declaration. The Declaration was ratified by the Arab League with its resolution number 5249, dated 12 June 1992. The Saudi Council of Ministers approved this Declaration on 8 June 1991. According to Article 2 of this agreement, the Arab states are obliged to extradite any suspect living within their territories in accordance with the rules of international agreements, unless the suspect requested for extradition is a national of the country in which he is arrested and his extradition is for his trial.

With reference to the practicalities of these agreements, especially those dealing with extradition, signed by Saudi Arabia, it is worth exploring the main extradition procedures followed in the Saudi Kingdom, and also, the key bodies responsible for extradition requests.

## **5.8 Extradition procedures in the Kingdom of Saudi Arabia**

### **5.8.1 The body responsible for extradition requests 1058**

The Ministry of the Interior is the body responsible for the procedures for requesting or extraditing criminals, as well as the signing of the official papers. These are undertaken according to Act 83 dated 13 February 1975 (1/2/1395 AH), which states that the Ministry of the Interior is responsible for finding suspects and criminals and requesting them from outside the Kingdom using official processes and procedures. The Extradition Requests Committee consists of three consultants from the Ministry<sup>1059</sup> and carries out the investigation of requests for those who are wanted from abroad or for extradition, as well as dealing with the necessary documents. These activities are carried out according to the relevant regulations so that the Committee can fulfill the legal requirements agreed to in the extradition treaties. The regulations also guide them in deciding whether to accept or reject requests and whether additional documentation is needed. They also govern the procedures for arrest or investigation within the Ministry of the Interior and how to communicate with specific countries, by diplomatic means or Interpol.

The procedure used in Saudi Arabia to request criminals from abroad or to extradite them is an administrative process. It was noted above that this process is easier than a judicial or mixed process, as it is possible for the Extradition Committee to simplify the process of extradition, to or from, according to the regulations of a particular treaty or agreement signed by the Kingdom.

As for the organisation of the extradition bodies and the orders issued by the Ministry of the Interior, as well as written instructions, these are all considered to be internal procedures, which aim to achieve and implement what is in the extradition treaties.

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<sup>1058</sup> Instructions of the General Organisation of Law, General Law, Interior Ministry No. 3976 date 3 July 1993 (13/01/1414 AH).

<sup>1059</sup> Order of the Interior Minister, see n.877.

### **5.8.2 Documentation and information**

As noted in the discussions above of the various treaties and agreements described, these would require all documents, and information related to the extradition request. Generally these should contain the personal details of the wanted person, his description, photograph, the time and place of the crime, the rules concerning the punishment of the said crime as well as the arrest warrant or ruling of the court against him. All these must be certified and endorsed by the relevant authorities.

Naturally, the organisational procedures in the Kingdom necessitate the fulfillment of all the appropriate documents, which must be related to the relevant treaty according to its particular requirements. Because it is important that all requests for extradition contain all the necessary documentation, a committee was established for specifying the necessary documents and information in order to facilitate the notification process for the search of wanted criminals in the Kingdom and their arrest. This committee also specifies suitable processes for obtaining these documents. The necessary documents and information are organised by two circulations.<sup>1060</sup>

### **5.8.3 Procedures for handing over and bringing back criminals to the Kingdom**

It was noted above that the Kingdom of Saudi Arabia is very careful to support international co-operation for the prevention of crime and pursuing escaped criminals. It also abides by the principle of handing over criminals requested by other countries in accordance with international treaties signed by itself and those countries, or just following the principle of similar treatment.

Regarding this matter, the Committee of Extradition in the Interior Ministry has issued a number of procedures, which organise the handing over process of people wanted in other countries, as well as the organisation of the process for requests by the Kingdom for the extradition of people wanted from other countries. The procedures used are as follows.<sup>1061</sup>

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<sup>1060</sup> Report of the Extradition Committee formed by the General Organisation of Law and the Communication Unit of Interpol in the Kingdom (privately communicated).

<sup>1061</sup> Instructions of the Extradition Committee, see n.1058.

### **a. Procedures for handing criminals over**

A country which asks for the handing over of a person who was sentenced or accused and is in the Kingdom must forward a request to the Foreign Minister through the appointed embassy or consulate of that country in the Kingdom. The request for extradition must be complete, contain all the required information, and accompanied by the necessary documents. Another option is to ask for the detention of the accused or criminal until the full file is completed and in this case the Under-Minister will refer the file to the Interior Ministry using official channels, where the case will be decided by representative of the responsible body, the Extradition Committee. The Extradition Committee, which, as noted above, consists of three consultants, carries out the consideration and organisation of the extradition file and makes sure that all necessary documents are included according to the internal regulation of the Kingdom and the country requesting the extradition. This Committee has full control over the process as well as the powers of investigating judges. For example, it has the right to take statements from the person requested, detain or release him on bail, and use the legal regulations for the process. The Extradition Committee examines the extradition file, checks the legal conditions, and completes the process, making sure that the evidence for the crime is included. The Committee can appoint an investigator to carry out the necessary investigation. That person will present to the Committee, after finalising the process, a complete file about the case which the Committee will study before giving its final decision regarding the extradition. The wanted person is asked to appear before the Committee or the appointed investigator and informed about the documents regarding the extradition.

In the case of a request by a country to detain a person who is in the Kingdom but without a complete file, the Committee can detain the person until the arrival of the complete file. The country forwarding the request will be notified about the situation and the detainee will be released after two months from the start of detention if the complete file is not received. However if the country has a new request which states that the complete file will be sent immediately, the period of detention could be extended if the Extradition Committee is convinced with the reasons forwarded from the country requesting detention. The Extradition Committee can release the wanted person on bail, which will be until the arrival of the extradition file or the finalising of the extradition procedures. The Committee can continue

the examination of the extradition request after the arrival of the file of the released detainee. In the case of rejection of extradition by the Committee, the accused is released immediately if he was detained. However if the Committee decides to hand over the accused, this will need an order from the Interior Minister<sup>1062</sup> with the permission of the high commission of legal affairs. This will need a promise from the requesting country to comply with the rule of extradition and the final decision of the Committee cannot be appealed against. If the accused chooses voluntary extradition, the Committee can accede to this, even if it does not receive a complete file, and this is permitted with the following conditions.

- The wanted person has to agree to this in front of the Committee.
- The voluntary choice has to be officially recorded and clearly states that the accused has voluntarily accepted the extradition.
- The crime must be of a kind that allows extradition.

If the Committee is satisfied that all the necessary requirements are fulfilled, it will get in touch with the country which requested the extradition and ask it to send somebody to receive the wanted person.

Although the extradition treaties state that the costs of the process should be agreed between the parties, the Kingdom bears all the costs as a sign of its seriousness in fighting crime. It also sends a Saudi Policeman with the suspect to the country wanting that person.

In the case of an arrest warrant issued by Interpol and that person has returned to the Kingdom, the person should be looked for and if found should be arrested.

#### **b. Procedures for bringing criminals back**

In the case of a suspected or sentenced person put on trial in the Kingdom who has escaped to another country, the following procedures are followed:<sup>1063</sup>

- The request for extradition is sent through diplomatic channels.

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<sup>1062</sup> This was decided by the Act of the Council of Ministers no.83 on 13 February 1975 (1/02/1395 AH).

<sup>1063</sup> Instructions of the Extradition Committee, see n.1058.

- The extradition file is prepared before issuing the arrest warrant and it stays with the Extradition Committee, which can decide if it wants to send it to other bodies for finalisation. A spare copy must be retained for future use. In exceptional cases it is permissible to issue an arrest warrant before the preparation of the extradition file, if sound evidence is collected but minor documents are not yet available. For example, in the case of forgery, the forger can be detained for not more than 15 days until a forensic expert looks at the collected evidence.
- If Interpol is notified about an arrest warrant for a person wanted by the Kingdom, the General Organisation of Law must also be notified within two days of the date of the arrest warrant, excluding weekends. The latter body must send the extradition file through diplomatic channels within 5 days after receiving the notification letter.
- Interpol must be notified of extensions of the detention period according to the agreed treaties, if the file is not completed yet.
- If the period of detention for serious cases is near the end, two representatives from the General Administration of Law and the Interpol Connection are appointed to follow the extradition with the Foreign Ministry and then the embassy of the particular country, which can then communicate with the foreign ministry of that country and also in connection with the different legal bodies of the requested country. This should be undertaken in connection with Interpol or the Arab police in the countries concerned.
- The Extradition Committee and the Interpol Connection exchange photocopies of the procedures of both parties in order to complete the files of the wanted persons in both of these administrations.
- The arrest warrant should include whenever possible a report about the criminal methods used.

Finally, it may be judged that Saudi Arabia – from what has been said and explored – as fully committed to the application of the rules of *Shari'a*, despite the criticism and the existence of weaknesses. As discussed above, the Islamic criminal code does indeed govern the system for criminal law and punishment. Under the influence of the roles of the King and the Islamic



religious scholars and council, the legislative process proceeds to make a major contribution to judicial sources, the courts, judges, and ensuing *fatwa*.<sup>1064</sup>

The Islamic *Shari'a* encourages the use of different rules that govern the extradition of criminals. What Islamic jurists have endorsed over the years does not contradict what has been approved by the international community with regard to the extradition of criminals. Just as the right of any sovereign country not to extradite its subjects is internationally recognised, the *Shari'a* does not permit the extradition of Muslim subjects to non-Islamic countries. The same applies to the right of non-extradition of subjects of another Islamic country to a non-Islamic country, because according to the *Shari'a* they are regarded as its subjects.<sup>1065</sup> One of the main principles in Islam is that there is no governance of non-Muslims over Muslims.<sup>1066</sup>

The strong influence of the *Hanabli* doctrine over lifestyle and traditions in Saudi Arabia for more than 400 years can be felt very clearly, because it is the doctrine adopted by Mohammed ibn Abdel Wahb when he allied with the founder of the Saudi state Al imam Mohammed ibn Saud. Both of them contributed to the liberation of the Arab peninsula from a lack of ethical and religious values that led to a lack of security and stability.<sup>1067</sup> Examining the *Hanabli* doctrine for this research on extradition, it can be concluded that both the *Maliki* and *Hanabli* are the most flexible Islamic doctrines with regard to the extradition of criminals. For example, in the case of an Islamic country requesting the extradition of a criminal who has fled to a non-Islamic country, the basis for such a request would be the existence of an agreement between the two countries by which the non-Islamic country is obliged to hand over the criminal. In the case of the non-existence of such an agreement, custom would be used. Islamic jurists, depending on the Islamic doctrine they follow, disagree over the question of the impact of an agreement over the extradition of a Muslim criminal to a non-Islamic state. Whereas the *Shafi* School posit the existence of clan for the Muslim, to protect him in a non-Islamic country where no agreement exists, the *Hanifi* totally reject the extradition of criminal Muslims to non-Islamic countries, even

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<sup>1064</sup> Al Turki A A, 'Islamic legislation: its importance and necessity to look after its sources and authorities', (2006) 118 *The Arab Journal* at 22.

<sup>1065</sup> See Abu Zahra, n.819, at 450.

<sup>1066</sup> Qur'an, *Surrat Al Nissa*, verse 141.

<sup>1067</sup> A. Rihani, *Tareekh Najd* [The history of Najjad], (Riyadh: Al Fakhira Press, 1985).

if an agreement exists between the two parties.<sup>1068</sup> In contrast, the *Malikia* and *Hanabli* schools see this agreement as correct and must be honoured, because it does not contradict the Qur'an or Suna, citing the example of the Prophet Mohammed when he honoured the agreement of Al Houdiay.<sup>1069</sup>

The majority of Islamic jurists agreed with the non-extradition of Muslim women in all cases, in accordance with the Qur'an.<sup>1070</sup> This does not mean that women are protected from punishment. If proved guilty, they would stand trial and be punished.

Moreover, the design and management of prisons should take into consideration the integrity of women and their non-exposure to men. This may not be possible in non-Islamic countries where a Muslim woman may not be allowed to wear the veil or pray five times a day in a clean place and have her own separate toilet. From the point of human rights, it is believed that it is her right to stand trial in her own country and remain close to her family. Other sovereign states, particularly non-Muslim countries, doubtless see this issue otherwise.

Until now, there has been no internal procedure dealing with extradition in Saudi Arabia unlike in other countries. This has not stopped the authorities in the Kingdom from concluding several bilateral or multilateral treaties and agreements covering the issue of extradition of criminals. Saudi Arabia may be regarded as a pioneer in this respect, as there is nothing that prevents it extraditing criminals in accordance with international courtesy or on a reciprocal basis.<sup>1071</sup>

In spite of that fact that Saudi Arabia is also a party to several agreements covering the extradition of criminals, it also still has an urgent need for internal procedures to deal with the issue of the extradition of criminals in line with Islamic principles, and to keep up to date with international efforts to combat terrorism and violence. Such situations necessitate the creation of new security organs and mechanisms to deal with new developments. Among the steps to be taken is the creation of institutions that work on combating crimes. Saudi Arabia, however, is still lacking such expertise, and if not dealt with, the Kingdom might suffer setbacks in the near future and have negative consequences for its systems, and therefore, stability. This would

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<sup>1068</sup> See generally Awdah , n.817.

<sup>1069</sup> I. Al Hamam, *Sharh Fathelgadeer* [The explanation of Fatah Al Qudos], (1898).

<sup>1070</sup> Qur'an, *Surrat Al Moumthina*, verse 10.

<sup>1071</sup> Noted in section 5.3.2 of this Chapter.

require an inter-injection of other countries' systems, notably countries that do, to some degree, share some factors with the Kingdom but also international co-operation and exchange of experiences.

Despite this relatively weakness, Saudi Arabia is still keeping sight of new developments, because of its regional leadership and economic weight in the Arab world, and its growing importance internationally, especially under the current credit crunch and global financial crisis. Considering the difficulties of concluding extradition agreements between the Kingdom of Saudi Arabia and western countries, for religious or political reasons, the Kingdom has to be satisfied with memoranda of understanding with the western countries on a reciprocal basis. There is no justification for the non-existence of extradition agreements between Saudi Arabia and other Islamic countries, apart from Arab League states, because the Kingdom keeps very strong ties with Islamic countries in Asia, Africa, and Europe. Every year, Saudi Arabia receives millions of pilgrims from these countries. Inevitably among these numbers are some criminals, and the existence of extradition agreements would make it easier to pursue and arrest them. In this respect, the security agreements between Saudi Arabia and Pakistan and Iran would represent good examples to be followed.

However, under the current perceived global threat of rising terrorism, money laundering, organised crime, and drugs trafficking, a formal agreement of extradition between the Kingdom of Saudi Arabia and western powers is not only necessary, but vital and beneficial for both parties.

Technically, as noted above, the Kingdom of Saudi Arabia follows the administrative procedure for the extradition of criminals. No doubt every country has its own reasons for following either the administrative, judicial, or mixed procedure. For example, Egypt, Spain, and Portugal follow the administrative procedure, whereby the executive authorities have the major role in such systems in either submitting extradition requests to other countries or when receiving feedback from these countries. Because requests are submitted through diplomatic channels, they come under executive powers, which give the discretion to accept or decline extradition. This system is also known to be the easiest and more direct, for both the requesting and requested country. The administrative system that Saudi Arabia follows has some disadvantages, because it favours the

requesting country, so it does not take into consideration the safeguards that should be available for the subject requested for extradition, and does not differentiate between crimes for which extradition is requested, whether criminal or political. In addition, the administrative system for extradition comes at the cost of the personal freedom of the suspect requested for extradition by restricting his movements in a country whose rules he has not violated, and allows him to be handed over to another country without having the chance to defend himself.<sup>1072</sup>

This is in contrast to the judicial system, which is followed by Britain, the U.S., and India, where the judicial authorities issue arrest warrants, taking into consideration the type of crime and the evidence presented.<sup>1073</sup> Because of this, the interests of the suspect are secured and all the assurances for his personal freedom are there. However, the system also has its disadvantages because it places many obstacles before a requesting country and procedures may be long drawn-out.<sup>1074</sup> This contradicts the principle of competency, because it gives the judge of the requested country the right to look into the case, and that represents a clear violation of the competency of the judge in the requesting country.<sup>1075</sup> In all cases, an integrated system is required to avoid the disadvantages of the two other systems. This is the mixed system (administrative and judicial) which is in use in Belgium, Italy, the Netherlands, and Japan. Such a system gives the judicial authorities the right to look into extradition requests, and give an opinion, which is a consultative one over the extradition request itself, not the suspect, with the final decision being for the executive authorities. By this means, the interests of both the suspect and the state are considered.

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<sup>1072</sup> See Alarousi, n.188, at 149.

<sup>1073</sup> C. Parry, *A British digest of international law*, (London: Stevens and Sons, 1965).

<sup>1074</sup> J. Starke, *An introduction to international law*, (London: Butterworth, 1963).

<sup>1075</sup> See Abu Haif, n.191, at 315.

## **Chapter Six**

### **Comparative case study between the British and Saudi extradition systems**

#### **6.1 Introduction**

This chapter is divided into two parts. In the first part, British and Saudi laws are compared and contrasted, in the light of the descriptions and analysis presented in earlier chapters. The focus will be on in what respect these two examples (Britain and Saudi Arabia) are similar and in what ways they differ. The sources of legislation are also discussed. The UN Model Treaty, also discussed previously, is used as a point of reference to see, for example, whether, either of the systems has been able to reform its extradition laws, to make them compatible with the Model Treaty.

As for part two, the research analysis and findings are presented. It is also dedicated to exploration of the possibility of an extradition between Britain and Saudi Arabia, and whether they do provide both ability and will to conclude any formal form of extradition, or whether there are any serious hurdles in the way of concluding an extradition treaty between the two sovereign entities. Further, there is a discussion and attempt to answer the key questions asked in earlier chapters as well as an investigation into how the proposed treaty between the two countries could possibly lead to global co-operation, with the view to effectively containing, reducing, or totally suppressing international crimes, principally terrorism.

#### **6.2 A comparison of the Saudi and British extradition systems**

The most striking difference between the systems of Saudi Arabia and Britain has to do with the statutory provisions of either country on extradition. In Saudi Arabia's Basic Law, there is a terse three-line provision relating to asylum and extradition which reads: "The State shall grant the right to political asylum when the public interest demands this. Statutes and international

agreements shall define the rules and procedures governing the extradition of common criminals.”<sup>1076</sup>

As can be seen, the provision is rendered in very general terms. Statutes and *international agreements*, which may include treaties, conventions, memorandums of understanding, and agreements, are to determine the modalities of the extradition arrangements between the party countries. The point to be emphasised here, is that Saudi Basic Law (and therefore *Shari’a*, as the Basic Law is based on this) expressly allows the conclusion of bilateral or multilateral agreements with other countries. It does not make a distinction between Muslim and non-Muslim states for that matter. So, from this Article alone, a formal extradition agreement between Saudi Arabia and Britain would be possible, because there does not seem to be any restrictive stipulations as to which countries Saudi Arabia can enter into arrangements with. Another point to be noted is that the Basic Law does not specify for which crimes extradition is to be made. The term “common criminals” allows sufficient room for the state to make arbitrary decisions as to who is to be extradited. The Basic Law also does not prescribe a procedure for extradition proceedings. Here again, it leaves the government to adopt any procedures it deems appropriate.

In sharp contrast to this generality, Britain has very elaborate statutory provisions on extradition. Extradition law has a long history in the country – the first statutes directly concerned with extradition were enacted in 1843. The latest extradition act (EA 2003) is discussed extensively in Chapter 3, but in contrast to the Saudi Basic Law consists of approximately 228 subsections and is divided into five Parts and four Schedules. It divides countries into Category 1 and Category 2 territories, which comprise countries or territories by designation and outlines procedures for each category separately.

Note that so far Saudi Arabia has entered bilateral and multilateral extradition treaties or security arrangements only with Arab or other Muslim countries. With non-Muslim countries it has special arrangements or memorandums of understanding, for example that with Britain,<sup>1077</sup> which govern extradition arrangements. Saudi Arabia has also been party to many international

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<sup>1076</sup> See Basic Law, n.40, Article 42.

<sup>1077</sup> See generally n.784.

conventions<sup>1078</sup> yet it has not signed any treaty with a country outside the Muslim world. However, this situation does not prevent the Kingdom from signing a formal extradition treaty with a non-Muslim country, especially in the current world situation, in which a significant number of countries are sharing the same threat of global terrorism. Also, given the fact that there is nothing in *Shari'a* and Basic Law which expressly forbids Saudi Arabia from signing a bilateral or multilateral treaty with non-Muslim countries, it is interesting to ask why Saudi Arabia has not done so. An answer to this question is explored below. A closer look is now taken at the similarities and dissimilarities between the Saudi and British extradition systems.

### 6.2.1 Similarities

One of the similarities between Saudi Arabia and Britain, as far as their extradition systems are concerned, is the desire on the part of both countries to make the extradition system an effective tool in preventing and curbing crime at the international level, in particular controlling the increasing acts of terrorism in any of their forms and manifestations. This determination and commitment has gained added political impetus after the 11 September 2001 event and the consequent 'war on terror' phenomenon. The incident was a significant reason for the United Kingdom's Extradition Act of 2003.<sup>1079</sup> For instance, the avowed goals of EA 2003 included consolidation and reinforcement of the legal framework in general (and the extradition system in particular), the introduction of the European Arrest Warrant, provision of a single-track appeal system, and aligning it with other EU countries.<sup>1080</sup> This intent is demonstrated by Britain being party to many multinational conventions, and being signatory to many bilateral and multilateral extradition treaties and other arrangements.<sup>1081</sup>

Likewise, Saudi Arabia's determination and commitment to combat terrorism at the regional and international levels has been sufficiently demonstrated by deeds. For example, Saudi Arabia extended full co-operation to the allied forces in bringing an end to the Iraqi occupation of

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<sup>1078</sup> Noted in Chapter 5, section 5.7.4.

<sup>1079</sup> See Jones and Doobay, n.33, at vi.

<sup>1080</sup> C. Nicholls, C. Montgomery, and J. Knowles, *The Law of Extradition and Mutual Assistance*, 2<sup>nd</sup> ed. (Oxford: OUP, 2007), 1.27-1.28, at 9.

<sup>1081</sup> Discussed at length in Jones and Doobay, see n.33, Chapter 19.

Kuwait in the 1990s.<sup>1082</sup> At a regional level, it has also shown its commitment to combating terrorism and extremism by participating in and signing the Accord of the Arab Convention on the Suppression of Terrorism,<sup>1083</sup> held in April 1998. It should therefore be noted that Saudi Arabia's strenuous opposition to terrorism springs from the religious precepts it follows, which prohibit both violence and terrorism.<sup>1084</sup> The word 'Islam' itself means 'peace'.<sup>1085</sup> One of the avowed goals of the Convention was "to promote mutual co-operation in the suppression of terrorist offences, which pose a threat to the security and stability of the Arab Nation and endanger its vital interests."<sup>1086</sup> The accord pressed the member states to adopt measures to make sure that their lands were not used "as a base for planning, organizing, executing, attempting or taking part in terrorist crime in any manner whatsoever"<sup>1087</sup> and included commitments on part of the member states to "establish effective co-operation between the relevant agencies and the public in countering terrorism by, *inter alia*, establishing appropriate guarantees and incentives to encourage the reporting of terrorist acts, the provision of information to assist in their investigation, and co-operation in the arrest of perpetrators,"<sup>1088</sup> and "extradite those indicated for or convicted of terrorist offences whose extradition is requested by any of these states in accordance with the rules and conditions stipulated in this convention."<sup>1089</sup> Article 1 defines terrorism as "any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests that is punishable by their domestic law."<sup>1090</sup> Additionally, terrorist offences are defined as including the Tokyo, Hague, and Montreal Conventions, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, the International Convention Against the Taking of Hostages, and the applicable provisions of the UN Convention on the Law of the Seas, "except where conventions have not been ratified by Contracting States or where offences have been

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<sup>1082</sup> Acknowledged in a U.S. Department of State report, Bureau of Near Eastern Affairs, 'Background Note: Saudi Arabia', (January 2009), <http://www.state.gov/r/pa/ei/bgn/3584.htm> (accessed 10 March 2010).

<sup>1083</sup> Arab Convention for the Suppression of Terrorism, an unofficial translation into English can be viewed at [www.al-bab.com/arab/docs/league/terrorism98.htm](http://www.al-bab.com/arab/docs/league/terrorism98.htm) (accessed 10 March 2010).

<sup>1084</sup> 'Terrorism cannot be justified by any religion of God', available at <http://www.submission.info/perspectives/striving/terrorism.html> (accessed 10 March 2010).

<sup>1085</sup> *Ibid.*

<sup>1086</sup> Arab Convention for the Suppression of Terrorism, see n.984, Preamble.

<sup>1087</sup> *Ibid.*, Article 3 (I) 1.

<sup>1088</sup> *Ibid.*, Article 3 (II) 5.

<sup>1089</sup> *Ibid.*, Article 5.

<sup>1090</sup> *Ibid.*, Article 1 (3).



excluded by their legislation.”<sup>1091</sup> These provisions are in line with the international extradition law which gives due importance to the local laws. Saudi Arabia is party to all these conventions except the last.

The Convention also conforms to international law in its provision of standard exceptions. Article 6 specifies the exceptions and limitations on extradition with ‘exceptions to the exception’ specified for terrorist offences and any attacks on heads of state or their families, military offences, expiration of the statute of limitations, and double-criminality and extraditable offences in cases of extraterritorial jurisdiction. The Convention also adheres to the international theory of the protective principle of jurisdiction.<sup>1092</sup> The provision stipulates that extradition will not take place for an offence for which extradition has been sought which was committed in the territory of the requested contracting state “except where the offence has harmed the interests of the requesting State and its law provide for the prosecution and punishment for such offences and where the requested State has not initiated any investigation or prosecution.”<sup>1093</sup>

Another common ground between Saudi Arabia and Britain is their concern for human rights in the process of extradition. Both countries are committed to upholding human right standards by signing relevant conventions, which bind the member countries to observe human right standards in their legal and executive proceedings, and which also apply to extradition processes. As noted in Chapter 5, a hostile attitude to Saudi Arabia’s human rights record is largely promulgated by Western commentators. As noted, documentary materials relating to Saudi Arabia are lacking, and this issue is typical of that imbalance – commentary in support of Saudi Arabia’s position is in short supply. However, contrary to common perception in the West,<sup>1094</sup> Islamic law guarantees human rights in all criminal procedures. As observed by Bassiouni, Islamic criminal justice procedures encompass a range of due process and human rights protection regardless of which category of crime is involved, “[including] the right to life, liberty and property; the right to petition for redress of wrongs and grievances; the requirement of a fair and impartial trial

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<sup>1091</sup> Arab Convention for the Suppression of Terrorism, see n.984, Article 1 (3).

<sup>1092</sup> See Chapter 3, section 3.6.4 for discussion of this principle.

<sup>1093</sup> Arab Convention for the Suppression of Terrorism, see n.984, Article 6 (c).

<sup>1094</sup> See Alotaibi, n.73, at 3.

without distinction of colour, creed, or origin are fundamental to them.”<sup>1095</sup> Protection against unreasonable deprivation of any such right is subject to judicial scrutiny, and prompt legal determination is commanded. This is deemed essential not only as a human rights, but as a political right that is indispensable for “the maintenance of a scheme or ordered liberty and fundamental freedom.”<sup>1096</sup> In fact, as Al Saleh notes, “Islamic jurisprudence is unique in guaranteeing the right of individual security...Islam guarantees five essential things to all persons and prevents unwarranted infringement of them by the State...1) religion, 2) life, 3) mind, 4) prosperity, and 5) property.”<sup>1097</sup> He further divides human rights protections into four topics including these two:

1. The presumption of innocence. That is, under Islamic jurisprudence people are presumed innocent until proved guilty. On this view, “the burden of proof rests with the accuser”<sup>1098</sup> and “doubt is construed strictly against the accuser.”<sup>1099</sup>
2. Rights during the investigation and primary questioning state. Three categories of guarantees are ensured to the accused during the investigative and primary questioning stage, namely: freedom from unreasonable searches and seizures; determining the limits to which the investigator can go; extension of the right to remain silent; guarantees against having to take an oath or put up money or property; and *prohibitions against torture or cruel and inhuman treatment* and rights of the accused during preventive detentions. Similarly, rights are guaranteed to the accused during trial including protections related to the rules of evidence, the presumption of innocence, the requirement of proof of guilt beyond a reasonable doubt, and the right to be tried before a fair and impartial court and right to counsel (albeit this latter is not without controversy).<sup>1100</sup>

Like other stages of the criminal proceedings, rights are also guaranteed to the accused during imprisonment. Although there is a considerable disagreement among Islamic jurists as to the

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<sup>1095</sup> Bassiouni M C, *Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System*, in Bassiouni M C (ed.), *The Islamic Criminal Justice System*, (New York: Oceana, 1982), at 25.

<sup>1096</sup> *Ibid*

<sup>1097</sup> O. Al-Saleh, *The Right of the Individual to Personal Security in Islam*, in Bassiouni, M. C. (ed.), *The Islamic Criminal Justice System*, (New York: Oceana, 1982), at 55-56.

<sup>1098</sup> *Ibid*.

<sup>1099</sup> *Ibid*.

<sup>1100</sup> See n.34 for more about this.

lawfulness of imprisonment as a punishment, as well as about the scope of its use, as Al Saleh notes, “most jurists agree that regardless of the offence, no prisoner should be *insulted, humiliated, beaten, tortured or chained* (except to prevent flight).”<sup>1101</sup>

Nonetheless, in practice, and as noted earlier,<sup>1102</sup> Saudi Arabia is still perceived as doing very little in improving human rights. According to many human rights organisations and countries in the west, issues like the treatment of women, the treatment of foreign workers, the death penalty, torture and beating by the religious police, and the lack of free political speech, all remain obstacles, if not a deterrent, for those countries that might wish to approach the Kingdom for a formal treaty, or agreement on extradition.<sup>1103</sup>

So, from this perspective, what was claimed, above, to be a similarity appears instead to be a real contrast between the Kingdom of Saudi Arabia and Britain. However, in reality, the two entities, despite their different views, do share this noble principle, endorsing it and respecting it, although a number of weaknesses are still present. The United States Bureau of Democracy, Human Rights, and Labor wrote in 2009 on this issue that:

“the Basic Law prohibits torture, and *Shari’a* prohibits judges from accepting confessions obtained under duress. Nevertheless, during the year the non-governmental organisation (NGO) Amnesty International (AI) continued to report that authorities systematically subjected prisoners and detainees to torture and other physical abuse. Government contacts claimed privately that measures were taken to ensure that torture did not occur in the penal system, such as alleged Ministry of Interior (MOI) formal rules prohibiting torture. The government occasionally, withheld medical care from prisoners.”<sup>1104</sup>

Similarly, the case of Mitchell, Walker, Sampson, and Jones shows the divergence between human rights as perceived in the West and their perceived practice in Saudi Arabia. The four men were arrested for alleged involvement in terrorist bombings in Riyadh and Khobar in 2000. Jones was released without charge after 67 days in prison. Mitchell and Sampson were

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<sup>1101</sup> See Al-Saleh, n.1097, at 124.

<sup>1102</sup> See Chapter 5, section 5.5.

<sup>1103</sup> See, for example, reports from Human Rights Watch, <http://www.hrw.org/en/middle-eastn-africa/saudi-arabia> (accessed 12 March 2010).

<sup>1104</sup> U.S. Bureau of Democracy, Human Rights and Labor, see n.897.

condemned to death, and Walker was given a sentence of 18 years in prison. The four men alleged they were tortured while imprisoned. Having been released as an act of clemency, they attempted to sue the government of Saudi Arabia for torture, assault and battery, trespass to the person, and unlawful imprisonment.<sup>1105</sup> Lord Bingham said that:

“that the issue at the heart of the case was the relationship between two principles of international law. One was that a sovereign state will not assert its judicial authority over another. The second, and more recent, principle was one that condemned and criminalised the official practice of torture, required states to suppress the practice and provided for the trial and punishment of officials found guilty of it.”<sup>1106</sup>

Reconciling conflicting international law obligations like that between torture and sovereignty in *Jones v. Saudi Arabia*, is at the heart of extradition analysis within the context of international human rights obligations. After the initial High Court hearing followed by a hearing by the Court of Appeal, there was an appeal to the House of Lords, the judgment was that sovereignty over jurisdiction was the stronger force in international law, despite abhorrence in the U.K. at the use of torture.

There seems to be a presumption in the West that Islamic countries with similar competing international obligations do not treat those obligations seriously, especially when it comes to human rights. However, contrary to many Western misconceptions, the protection of human rights is a familiar concept within Islam.

Islam granted human rights fourteen hundred years ago, which are being emphasised now in the principles of international law and extradition practices and procedures. Included among these inalienable rights are the rights to life, the right to freedom, the right to equality and prohibition against impermissible discrimination, the right to fair trial, the right to protection against abuse of power, the right to protection against torture, the right to asylum, the right to freedom of belief, thought, and speech, the right to freedom of religion, the right to free association, the right to protection of property, the right to social security, the right to education, and the rights of

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<sup>1105</sup> International Centre for the Legal Protection of Human Rights, ‘Jones v. Saudi Arabia’, <http://www.interights.org/jones> (accessed 15 March 2010).

<sup>1106</sup> James Sturcke, ‘Victims lose Saudi torture case’, *The Guardian* 14 June 2006, <http://www.guardian.co.uk/uk/2006/jun/14/politics.saudiarabia> (accessed 15 March 2010).

privacy.<sup>1107</sup> Being an Islamic country, these human rights are guaranteed in the Saudi Basic Law. There may be weaknesses in practice, but this law grants rights to individuals accused of crimes. For example, Article 26 declares that “the state protects human rights in accordance with the Islamic *Shari’a*.”<sup>1108</sup> Article 36 states that “no one shall be arrested, imprisoned or have their actions restricted except in cases specified by statutes,”<sup>1109</sup> while Article 37 pledges that “the home is sacrosanct and shall not be entered without the permission of the owner or be searched except in cases specified by statutes.”<sup>1110</sup> Likewise, Article 38 promises that “penalties shall be personal and there shall be no crime or penalty except in accordance with the *Shari’a* or organizational law. There shall be no punishment except for acts committed subsequent to the coming into force of the organisational law.”<sup>1111</sup> The Universal Islamic Declaration of Human Rights, issued by the Islamic Council on September 19, 1981 also affirms these “inviolable and inalienable human rights that the [Council] consider are enjoined by Islam.”<sup>1112</sup>

Whereas the Saudi Basic Law “does not provide the accused with the right to legal representation,”<sup>1113</sup> imparting the right to be heard in the justice system has compensated for this lack.<sup>1114</sup> For instance, Article 43 states that “the King’s court and that of the Crown Prince shall be open to all citizens and to anyone who has a complaint or a plea against an injustice. Every individual shall have a right to address the public authorities in all matters affecting him.”<sup>1115</sup> Similarly Article 47 provides that “the right to litigation is guaranteed to citizens and residents of the Kingdom on an equal basis.”<sup>1116</sup>

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<sup>1107</sup> See Alotaibi, n.73, at 281.

<sup>1108</sup> See Basic Law, n.40, Article 26.

<sup>1109</sup> *Ibid*, Article 36.

<sup>1110</sup> *Ibid*, Article 37.

<sup>1111</sup> *Ibid*, Article 38.

<sup>1112</sup> Universal Islamic Declaration of Human Rights, September 19<sup>th</sup> 1981, Preamble (xiv) b. For the text and some annotation by the Islamic Council of Great Britain, see <http://www.ntpi.org/html/uidhr.html> (accessed 16 March 2010).

<sup>1113</sup> See Alotaibi, n.73, at 275.

<sup>1114</sup> There is some controversy about the extent of the right to counsel under Islamic law. Al Saleh (see n.998) notes that “Islamic law guarantees to both the accuser and the accused the right to appoint another person to represent him before the judge” However, some jurists argue that the right to counsel does not attach to *Hadud* crimes [against God], while some jurists argue that counsel is allowed to the *Hadud* crimes involving the violation of the right of the man (theft, highway robbery etc.) All the jurists agree that the right to counsel applies to *Ta’azir* offences (offences which result in material individual or social harm and do not fall within the *Hadud* or *Qesas* crimes).

<sup>1115</sup> See Basic Law, n.40, Article 43.

<sup>1116</sup> *Ibid*, Article 47.

The emphasis on human rights stems from Islam's emphasis on the importance of individual dignity, which is regarded as supreme. Bassiouni observes that "in Islam the dignity of man is foremost for this is the prize creation of Allah; equality and justice are therefore a natural corollary."<sup>1117</sup> Weeramantry confirms this, saying that "individual dignity ranks high in Islamic law and the concept of human rights fits naturally within this framework. The Qur'an warns repeatedly against persecution, denounces aggression, warns against violations of human dignity and reminds believers of the need to observe justice in all their dealings...Since this elevated position of the individual is preordained and eternal, human freedom cannot be transitory or dependent upon a rule. It inheres in the human condition and is immutable..."<sup>1118</sup>

It is also noteworthy that the injunctions of Islam are also in consonance with the international law framework. As Bassiouni observes that "nothing in Islamic international law precludes the applicability of [the] international obligations [accepted by signing and adhering to the UN Charter by all Muslims and Islamic States] to the domestic legal system of an Islamic state provided these obligations are not contrary to the *Shari'a*."<sup>1119</sup> Saudi Arabia, by being a member of the UN, fully subscribes to the human rights conferred under the UN Human Rights Convention. Nonetheless, it is important to note that it is only in perception rather than implementation of these rights that Saudi Arabia differs from other legal systems. Bassiouni observes that many Muslim states have in fact adopted a Western model, with modifications in procedure to the application of human rights and individual rights.<sup>1120</sup> Saudi Arabia, which rigidly adheres to traditional Islamic law in the application of the recognition of human rights under the *Shari'a*, drastically differs from the Western model. Nonetheless, the Islamic law scholar, Ali Ahmad argues "Islamic states can reconcile the Islamic view of international law with the Western-dominated view of international embodied in the United Nations Charter."<sup>1121</sup>

Likewise, Britain is also committed to observing human rights standards by virtue of being a signatory to the Geneva Conventions of 1949 which provides the basis for international humanitarian law formulations, considered to be a branch of human-rights law by some writers.

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<sup>1117</sup> See Bassiouni, n.996, at 19.

<sup>1118</sup> C. Weeramantry, *Islamic Jurisprudence: An International Perspective*, (London: Macmillan, 1988), at 1.

<sup>1119</sup> See Bassiouni, n.996, at 41-42.

<sup>1120</sup> See Alotaibi, n.73, at 282, citing Bassiouni.

<sup>1121</sup> A. Ahmad, 'The Role of Islamic Law in contemporary World Order', (2001) 6 *Journal of Islamic Law and Culture* 157.

These Conventions are geared towards providing “humanitarian protection to war victims, in particular prisoners-of-war, the wounded, sick and shipwrecked, and civilians.”<sup>1122</sup> The ‘grave breaches’ provisions of the Geneva Conventions of 1949 bind the member states to a mandatory ‘try-or-extradite’ principle for specified serious violations.<sup>1123</sup> This regime has been incorporated into English law through the Geneva Conventions Act 1957 as amended by the Geneva Conventions (Amended) Act 1995.

Britain’s ratification of the convention on human rights placed it under obligation to observe its provisions. In English law, these instruments have been used ‘as an aid’ to construct and inform the exercise of judicial discretion and to establish the scope of the common law<sup>1124</sup> wherever there was ambiguity, even before the advent of the Human Rights Act 1998.

Further, Britain is also a signatory to the European Convention on Human Rights. By ratification of the Convention, Britain is bound to enact its provisions. With the enactment of the Human Rights Act 1998 (HRA 1998), Britain has incorporated, to a large degree, the provisions of the European Convention on Human Rights into domestic law. The adoption of the law is seen as the “most significant development in English human-rights law.”<sup>1125</sup>

The European Court of Human Rights was established to adjudicate human rights disputes. The functions of the court included hearing human rights violation cases referred to it by the member states. As noted earlier in this study,<sup>1126</sup> the HRA 1998 provides that a court, when considering an issue involving ECHR rights, must allow for the following, whenever made or given, if they appear to be relevant to the case under consideration: any judgment, decision, declaration or advisory opinion of the European Court of Human Rights; any opinion of the Commission given in a report adopted under Article 31 of the Convention; any decision of the Commission in connection with Articles 26 or 27 (2) of the Convention; or any decision of the Committee of Ministers taken under Article 46 of the Convention. These decisions are only of a persuasive character, and are not a binding authority.

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<sup>1122</sup> See Jones and Doobay, n. 78, 8.05, at 96.

<sup>1123</sup> *Ibid.*

<sup>1124</sup> *Ibid.*, 8.10, at 97-98.

<sup>1125</sup> *Ibid.*, 8.11, at 98.

<sup>1126</sup> See Chapter 4, section 4.6.

From the facts described above, it can be noted that both Saudi Arabia and Britain are upholders and exponents of human rights standards and are also concerned to implement them in their respective countries. Their roles in observing them are of great significance, in view of their standing, both in the world generally and at a regional level. For example, while the kingdom of Saudi Arabia – being at the centre of Islam – is something of a role model for the rest of the Islamic world particularly, in the Middle East (due to its political and economic weight), Britain, similarly, is seen as a major power, and an important member of the European Union with a persuasive role.

The two countries are also linked through the International Criminal Police Organisation, commonly referred to as Interpol. By becoming a member of this organisation, the two countries are obliged to abide by the rules. This commitment and engagement indicates a full willingness on their respective parts to co-operate and collaborate in efforts with the international community in curtailing, or preventing if possible, international crime. Both countries are also fully aware of the modern challenges posed by the ease and mobility of communication and transport. From this angle, it can be asserted that this is more supporting evidence that the two countries could enter into a formal agreement on extradition (that would exceed the current simple Memorandum of Understanding<sup>1127</sup>). As both sovereign states therefore possess the ability to interact on subjects, such as the shared threat of terrorism, there will be no obstacles for them to formally, conclude an agreement on this subject matter.

Saudi Arabia takes the terrorism threat very seriously, and is prepared to go to great lengths, whether by extending co-operation in terms of the exchange of information or by taking practical steps permitted within the broader scope of *Shari'a*. The phenomenon of terrorism is particularly in conflict with Islamic teachings<sup>1128</sup> and is diametrically opposed to the chief goal of Islamic philosophy, which is, establishing peace and harmony not just at the state level but also internationally.<sup>1129</sup> For instance, after the 9/11 attacks on the U.S., Saudi Arabia was quick to support the United States and its sponsorship of anti-terrorist resolutions in the United Nations.

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<sup>1127</sup> 'Terrorism cannot be justified by any religion of God', see n.1084.

<sup>1128</sup> *Ibid*

<sup>1129</sup> *Ibid.*



Speaking in the UN General Assembly on October 2, 2001, Saudi Ambassador Fawzi A. Shobakshi spoke of the position of Saudi Arabia on the situation by declaring that:

“Saudi Arabia, its monarch, its government and its people have condemned those criminal acts which result in the great losses of human life and tremendous destruction and damage to property...H.R.H. Prince Abdullah expressed the full co-operation of Saudi Arabia with the American Government in all its efforts to uncover the identities of the perpetrators of these criminal acts and bringing them to justice.”<sup>1130</sup>

The speech established beyond any shadow of doubt Saudi Arabia’s strenuous commitment to eradicate terrorism in all its forms and manifestations. Yet there is a perception in Western countries that all terrorist activities carried out anywhere in the world have the approval and backing of Islamic countries, particularly Saudi Arabia as the spiritual centre for Muslims worldwide. This perception was implicit in the 900-page inquiry report into the terrorist attacks of 9/11 by the Congressional Joint Inquiry Commission.<sup>1131</sup> The Commission’s decision to censor 28 pages of the report excited media speculation about the linkages between the attacks and the Saudi Arabian Government. Protesting at baseless and unfounded speculation, Saudi Foreign Minister Prince Saud Al-Faisal released a statement expressing Saudi Arabia’s position on the matter by stressing that:

“it is an outrage to any sense of fairness that 28 black pages are now considered substantial evidence to proclaim the guilt of a country that has been a true friend and partner to the United States for over 60 years. Saudi Arabia has been wrongfully and morbidly accused of complicity in the tragic terrorist attacks...This accusation is based on misguided speculation and is born of poorly disguised malicious intent...The report seems to have overlooked or intentionally ignored Saudi Arabia’s continuing efforts to fight terrorism. [Saudi Arabia and the U.S.] are both victims of terror and partners in the war against it, making it incumbent upon [both the countries] to work together effectively

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<sup>1130</sup> UN General Assembly, ‘Measures to Eliminate International Terrorism’ October 2nd 2001, 56<sup>th</sup> Session, Agenda item 166.

<sup>1131</sup> U.S., House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, ‘Report of the Joint Inquiry into the Terrorist Attacks of September 11 2001’, (December 2002), Senate Report 107-351, House Report 107-792.

in an environment of trust and mutual confidence if [both the countries] are to prevail in this war [against terrorism].”<sup>1132</sup>

Contrary to popular perception in the West that Islam perhaps patronises or abets terrorism, Islam is entirely and totally against any form of violence which results in great losses of human life and tremendous destruction and damage to property. If terrorist attacks are occurring, the motive for these definitely lies elsewhere and it is in vain to associate it with Islam, since it preaches peace and harmony and wishes to see the world where tolerance, peace and harmony prevail.

### **6.2.2 Differences**

Despite the similarities in the extradition systems of the two countries discussed above, the two differ from each other in a number of respects. This starts quite clearly from the fact noted above, that Saudi extradition provisions as laid down in the Basic Law are very broad and leave a lot to the discretion of its government to be mutually determined between the contracting states, while the British extradition system is very detailed and elaborate. The ‘weakness’ of Saudi flexibility in fact can be a positive virtue for dealing with crimes like terrorism. The difference also stems from the traditions of the two countries. Britain has a long tradition of extradition, which has matured through a process extending over centuries. The differences range from questions of sovereignty to the legal basis and procedures for executing an extradition process. In what follows, the nature and extent of the principal differences between the two systems are examined.

#### **a. The different concepts of sovereignty**

The first and foremost difference between Islamic law and Western philosophy relates to the concept of sovereignty. In the 17<sup>th</sup> century, the word ‘sovereign’ itself was equivalent to ‘king,’ and referred to monarchies which were believed to have been invested with ‘divine rights’ and wielded supreme authority over the state or kingdom, “a high view of monarchy resting on

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<sup>1132</sup> The speech is reprinted in English in the League of Arab States website: <http://www.arableagueonline.org/arab..e/english/>, last accessed 15 March 2010, the English version of this website is now being reconstructed (17 March 2010).

biblical texts which associate kings closely with God through their anointing.”<sup>1133</sup> In Western jurisprudence, various sovereignty theories have been advanced which enunciate doctrines of absolute sovereignty, as argued by Hobbes,<sup>1134</sup> or some form of limited sovereignty, as advanced by Locke.<sup>1135</sup> The modern so-called positivist school of legal philosophers has “formulated doctrines of sovereignty based upon the concept that no source of authority stands higher than the sovereignty of a state, within the limits of sovereign’s dominions.”<sup>1136</sup> Bassiouni explains that “Western political thought imparts the precept that sovereignty is in the ‘people’ and is absolute. The conduct of affairs of state by its own people is original, unbridled, absolute, un-derived, independent, permanent and exclusive, even when self-imposed limitations are included in certain constitutions to indicate the need for a higher order of legality.”<sup>1137</sup>

In sharp contrast to the Western view of sovereignty, “the Islamic construction of sovereignty begins with the doctrine that sovereignty belongs to God *alone*.”<sup>1138</sup> A ruler’s or a state’s sovereignty is that of a trusteeship or a vice-regency.<sup>1139</sup> This means that the ruler or state authorities are merely representing Him and carry out His commands. The ruler of a state in this sense has a limited sovereignty, which is an implementational role. Of course, this concept of sovereignty and vice-regency has been revealed through the words of God, the Qur’an. This means that the heads of an Islamic state exercise their invested powers well within the boundaries of the *Shari’a* and they are not ‘authorised’ to enforce any rules which conflicts with the basic precepts of the *Shari’a* or the *Sunnah*. Weeramantry notes that while “there have been tyrants and despots in Islamic history...whatever their abuses of power, not one of them could controvert the central proposition that sovereignty belonged to God alone and that the law ‘never conceded to any human being any greater right than that of enforcing His law and protecting and leading His people.’”<sup>1140</sup> Bassiouni explains the concept by saying that “Islamic polity is a

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<sup>1133</sup> J. Bowker (ed.), *The Oxford Dictionary of World Religions*, (Oxford: OUP, 2000).

<sup>1134</sup> T. Hobbes, *Leviathan*, (Oxford: OUP, 1998).

<sup>1135</sup> J. Locke, *Two Tracts on Government*, (Cambridge: CUP, 1967).

<sup>1136</sup> Quoted in Alotaibi, n.73, at 279.

<sup>1137</sup> See Bassiouni, n.20, at 9.

<sup>1138</sup> *Ibid*, at 9.

<sup>1139</sup> See Alotaibi, n.73, at 279.

<sup>1140</sup> See Weeramantry, n.1018, at 82.

‘theo-democracy’. It is, therefore, distinguishable from the democracy in which constitutional principles place sovereignty in the people.”<sup>1141</sup>

The difference then, essentially, is the extent of sovereignty invested in people. While in a non-Muslim democracy like Britain the unbridled, absolute, permanent and exclusive sovereignty lies with ‘people’, in an Islamic country, Islamic law reigns supreme and ‘people’ can only function within the rights conceded to them by the *Shari’a*, revealed through the Qur’an and the *Sunnah*.

Talking in relative terms, Britain is free to enact new extradition statutes to meet modern challenges and subject to the approval of the people through Parliament. This is possible through the supremacy of Parliament.<sup>1142</sup> Further the State interest is the guiding principle in formulating rules from time to time and a statute relevant today may be obsolete and hence can be discarded tomorrow, through the means by which it was made. In contrast, Saudi Arabia, being an Islamic country, has to obey certain divine precepts and can never overstep the boundaries drawn by the *Shari’a*.

#### **b. The legal bases**

Another difference between the two extradition systems is the very foundations underlying extradition practices and procedures. As discussed earlier,<sup>1143</sup> in the earlier phases of extradition history, the authority to ‘deliver up’ (the older term for extradition) the criminal to the requesting state rested purely with the King. In this sense, extradition law had an exclusively administrative character. This practice continued up to the latter half of the nineteenth century when ‘delivering up’ a fugitive criminal without a legal backing was deemed to be unlawful.<sup>1144</sup> In 1870, the treaties governing extradition were given legal effect through an enactment, after which processes and procedures would be governed through statutory provisions, which means every extradition request has to be routed through a specified and prescribed channel.<sup>1145</sup> Similarly, extradition proceedings would be conducted under the procedures laid down in the relevant act. The right of appeal of *habeas corpus* was also granted under which the accused could lodge an

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<sup>1141</sup> See Bassiouni, n.20, at 11.

<sup>1142</sup> See Alder, n.32, at 11.

<sup>1143</sup> See generally Chapter 2.

<sup>1144</sup> See Jones and Doobay, n.33, 1-007, at 10

<sup>1145</sup> *Ibid*, 1-013, at 16.

appeal to the High Court or House of Lords. It was meant to give the person under trial a fair chance to defend himself.<sup>1146</sup> The statutory provisions, as the history of extradition acts indicates by the subsequent Acts of 1989 and 2003, are a dynamic and responsive instrument, subject to change from time to time.

By contrast, as discussed in Chapter 5,<sup>1147</sup> Saudi Arabia does not have a separate constitution in the traditional sense of most other nations. Saudi Arabia is governed by the Basic Law of Government, established in 1982 and revised in 1992.<sup>1148</sup> This “addresses a number of legal issues, but it is not a constitution.”<sup>1149</sup> The Saudi Basic Law declares that “the Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; Gods Book and the *Sunnah* of His Prophet, God’s prayers and peace be upon him, are its constitution...”<sup>1150</sup> Thus, Saudi Arabia is ruled not by a constitution, but by the Islamic *Shari’a*. Vogel contrasts Islamic *Shari’a* with Western-style rule of law as set forth in codes, statutes and regulations by stating the primary difference between the two. He notes that “[*Shari’a*] is properly the ideal divine law which encompasses all human ideals and goods, both for this world and the next, both social and individual. But in practical context, it may refer to either the *Qur’an* or *Sunnah*, the two revelations from which *Shari’a* is known; or to the classical law found in the books of medieval scholars and their modern successors called the *fiqh*...”<sup>1151</sup> He further notes that all man-made laws (*nidhams*), stipulated through the Basic Law and through other Royal Decrees, are subordinate to the *Shari’a* as the “rule in Saudi Arabia draws its authority from the Book of God Most High and the *Sunnah* of His Prophet. They are sovereign over all regulations of the state.”<sup>1152</sup> The method of making law has been laid down in Saudi Arabia’s Basic Law, which states that “all the governmental authority and laws of Saudi Arabia derive from the Holy *Qur’an* and the Prophet’s tradition.”<sup>1153</sup> From this view, the criminal justice of Saudi Arabia is “derived

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<sup>1146</sup> See Jones and Doobay, n.33, 1-014, at 16.

<sup>1147</sup> See section 5.4.2.

<sup>1148</sup> See Basic Law, n.40.

<sup>1149</sup> See Alotaibi, n.73, at 273.

<sup>1150</sup> See Basic Law, n.40, Article 1.

<sup>1151</sup> Cited in Alotaibi, n.73, at 273-274.

<sup>1152</sup> See Alotaibi, n.73, at 274.

<sup>1153</sup> See Basic Law, n.40, Article 7.

entirely from Islamic Law.”<sup>1154</sup> In other words, Islamic rules have supremacy over the man-made laws.

Where the rule of *Shari'a* is not clear, the King and the Council of Senior Scholars, appointed by the King, will interpret the constitutional rules implicit in the *Shari'a*. The Basic Law establishes a hierarchical legal administrative structure encompassing a Higher Council of Justice, a tribunal of complaints, an investigative body, a prosecutor-general, and a system of courts.<sup>1155</sup>

Saudi Arabia has no specific laws (statutes) pertaining to extradition. The Basic Law addresses both asylum and extradition - albeit rather generally - stipulating that “the state shall grant the right to political asylum when the public interest demands this. Statutes and international agreements shall define the rules and procedures governing the extradition of common criminals.”<sup>1156</sup> The important point to note in this regard, however, is that “there is nothing in Saudi Arabia’s Basic Laws or within the principles of Islamic Law which would forbid the extradition of nationals.”<sup>1157</sup>

There are a number of other articles in the Basic Law which have implications for international extradition practice. As discussed in Chapter 5, there are injunctions in the Qur’an which refer to how to deal with enemies and refugees. However, there are none which directly forbid Muslims from entering into extradition arrangements with ‘enemies’. This flexibility has been codified in Article 70 of the Basic Law, which stipulates that “international treaties, agreements, regulations, and concessions are approved and amended by Royal decree.”<sup>1158</sup> This provides the government “with considerable discretion in extradition arrangements.”<sup>1159</sup>

The differences in the legal basis of the extradition practice outlined above, has “important implications in terms of comity, double criminality, extraditable offences, the principle of non-inquiry, the principle of specialty, and recent trends in international extradition practice related to human rights.”<sup>1160</sup> As seen in Chapter 3 (section 3.1), Britain belongs to the category of countries

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<sup>1154</sup> See Alotaibi, n.73, at 272.

<sup>1155</sup> See Basic Law, n.40, Articles 45, 51, 53, and 54,

<sup>1156</sup> *Ibid*, Article 42.

<sup>1157</sup> See Alotaibi, n.73, at 298.

<sup>1158</sup> See Basic Law, n.40, Article 70.

<sup>1159</sup> See Alotaibi, n.73, at 275.

<sup>1160</sup> *Ibid*, at 272.

that follow common law. In terms of extradition practice, this means that Britain has transparent and objective procedures which are open to contest and can be challenged. Every step of the proceeding is laid down in the relevant act and the accused has the right to appeal against the decision at a higher level in the hierarchy. In sharp contrast, the latter, because of the absence of statutes governing extradition processes has a system where extradition practices and procedures are quite opaque<sup>1161</sup> and thus contain no requirements of comity, double criminality, and the other aspects listed above. In this sense, virtually any mutually binding requirements and conditions can be determined through bilateral and multilateral treaties or arrangements. As extradition requests and responses are traditionally handled through confidential diplomatic channels, “the Saudi extradition procedures are also rendered less easily decipherable.”<sup>1162</sup> This is borne out by the reliance on comity as a basis for extradition and the fact that “Saudi Arabia is party to relatively few bilateral extradition treaties.”<sup>1163</sup> Saudi Arabia is a party to a number of multilateral conventions that include extradition provisions rendered in general terms. This provides the country with “considerable discretion on extradition practices.”<sup>1164</sup> This also means that the conditions such as double criminality, extraditable offences, and the principle of specialty, which are strict requirements in Britain extradition law, are not binding on Saudi Arabia.

The facts divide the two countries in a significant way. Britain having an elaborate and transparent extradition statutory provision is bound to follow a strict regime, whereas Saudi Arabia has a free hand in taking discretionary measures to facilitate extradition. This may partly account for the delay in the process (some cases might take as long as five years) or relatively larger number of refusals in the extradition process in Britain. Appeal is allowed in Britain for human rights concerns, human rights standards in the requesting state, and other concerns such as torture or fear of torture, or the death penalty, and international laws can be invoked in defence against extradition.

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<sup>1161</sup> See Alotaibi, n.73, at 272.

<sup>1162</sup> *Ibid.*, at 273.

<sup>1163</sup> *Ibid.*

<sup>1164</sup> *Ibid.*

### **c. Types of extradition systems: Process for Requesting Extradition**

Another difference related to statutory provisions and procedures is the types of extradition system the two countries adhere to which then affects the process for requesting the extradition of an alleged fugitive. A comparison of the two systems reveals that the Saudi extradition procedures, specifically the request for extradition, due to its administrative system, is more susceptible to political influence and perhaps violations of due process. Though there are criteria that the Extradition Committee considers, the process lacks transparency and the assurance that the process is fair. The U.K. system, on the other hand, requires a warrant in some instances and has transitioned into a judicial system of extradition, providing more due process rights for the alleged fugitive. Nevertheless, EA 2003 has also done away with some requirements like the arrest warrant, especially under the EAW regime. In regards to the arrest warrant requirement, both systems seem to favour efficiency over the protection of due process rights, which may be cumbersome in the context of extradition, though necessary. Overall, the Saudi system provides less protection to the alleged fugitive though the process is faster, and the U.K. system provides more protection to the alleged fugitive, especially with the warrant requirement and the hearing, though the process may seem more cumbersome. The U.K. has tried to balance the need for a faster extradition system by waiving some requirements. Saudi Arabia, however, continues to follow its administrative system.

Under the Saudi Arabia administrative system, extradition requests are received through diplomatic channels and processed by the Ministry of Justice. Although a judicial opinion is occasionally sought on an issue, it is mainly an administrative decision whether to hand over an accused or convicted fugitive to the requesting state. The role of the judiciary in the process is purely recommendatory and is not binding on the administration. Political considerations and relations with the requesting state drive extradition decisions under this system. For instance, it is possible that a state might agree to extradite a required person in order to avoid souring relations. The opposite may also be true. A state might not, for example, be willing to return a wanted person because it does not enjoy good relations with the requesting state. Other considerations might also come into play under the administrative system. A state might decide not to return a person accused of political offences because of the fear that the revolutionary or



political dissident may come into power at some future point, which might have a negative influence on the political relations between the two countries should that happen.

Foreign policies are said to bear upon a state's extradition practice profoundly, particularly in situations where the state has considerable discretion in extradition decisions. Saudi Arabia is not a party to any extradition treaties with North or Latin American or European countries, although it has formal extradition agreements with many countries in its region. Yet Saudi Arabia is a party to a number of international treaties on mutual co-operation that could theoretically serve as the basis for extradition with developed world countries who are also a party to these conventions. Thus, extradition between Saudi Arabia and most of the developed world occurs only outside the framework of formal extradition agreements. In this context, "Saudi Arabia's basic foreign policy positions are therefore germane to Saudi extradition practice and procedure."<sup>1165</sup> For example, it has a "special relationship" with the U.S.<sup>1166</sup>

Another weakness of the administrative system of extradition is its denial to the accused of a fair trial and the failure to provide the accused with a chance to defend himself. This disallowance of the right to be tried in a free and fair manner runs counter to the human right standards which have been the main concern of international law and human rights activists.

After the 9/11 terrorist attacks on the U.S., a number of wanted persons, who were alleged to be involved in conceiving, planning or executing attacks, were handed over to the Americans. Pakistan captured many terrorists who were thought to be involved in the attack in some way, or were connected with Al-Qaeda, and handed them over to the U.S. without any trial.<sup>1167</sup>

By contrast, Britain, which started off with the administrative type of extradition practice, has gradually shifted to a complete judicial system of extradition, via the administrative-judicial path. As discussed in Chapter 4 and suggested in the preceding paragraphs, the extradition process has go through the steps prescribed as laid down in the Extradition Act of 2003. The Act has been designed to converge, as far as possible, with principles of international law and human

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<sup>1165</sup> See Alotaibi, n.73, at 294-295.

<sup>1166</sup> *Ibid*, at 295.

<sup>1167</sup> See, for example, 'Pakistan to hand over top Al-Qaeda suspect to U.S. for prosecution', *Washington Post*, (1 June 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/31/AR2005053101381.html> (accessed 10 March 2010).

rights standards as prescribed by the UN Charter and provisions of the European Convention on Human Rights. Britain is notorious for its delayed extradition process and lower success rate, but this is not a high price for providing the accused with a fair trial.<sup>1168</sup> The major reasons for the delay and requests becoming unsuccessful may be partly attributable to the right of appeal given to the accused in the High Court and House of Lords. Occasionally, the process takes such a long time that by the time the proceedings come to completion, the accused may invoke human rights, such as the right to family and the right to life.<sup>1169</sup>

Another contrast in extradition practices and procedures between the two countries is the method of modifying the extradition rules. As noted above, any modification in the Extradition Act of Britain has to be routed through Parliament, while in Saudi Arabia the modification can be effected through Royal Decree.

#### **d. State organs involved in the extradition process**

Being adherents of two different types of extradition mechanism, administrative and judicial, it is quite predictable that the state organs and functionaries involved in the extradition processes in the two countries are different. This prediction is borne out by the fact that in Saudi Arabia, the Ministry of the Interior is the body responsible for the procedures for requesting or extraditing criminals, as well as the signing of the official papers. Act 83 of the Council of Ministers stipulates that the Ministry of the Interior is responsible for finding suspects and criminals and requesting them from outside the Kingdom using official processes and procedures, with a committee dedicated to dealing with extradition requests. This consists of three consultants from the Ministry<sup>1170</sup> and carries out investigation of requests for those who are wanted from abroad or for extradition, as well as dealing with the necessary documentation. It decides whether to accept or reject requests in the light of existing statutes and regulations and if additional documentation is needed. The committee also ascertains whether the procedures for arrest or investigation within the Ministry of the Interior are being adhered to within the provisions of the

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<sup>1168</sup> Enshrined in the European Convention on Human Rights, see n.41, Article 6.

<sup>1169</sup> ECHR, see n.41, Article 2 and Article 8.

<sup>1170</sup> Order of the Under-Secretary of the Interior Minister No.749, see n.877.

treaties and agreements, and communicates with relevant countries by diplomatic means or through Interpol.<sup>1171</sup>

In contrast, Britain has a hierarchy in its judicial system. The main state organs involved are the Secretary of State, the judges, the High Courts and the House of Lords. The Secretary of State is lynchpin in the whole process. Prior to EA 2003, the Secretary of State enjoyed many powers. He was responsible for initiating the extradition process and could terminate it whenever he deemed it appropriate. Under EA 2003, however, his powers were somewhat curtailed, but he still holds a key position in the whole process.<sup>1172</sup> First, he is empowered to designate a territory as being either Category 1 or 2. He is responsible for issuing a certificate if he receives a valid request for extradition. For Category 1 territories, the Secretary of State is responsible for issuing a certificate to the effect that the arrest warrant has been issued by the authority designated by him. He may also designate more than one authority or designate different authorities for different parts of the United Kingdom. As regards Category 2 territories, he issues a certificate if he receives a valid request for extradition of a person who is in the United Kingdom. He can also order proceedings, if he receives another valid request, for one of the requests to be deferred until the other has been disposed of, or in he may take account the relative seriousness of the offences concerned; the places where each offence was committed, the date when each request was received; if the person is alleged to be unlawfully at large after conviction.

#### **e. Categorisation of territories**

For the purpose of extradition, the British Extradition Act 2003 (EA 2003) divides territories, roughly equivalent to countries, into two classes, referred to as Category 1 and Category 2 territories. EA 2003 does not provide any guidance as to which countries should be designated as Category 1 territories. A state can belong to either of the categories by designation of the Secretary of State. The list of territories in a category is liable to change and any country can be placed in the other category by designation. However, generally, European countries are included in Category 1 territories for which the main mechanism for initiating an extradition

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<sup>1171</sup> See Chapter 5, section 5.6.11, for further discussion.

<sup>1172</sup> See Jones and Doobay, n.33, 12-001, at 248.

request is through a European Arrest Warrant, which requires a certificate by the appropriate authority for the extradition proceedings to start.

The list of Category 2 territories includes countries with which Britain has extradition treaties. Nearly 110 countries fall into this category, but not so Saudi Arabia. As the two countries (Britain and Saudi Arabia) are only connected in this context by a Memorandum of Understanding,<sup>1173</sup> there exists no formal treaty between them (a treaty signed in 1942 was never ratified).<sup>1174</sup> By contrast, Saudi Arabian's Basic law does not make any distinction. All countries are equal in the eyes of the Saudi law in respect of extradition matters. The fact that the Kingdom is not restricted has allowed it to be active in concluding both bilateral and multilateral treaties and conventions

#### **f. Extradition crimes**

Yet another difference between the two countries is in terms of extraditable crimes. As noted above, the Saudi Basic Law is opaque as to the crimes for which extradition can be sought, rather than the nature of the crime, the gravity of which the Kingdom considers as stipulated in bilateral and multilateral treaties. According to Saudi law, extradition can be requested for any crime for which the punishment is a minimum of six months imprisonment (as in its agreement with the Gulf States).<sup>1175</sup>

In contrast, Britain has listed as many as 32 crimes in Schedule 2 of the Extradition Act 2003, which are referred to as extradition crimes. Under the Act, accused fugitives can only be extradited to the requesting state if the crimes for which he has been alleged or convicted are included in the list. Another important difference in relation to extraditable crimes between the two countries is that in Saudi Arabia, murder, or attempt to murder the King or his family members is not a crime immune to extradition, whereas it could qualify for exception in British law.

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<sup>1173</sup> This was decided by the Act of the Council of Ministers no.83 on 13 February 1975 (1/02/1395 AH).

<sup>1174</sup> See Alotaibi, n.73, at 289.

<sup>1175</sup> See Chapter 5, section 5.6.2.

With regard to extradition crimes, there is no stipulation provided in Saudi Basic Law, or in the *Shari'a*. This allows Saudi Arabia to determine extraditable crimes and mutually agree with the contracting country. Basically, any conduct which jeopardises or threatens the peace, both at home and abroad, qualifies as an extraditable crime in Islam. As it envisions a world that “consists of friendly or non-threatening nations, the interstate relationship is to be based on a standard of fairness and justice that is universal and not limited by state boundaries.”<sup>1176</sup> Weeramantry maintains that Islamic doctrine holds that peace is the basic norm for international relations and stresses international relations based on equality, not dominance and submission.<sup>1177</sup>

Although there are no explicit guidelines on what extradition crimes would be in the Basic Law or in the *Shari'a* for that matter, the Arab Extradition Treaty of 14<sup>th</sup> September, 1952 (enforced on 28<sup>th</sup> August 1954) to which Saudi Arabia is a party, relies on the eliminative method for determining extraditable offences, with the general guideline that the fugitive must be accused of an offence punishable under the laws of both the requesting and the requested states by one year's imprisonment or a more severe penalty, or, in the case of convicted offenders, the fugitive must have been convicted of a crime that carries a sentence of two months' imprisonment or more. The treaty also allows for the extradition of persons sought in connection with an extraditable offence (i.e. persons not yet convicted or accused of an extraditable offence).<sup>1178</sup>

On the other hand, crimes for which extradition can be sought are specified in Schedule 2 of EA 2003 in Britain. There are 32 types of crime which qualify for an extradition request.<sup>1179</sup> The crimes draw upon the European Framework List – a list common to all the member states of the EU.<sup>1180</sup> The other conditions attached to extradition offences are separately given for Category 1 and Category 2 territories, most of them overlapping.

The concept of an ‘extradition offence’ is fundamental to extradition law. This is because only those accused or convicted of such offences in the requesting state can be extradited. Therefore the importance question to be decided by the judge at the extradition hearing is whether the

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<sup>1176</sup> See Ahmad, n. 1121, 157, 159.

<sup>1177</sup> See Weeramantry, n.1118, at 160.

<sup>1178</sup> See Alotaibi, n.73, at 290.

<sup>1179</sup> Extradition Act 2003, Schedule 2, see n. 39.

<sup>1180</sup> See Chapter 4, section 4.6.6.

defendant is accused or has been convicted of an extradition offence in the requesting state. It is important to point out the condition of 'dual criminality', that is, the alleged conduct has to be both an offence under the law of the requesting state and, had it been committed there, an offence in the U.K. This condition was removed in EA 2003 for Category 1 territories, which means that defendants can now be extradited for conduct that does not amount to a criminal act under U.K. domestic law.

In England and Wales, at the extradition hearing, the appropriate judge has the same powers as a magistrates' court would have if the proceedings were the summary trial of an information against the person in respect of whom the Part 1 warrant was issued.<sup>1181</sup> In Scotland, he has the same powers as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by the person in respect of whom the Part 1 warrant was issued, while in Northern Ireland, at the extradition hearing the appropriate judge has the same powers as a magistrates' court would have if the proceedings were the hearing and determination of a complaint against the person in respect of whom the Part 1 warrant was issued.<sup>1182</sup>

Either party can lodge an appeal with the High Court against the decision of the judge. The High Court must begin to hear the appeal before the end of the relevant period, failing which, either the appeal must be taken to have been allowed by a decision of the High Court or the person whose extradition has been ordered must be taken to have been discharged by the High Court; or the order for the person's extradition must be taken to have been quashed by the High Court.<sup>1183</sup> Also, either party may appeal to the House of Lords, which is the highest court in Britain. Leave to appeal to it may only be granted if the High court has certified that there is a point of law of general public importance, or it is a point that ought to be considered by the House of Lords,<sup>1184</sup> or if leave is granted by it.

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<sup>1181</sup> See Jones and Doobay, n.33, 8-021, at 183.

<sup>1182</sup> *Ibid.*

<sup>1183</sup> See Chapter 4, section 4.6.11.

<sup>1184</sup> *Ibid.*

### **g. Bars to extradition**

Saudi Arabia and Britain differ in many ways with regard to bars to extradition. Saudi Arabia's Basic Law is silent on the subject. On the other hand, Britain has a number of bars which prohibit the extradition of an accused person, on the grounds discussed below.

### **h. Extradition of nationals**

As discussed above, Saudi Arabia does not have any statute in the Basic Law barring extradition of a criminal. However, all the Arab treaties to which Saudi Arabia is a party and the Islamic Conference Convention<sup>1185</sup> allow parties to refuse extradition based on nationality. As Alotaibi noted, "Saudi Arabia has never stated that its refusal to extradite a Saudi national was based on the individual's status as a Saudi national."<sup>1186</sup> This can be interpreted as an attempt on its part to align its extradition rules in accordance with the principles of international law.

Likewise, British law does not base extradition on the basis of nationality. For example, s.11 of EA2003 imposes other bases on it, but the issue of nationality is not included. This means that any British national is liable to be extradited if he is accused, or convicted of an extraditable crime of any national guilty of committing a crime included in the list of extradition crimes.

### **i. Double jeopardy**

Saudi Arabia does not any provision in the Basic Law to forbid extradition on the basis of double jeopardy. In sharp contrast to this lack of Saudi statutory provision, Britain's EA 2003 states that:

"A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption (a) that the conduct constituting the extradition offence constituted an offence in the part of

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<sup>1185</sup> Organisation of the Islamic Conference, 'Convention on Combating International Terrorism', (July 1999), Resolution 59/26-P, Annex, [http://www.oic-oci.org/english/convention/terrorism\\_convention.htm](http://www.oic-oci.org/english/convention/terrorism_convention.htm) (accessed 10 March 2010).

<sup>1186</sup> See Alotaibi, n.73, at 298.

the United Kingdom where the judge exercises jurisdiction; and (b) that the person were charged with the extradition offence in that part of the United Kingdom.”<sup>1187</sup>

The rule relates to Article 9 of the European Convention on Extradition which stipulates:

“Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.”<sup>1188</sup>

The echo of the rule is also provided in the Framework Decision which permits the judicial authorities in the executing state to refuse to execute the warrant; The Framework states:

“Where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based on to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings.”<sup>1189</sup>

#### **j. Extraneous considerations**

Within the British context, the British extradition Act of 2003 states in s.13:

“a person’s extradition to a category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that (a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by

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<sup>1187</sup> Extradition Act 2003, s.12, see n. 39..

<sup>1188</sup> European Convention on Extradition, n.254, Article 9.

<sup>1189</sup> Framework List, n.611, Article 4 (3).



reason of his race, religion, nationality, gender, sexual orientation or political opinions.”<sup>1190</sup>

This exception expresses the principle of 'non-refoulement' which has its roots in the UN Convention Relating to the Status of Refugees 1951, which found its way into the European Convention on Extradition and the Commonwealth Rendition Scheme. It was present in the British 1989 Extradition Act and incorporated into EA 2003. The provision resembles the ECHR, under which the responsibility of a state is engaged if it extradites or proposes to extradite a person to a place where he will be subjected to treatment which falls short of the standard to be expected under the ECHR. These standards include freedom of thought, conscience, and religion, and freedom of expression. The political offence exception, which survived up to the Extradition Act 1989, under which there was no extradition for crimes incidental to and forming part of political disturbances no longer finds a place in the scheme.<sup>1191</sup> This may be seen as the logical conclusion of a series of cases in which the English courts had tried to address the fact that the political offence exception had, in the 20<sup>th</sup> century, come to be used by terrorists seeking to undermine democracy rather than the liberal idealists for whose benefit it was first developed. “There are few who regret the passing of this exception.”<sup>1192</sup>

In contrast to this exception, although Saudi Arabia supports human rights in its criminal justice system, no provision to this effect has been made in the extradition system. However, provisions like the political offences exception have been promised by means of treaty provisions.<sup>1193</sup> As noted previously, Saudi Arabia's preference is to adopt international law principles and accommodate emerging trends through treaty provisions as far as possible. Therefore, despite the fact that the Saudi Basic law does not cover this issue, other instances can still be helpful, since these matters are generally taken care of by international arrangements.

#### **k. Passage of time**

The British EA 2003 provides that:

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<sup>1190</sup> Extradition Act 2003, s.13, see n. 39.

<sup>1191</sup> See *In re Castioni* [1891], 1QB 149.

<sup>1192</sup> See Jones and Doobay, n.33, at 219.

<sup>1193</sup> For example in the bilateral agreement with the Gulf States, see Chapter 5, section 5.6.2.

“a person’s extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be).”<sup>1194</sup>

However, it is not entirely clear how to determine when extradition would be ‘unjust or oppressive’ as no eligibility test has been laid down. These terms are very broad and liable to subjective interpretation. Saudi Arabia’s Basic Law, as for the cases discussed above, is also silent on this.

### **1. Age**

Another bar in British extradition law is the issue of age, which may make the person incapable of committing the crime for which the extradition is sought. The Act provides for instance, that

“a person’s extradition to a Category 1 territory is barred by reason of his age if (and only if) it would be conclusively presumed because of his age that he could not be guilty of the extradition offence, on the assumptions (a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction; (b) that the person carried out the conduct when the extradition offence was committed (or alleged to be committed); (c) that the person carried out the conduct in the part of the United Kingdom where the judge exercises jurisdiction.”<sup>1195</sup>

Note that the age of criminal responsibility is lower in British jurisdictions than in other European countries. It is therefore unlikely that many cases would resort to this exception.

Once again, the Saudi extradition system does not provide any details on this aspect of extradition.

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<sup>1194</sup> Extradition Act 2003, s.82, see n.39.

<sup>1195</sup> *Ibid*, s.13, see n.39.

### **m. Hostage-taking**

Hostage-taking considerations are also a bar to extradition in British extradition law (and again, Saudi extradition practice has nothing to say on this). EA 2003 provides that:

“a person’s extradition to a category 1 territory is barred by reason of hostage-taking considerations if (and only if) the territory is a party to the Hostage-taking Convention and it appears that (a) if extradited he might be prejudiced at his trial because communication between him and the appropriate authorities would not be possible, and (b) the act or omission constituting the extradition offence also constitutes an offence under the Taking of Hostages Act 1982 or an attempt to commit such an offence.”<sup>1196</sup>

### **n. Speciality**

The speciality condition originates from the consideration that when states surrender fugitives, they do so in relation to the offence for which extradition has been sought and not for any other offence. The purpose of this bar on extradition is intended to avoid abuse of the extradition process, so that “a person extradited is not dealt with in the extraditing state any offence other than that for which he was extradited.”<sup>1197</sup> EA 2003 provides that “[a] person’s extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory...”<sup>1198</sup> The original formulation of the rule stipulates:

“[a] person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence of detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except...(a) when the Party which surrendered him consents...(b) when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.”<sup>1199</sup>

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<sup>1196</sup> Extradition Act 2003, s.83 (1), see n. 39 .

<sup>1197</sup> See Nicholls, n.1080, 5.77, at 82.

<sup>1198</sup> Extradition Act 2003, s.17 (1), see n. 39.

<sup>1199</sup> European Convention on Extradition, see n.254, Article 14 (1)

There is no such provision in Saudi Basic Law dealing with extradition. Yet there does not seem to be any hurdle in incorporating this condition in a mutually agreed bilateral or multilateral agreement with a country or countries.

#### **o. The death penalty**

Further, there is also the imposition of the death penalty. It is abolished in Britain, but that is impossible in Saudi Arabia. Capital punishment once allowed in Britain has been relatively recently abolished, but in Saudi Arabia the death penalty is still applicable and practiced under *Shari'a* law.<sup>1200</sup>

The EA 2003 provides that the Secretary of State must not order a person's extradition to a Category 2 territory if he could be, will be, or has been sentenced to death for, the offence concerned in that territory. However this condition will not apply if the Secretary of State receives a written assurance, which he considers adequate, that a sentence of death (a) will not be imposed, or (b) will not be carried out (if imposed).<sup>1201</sup> The provision has its roots in Protocol 6 of the ECHR, which sought to abolish the death penalty. The Canadian Supreme Court noted that:

“while the evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty, it does show significant movement towards acceptance internationally of a principle of fundamental justice Canada had already adopted internally.”<sup>1202</sup>

In sharp contrast, Saudi Arabia's Basic Law allows the death penalty, which has been prescribed in the *Shari'a* for *Hadud* and *Qesas* crimes, as discussed previously.<sup>1203</sup> Primarily, capital punishment in Islamic law is aimed at preventing the spread of crime and is used as a deterrent to others to persuade them to refrain from committing crimes prejudicial to the well being of society. In order to understand how the punishment of crimes operates, the following provides a brief sketch of crimes and punishment under the *Shari'a*.

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<sup>1200</sup> See Alotaibi, n.73, at 283.

<sup>1201</sup> Extradition Act 2003, s.94, see n. 39.

<sup>1202</sup> *U.S. v. Burns and Rafay (Minister of Justice v. Burns and Rafay)* 2001 1 SCR 283

<sup>1203</sup> See section 6.2.2 (c) of this Chapter.

With regard to the punishment of crimes, Islam recognises three categories of crimes, namely, 1) *Hadud*; 2) *Qesas*; and 3) *Ta'azir*. *Hudud* (plural of *Had* 'penalty') crimes are considered to be offences against God. These crimes are set forth in the *Qur'an* or the *Sunnah* and in strict Islamic law are therefore mandatory and cannot be commuted or lessened. There are seven *Hadud* crimes for which a specific severe bodily punishment is prescribed. These are 1) *Ridda* 'apostasy'; 2) Theft; 3) *Baghi* 'transgression'; 4) *Haraba* 'highway robbery'; 5) *Zena* 'adultery'; 6) *Badhf* 'slander'; and 7) *Shorb al-Khamr* 'drinking alcohol'.<sup>1204</sup> A comparison of punishments with those of non-Islamic countries and their justifications is outside the scope of this study. The death penalty is only imposed for Apostasy (*Ridda*) and Transgression in *Hadud* crimes and in *Qesad* for equivalence<sup>1205</sup>. Generally two types of death penalties can be distinguished:

- (a) the death penalty for acts committed against God – apostasy;
- (b) the death penalty awarded on the basis of 'equivalence' as the word *Qesas* 'equality' or 'equivalence' implies.

Apostasy means to reject Islam by word, deed or omission. The person must commit the act of omission with the awareness of the penalty for it to qualify as apostasy. The offender is allowed a certain length of time to repent. If the offender fails to repent within the proscribed time period, the death penalty is imposed. Transgression refers to rising against legitimate leaders (*Imam*) to overcome them by force "equivalent to treason and armed rebellion."<sup>1206</sup> Those who get killed during the fight are regarded as having been punished; those who surrender or are arrested are forgiven, but those who continue to fight the *Imam* are punished by the death penalty. For *Qesas*, the death penalty is imposed as a means of 'equivalence', not as a vindication. Bassiouni notes that *Qesas*, the word for 'equality' or 'equivalence' "implies that a person who has committed a given violation will be punished in the same way and by the same means that he used in harming another person."<sup>1207</sup> Also referred to as 'retribution' or 'retaliation' by some Western writers, *Qesas* crimes and punishments are analogous to the Judeo-Christian teachings of an eye for an eye.

<sup>1204</sup> *U.S. v. Burns and Rafay*, 2001 1 SCR at 282-283.

<sup>1205</sup> *Ibid.*

<sup>1206</sup> M. Bassiouni, *Qesas Crimes*, in Bassiouni, M. C. (ed.), *The Islamic Criminal Justice System*, (New York: Oceana, 1982), at 202.

<sup>1207</sup> *Ibid.*, at 203.

Recently there has been a growing trend of refusing extradition to countries where the death penalty is allowed. The increase in application of the death penalty exception stems from human rights concerns. The focus has shifted from the possibility that the extraditee could be tortured and/or subjected to gross injustices within the requesting states' criminal justice system, to the human rights implications of requesting states which impose the death penalty. Most developed nations would be compelled to deny requests for extradition from Saudi Arabia, based on human rights considerations, because the death penalty can be imposed there.

The issue of the death penalty has been raised by the U.K. in the past to deny the extradition of individuals to states that allow the death penalty. Yet, the U.K. does extradite individuals to the U.S., which also has the death penalty under its federal system and most U.S. state systems. The death penalty, thus, by itself will not likely bar the formation of an extradition treaty, though it could create a heated political issue.

It is also possible for Saudi Arabia to grant a pardon from the death penalty through the family of the victim. Keeping this in mind, Saudi Arabia could agree to an extradition treaty whereby it does not impose the death penalty to extradited individuals who have not been convicted and sentenced in Saudi Arabia. Saudi Arabia could make the procedural applicability of the extradition treaty contingent on the victim's family agreeing to waive the death penalty, and/or agreeing to payment of money. In other words, a system could be designed that takes into account the differences in the two countries' positions on the death penalty.

#### **p. Immunity to extradition**

Under British extradition law, the defendant may in appropriate cases claim sovereign or diplomatic immunity from arrest or detention for the purposes of extradition proceedings. The immunity provisions came into U.K. law through the Vienna Convention on Diplomatic Relations 1961, adopted in the Diplomatic Privileges Act 1964. The convention confers absolute immunity from arrest for diplomats, members of their families, and their immediate households.<sup>1208</sup>

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<sup>1208</sup> Diplomatic Privileges Act 1964.

The State Immunity Act 1978 confers the same immunity *mutates mutandis* on visiting heads of state. However, the issue that attracted a lot of world attention was the immunity of former heads of state in respect of offences committed during the period they were in power. This issue was considered at length by the House of Lords.<sup>1209</sup> The majority of the seven Law Lords held that a former head of state had immunity from the criminal jurisdiction of the U.K. for acts performed in his official capacity as head of state pursuant to the State Immunity Act 1978.<sup>1210</sup> However, because torture was an international crime against humanity, after coming into effect after the United Nations International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1948, there had been a universal jurisdiction in all the Convention state parties to either extradite or punish *a public official* who committed such a crime.

Immunity to crimes of torture had therefore, come to an end with ratification of the convention. As the U.K., Spain, and Chile were parties to the convention, Pinochet had therefore no immunity from extradition for offences of torture, or conspiracy to torture.<sup>1211</sup> Although Saudi Basic law does not deal with this issue, it has nevertheless, accepted clauses in its extradition treaties pertaining to diplomats and officials for immunity from arrest for all official acts committed in office.

#### **q. Physical or mental condition**

Under EA 2003, a defendant can be discharged on the grounds of his physical or mental condition at any stage of the proceedings.<sup>1212</sup> The rule applies if at any time in the extradition hearing it appears to the judge that the physical or mental condition of the person in respect of whom the Part 1 warrant is issued is such that it would be “unjust or oppressive” to extradite him. If the unstable condition is confirmed, the judge must either order the person’s discharge, or adjourn the extradition hearing until it appears to him that the condition that the person should be in good physical and mental health to stand the trial is satisfied. Article 3 of the ECHR also

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<sup>1209</sup> *Pinochet*. (No 3) [2000] 1 AC 147, and Chapter 4, section 4.6

<sup>1210</sup> State Immunity Act 1978, s.20.

<sup>1211</sup> Discussed in Chapter 4, section 4.6.

<sup>1212</sup> Extradition Act 2003, n.39, s.91.

requires that if the physical or mental illness of the person is sufficiently severe, he should not be extradited.<sup>1213</sup>

In Saudi Arabia, the Basic Law has no provision to this effect. Nonetheless, and despite the Basic Law prohibiting torture,<sup>1214</sup> and *Shari'a* prohibits judges from accepting confessions under duress, Amnesty International reported on the violation of detainees and their state. The report on Human Rights practices of 2008, by the Bureau of Democracy, Human Rights and Labor noted on February 25<sup>th</sup> 2009 that:

“During the year, these were reports of physical abuse by the police and the CPVPV, as well as judicially sanctioned corporal punishment. On March 9, according to the NGO Human Rights Watch (HRW), police in Khamis Mushayt (Asir region) seeking to arrest a group of 25 undocumented Yemenis, including several children, allegedly set fire to the garbage dump in which they were hiding to force them to come out. At least 28 persons suffered severe burns. The victims alleged that instead of transporting them to the hospital, the police took them in an ambulance to a police station for questioning before treating them. The government claimed the police rescued the individuals from an accidental fire. At year’s end the government had not investigated the incident.”<sup>1215</sup>

#### **r. Abuse of process and bad faith**

Under EA 2003, a person arrested can challenge their extradition on the grounds that the request is made in bad faith, or amounts to an abuse of process, either directly or through the human rights provisions.<sup>1216</sup> This is in recognition of the right to challenge the legality of detention in accordance with Article 5 (4) of ECHR which provides that the Magistrates’ Court hearing the committal proceedings had jurisdiction to determine the question of whether a fugitive’s detention is lawful. Saudi law does not contain any similar provisions.

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<sup>1213</sup> This would amount to inhuman treatment. See European Convention on Human Rights, n.41.

<sup>1214</sup> Implicit in Article 38 of the Basic Law, n.40.

<sup>1215</sup> U.S., Bureau of Democracy, Human Rights and Labor, see n.897, section 1 (c).

<sup>1216</sup> Extradition Act 2003, n.39, s.21.



### **s. Right of appeal**

British extradition law allows the right of appeal, against the appropriate judge's order, to the High Courts, and again to the House of Lords by either party.<sup>1217</sup> Different procedures to appeal have been prescribed for the Category 1 territories (EAW) and non-Category 1 territories. However, the appeal has to be made on a question of law or fact.<sup>1218</sup> Also, the right of appeal has its basis in human rights, and aims to provide a free and fair trial while it gives the accused an opportunity to defend himself.

In contrast, Saudi Basic Law does not allow any appeal in extradition proceedings. The decision on an extradition request is taken by the Ministry of Interior on the recommendations of the Committee constituted to investigate extradition cases in the light of the evidence furnished by the requesting state. As many human rights organisations have reported when criticising the Kingdom, detainees are often neglected and prevented from contacting family members or even lawyers. For instance, it was noted in 2007 that:

“security forces arrested Professor Matrouk al Faleh at King Saud University on May 17; he had posted on a web site a three page criticism of the justice system, including conditions in Buraida Prison following a visit to detained reformers Isa and Abdullah al-Hamid. Al-Fatch remained in prison without care at year's end. According to HRW, the government did not permit his lawyers or international humanitarian organisations access to him.”<sup>1219</sup>

### **t. Extradition without treaty**

Britain is a signatory to a number of international conventions which place it under an obligation to criminalise certain types of conduct which have come to be known as ‘international crimes’. In particular, these conventions require the U.K. either to prosecute or extradite those accused of such offences and are found within its jurisdiction.

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<sup>1217</sup> Extradition Act 2003, n.39, ss.26-32.

<sup>1218</sup> *Ibid*, s.26 (3).

<sup>1219</sup> U.S., Bureau of Democracy, Human Rights and Labor, see n.897, section 1 (d).

Where a request for extradition for such an offence is made by a Category 1 or 2 territories, then no difficulty arises in giving effect to the obligation to extradite, as the former is governed under EAW while the latter are states which have formal extradition treaties with the U.K. When a request is received from a country which is not included in either of the categories but is parties to international criminal conventions, EA 2003 allows for them to be designated by order for the purposes of allowing the extradition process to start. In such cases, the requesting state shall be regarded as a Category 2 territory and will be dealt with under the provisions applicable.<sup>1220</sup>

Although Saudi Arabia approaches the British position in this regard, in that it can decide in a particular case whether to extradite the accused and accede to the request of the requesting state, the procedure is different. As discussed earlier,<sup>1221</sup> the Ministry of the Interior is empowered to make a decision on such a case and act through a Committee constituted for the purpose. The committee considers the circumstances surrounding the request, and the political relationship with the requesting country may decide the matter favourably or the request may be declined.

#### **u. Asylum claims**

Under EA 2003, a person whose extradition is requested can make an asylum claim at any time in the relevant period. That is, starting when a certificate is issued in respect of the request and ending when the person is extradited in pursuance of the request. In the event of a person lodging an asylum claim at any stage of the extradition hearing or appeal, the person is not to be extradited in pursuance of the request before the asylum claim is finally determined. The authority to decide on the asylum claim is the Secretary of State.<sup>1222</sup>

According to Saudi Basic Law, no-one is entitled to claim, as the country does not grant asylum under the country's law. It was noted in this respect that:

“the Basic law does not provide for the granting of asylum, or refugee status in accordance with the 1951 UN convention relating to the status of refugees and its 1967 protocol, but the government has established a system for providing protection to

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<sup>1220</sup> Extradition Act 2003, n.39, s.193 (2).

<sup>1221</sup> See Chapter 5, section 5.6.

<sup>1222</sup> Extradition Act 2003, n.39, s.121.

refugees. In practice, the government claimed to provide protection against refoulement, the forced return of persons to a country where there is reason to believe they feared persecution. The basic law provides that the state will grant political asylum, if so required by the public interest.”<sup>1223</sup>

#### **v. Consent to extradite**

EA 2003 provides that at any point in the extradition proceedings, a person arrested under a warrant may express his consent to be extradited to the Category 2 territory to which his extradition is requested.<sup>1224</sup> Similarly, a person arrested under a provisional warrant may consent to his extradition to the Category 2 territory in which he is accused of the commission of an offence or is alleged to have been convicted of an offence. Such a consent given in writing is irrevocable.<sup>1225</sup> The point, in brief, is that this alternative route to extradition has been provided to expedite the process and avoid unnecessary procedures if the person is willing to be extradited to the requesting state.<sup>1226</sup>

In contrast, there is no provision in Saudi law to allow for consent to extradition, nor do the bilateral or multilateral treaties have a provision to this effect. However, the government may make an administrative decision to allow voluntary extradition if it so deems.

### **6.3 The UN Model Treaty as a measure**

Having compared and contrasted the similarities and differences between the extradition systems of Britain and Saudi Arabia, it is now possible to see how each of the systems has gained maximum proximity to the ideal presented by the Model Treaty. This has been selected due to its consistency of objectives, which may make co-operation between Britain and Saudi Arabia in the control of crime more effective by the concluding of a treaty on extradition. The key notion implicit in the model is that extradition can be used to control crime and promote co-operation between member countries to ultimately foster global co-operation between the states of the

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<sup>1223</sup> U.S., Bureau of Democracy, Human Rights and Labor, see n.897, section 1 (d).

<sup>1224</sup> Extradition Act 2003, n.39, s.127 (1).

<sup>1225</sup> *Ibid*, s.127 (2) and (3).

<sup>1226</sup> See Jones and Doobay, n.33, 14-001, at 280.

world to collectively combat crime. In the previous discussion of its motives and purpose,<sup>1227</sup> the Model Treaty acts as an example since it contains most of the principles of international law, which traditionally recognises exceptions and stresses obligations. Apart from this focus, the Model Treaty is geared towards protecting human rights.

Although it has not been adopted in a bilateral treaty between the two countries, the ideals enshrined in this model are used as criteria for judging the quality of the extradition systems of Britain and Saudi Arabia against international law principles and human rights provisions. This gives a point of reference against which the standard of each extradition system can be measured.

In what follows, the criteria laid down in each article of the Model Treaty are taken to assess whether the British and Saudi extradition systems fulfill the proposed ideals. There are 18 Articles in the Model Treaty, but here the focus is on the Articles which are important to this study. Only those Articles which have a bearing on international law principles and human rights protection are discussed.

### **Article 1: Obligation to extradite**

With regard to the liability to extradite, the British Extradition Act of 1989 explicitly laid out the state's liability to extradite a fugitive criminal against a valid request. Although it has not been stated unequivocally in EA 2003, such an obligation is implicit in the Act. In contrast, Saudi Arabia's Basic Law does not make extradition mandatory. Yet it is obvious from the bilateral and multilateral treaties that Saudi Arabia has concluded with regional and Islamic states, that extradition is seen as an obligation in such circumstances.

### **Article 2: Extraditable offences**

In Schedule 2 of EA 2003, a list of offences which are extraditable is presented. This list has been adopted from the European Union Council Framework Decision of 13 June 2002. On the one hand, it replaced the double-criminality condition, discussed earlier,<sup>1228</sup> on the other; all EU

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<sup>1227</sup> See Chapter 3, section 3.10.1.

<sup>1228</sup> See Chapter 4, section 4.6.5.

member states agreed with it. So, Britain therefore sense follows the enumerative approach to extradition crimes.

In contrast, Saudi Arabia's Basic Law does not list crimes for which extradition can be requested or made. However, the nature and extent of crimes to qualify for extradition is determined through treaty provisions, as in the regional treaties and security agreements with Islamic countries.<sup>1229</sup>

### **Article 3: Mandatory grounds for refusal**

This Article stipulates that extradition should be denied if:

- The crime for which return is being sought is of a political nature.
- There are sufficient grounds for the requested state to believe that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;
- The offence for which extradition is requested is an offence under military law, but not an offence under ordinary criminal law;
- There has been a final judgment rendered against the person in the requested state in respect of the offence for which the person's extradition is requested;
- The person whose extradition is requested has, under the law of either party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;
- The person whose extradition is requested has been or would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, Article 14;
- The judgment of the requesting State has been rendered *in absentia*, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his defence and he has not had or will not have the opportunity to have the case retried in his presence.

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<sup>1229</sup> Noted in section 6.2.2 of this Chapter.

As discussed earlier,<sup>1230</sup> nearly all of these bars to extradition have been incorporated into the British Extradition Act of 2003. Saudi Arabia, in contrast, does not score on this account. As discussed previously,<sup>1231</sup> the Kingdom of Saudi Arabia uses confidential diplomatic channels to deal with extradition requests, and under such a system, there may be a greater risk of yielding to political pressure, and any discussion concerning an extradition request is therefore, perhaps, more likely to be made in the interests of the state, rather than the individual.

#### **Article 4: Optional grounds for refusal**

This Article of the Model Treaty states that extradition may be refused in any of the following circumstances:

- If the person whose extradition is requested is a national of the requested state. Where extradition is refused on this ground, the requested state shall, if the other state so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;
- If the competent authorities of the requested state have decided either not to institute or to terminate proceedings against the person for the offence in respect of which extradition is requested;
- If a prosecution in respect of the offence for which extradition is requested is pending in the requested state against the person whose extradition is requested;
- If the offence for which extradition is requested carries the death penalty under the law of the requesting state, unless that state gives such assurance as the requested state considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out;
- If the offence for which extradition is requested has been committed outside the territory of either party and the law of the requested state does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;
- If the offence for which extradition is requested is regarded under the law of the requested state as having been committed in whole or in part within that state. Where

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<sup>1230</sup> See section 6.2.2 (g) of this Chapter.

<sup>1231</sup> See Chapter 5, section 5.2.

extradition is refused on this ground, the requested state shall, if the other state so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;

- If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting state by an extraordinary or ad hoc court or tribunal;
- If the requested state, while also taking into account the nature of the offence and the interests of the requesting state, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

Under British extradition law, the last of the options has been given legal effect in EA 2003. The Act explicitly forbids extradition of a person when it considers the circumstances incompatible with humanitarian considerations of age, health or other personal circumstances. These bars have already been considered in detail.<sup>1232</sup> Pinochet's case<sup>1233</sup> is an illustration of refusal on the grounds of health of the accused, when the then Secretary of State terminated the proceedings against him on medical grounds. The other options fall under the authority of the Secretary of State.

In contrast, Saudi Arabia's confidential treatment of extradition requests makes it difficult to claim that these options are for example, exercised in its extradition law, and accordingly it does not fare well on this measure.

#### **Article 5: Channels of communication and required documents**

This Article states that a request for extradition shall be made in writing through diplomatic channels, directly between the ministries of justice or any other authorities designated by the parties. It requires the requesting state to provide the following documentation in support of the extradition request:

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<sup>1232</sup> See section 6.2.2 (g) (x) of this Chapter.

<sup>1233</sup> See section 6.4 of this Chapter.

- An accurate description of the person sought together with any other information that may help to establish that person's identity, nationality and location should be provided by the requesting state.
- The text of the relevant provision of the law creating the offence, or where necessary, a statement of law relevant to the offence and a statement of the penalty that can be imposed for the offence and, if the person is accused of an offence, by a warrant issued by court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts of commission constituting the alleged offence, including an indication of the time and place of its commission
- In case of convicted persons, a statement of the offence for which extradition is requested and a description of the acts of commission constituting the offence and the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, if convicted, should be attached with the extradition request.
- If a person has been convicted of an offence in his or her absence, in addition to the documents
- If the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions instituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

The documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the requested state or in another language acceptable to that state. Both Britain and Saudi Arabia fulfil this obligation.<sup>1234</sup> For instance, the documentation and channels recommended are used in both countries, although the designations of the state organs might differ.

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<sup>1234</sup> See Chapter 4 (Britain), section 4.6.3 and Chapter 5 (Saudi Arabia), section 5.8.2 for further discussion.



## **Article 6: Simplified extradition procedure**

For Britain, EA 2003 provides for consent to extradite and has relatively simple procedures for extradition, if the accused expresses his willingness to be extradited. Many procedural steps in such a case can be sidestepped to expedite the proceedings.

Saudi Arabia's extradition system does not expressly stipulate such a provision, but in a system in which confidential channels are used for extradition, voluntary extradition to the requesting state on the part of the wanted person should not be a problem.

From comparing and contrasting the two systems of Saudi Arabia and Britain against the standard laid down in the United Nations' Model Treaty on Extradition Britain seems to do much better in observing international law principles and offering human rights protection. Further, British extradition law is much closer to the international standard and presents a framework of extradition which protects individual rights by virtue of conventions and international instruments of extradition.

This sharply contrasts with Saudi extradition law. Although Islam imparts all the basic human rights to the individual,<sup>1235</sup> nothing of the sort has been provided through legislation. Extradition statutes are promulgated through royal decree, which runs the risk of disallowing human rights protection under the extraneous pressure of state interests. Yet there is nothing in the Islamic sources of criminal law which forbids these basic rights.

Reference also needs to be made to the strengths of one country (Britain), and the weaknesses of the other (Saudi Arabia). These are not only well documented, but can be justified. While a country like Saudi Arabia may be seen as a relatively recent nation-state, ruled by Islamic *Shari'a* law, which may appear to a western country as rigid and orthodox, Britain is, on the other hand, a well rooted nation-state with a long tradition of liberal democracy and parliamentary rule. Different concepts often lead to different practices. So, for instance, gay and lesbian rights are seen in liberal democracies like Britain as normal citizens' rights that need to be both respected and protected. In sharp contrast, such people are portrayed in an Islamic country like Saudi Arabia as deviant subjects who should either repent, or be punished. The fact

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<sup>1235</sup> See Chapter 5, section 5.5.

is, there exist a number of conflicts between the old and new, between the authentic and the alien, and more importantly, in the case of Saudi Arabia, between the religious and the scholars.

It is also, worth adding that historically, international relations and international law and conventions were mostly inspired by and based on scholarly liberalism in reaction to their medieval, theoretical, and autocratic rules. However, it is also, vital to remember that being sharply different does not disqualify countries from meeting and concluding treaties and agreements for mutual understanding. On the other hand, being totally, or at least mainly, similar does not always guarantee a full understanding between countries on matters of extradition and legal procedures. It was noted in this respect for example, that “other governments [similar to Britain in terms of culture and more or less, legal traditions]...have complained about Britain’s lengthy extradition proceedings. French officials are still bitter about the 10 years it took for Britain to extradite Rachid Ramada, an Algerian later convicted of financing deadly bomb attacks on the Paris metro system in 1995.”<sup>1236</sup> There are other examples between Britain and the U.S. where the former refused to extradite a number of Al-Qaida suspects to the latter for fear that they would be tortured and would not receive a fair trial. From this perspective, it could be concluded that a formal extradition treaty between Saudi Arabia and Britain is not inherently impossible, and that the two sovereign countries do not need to share legal or political systems, nor values and perceptions. As noted in an earlier chapter,<sup>1237</sup> shared threats and necessity, as well as national interests, are the forces which push countries into approaching each other and appealing for such agreements and understandings. Nonetheless, in this case study, it was the phenomenon of global terrorism, which has helped persuade countries to exchange intelligence and expertise, and to seek formal agreements. Jack Straw noted this necessity, saying that:

“on one level, the global dimension of this modern terrorism stems from the way in which it organizes and operates. It is not limited to one nationality or region. People from more than 40 countries passed through the terrorist training camps in Afghanistan before the September 11th attacks. It uses the tools of our modern, interconnected world -

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<sup>1236</sup> Craig, Whitlock, ‘Extradition of terror suspects founders’, the Washington Post, December 21<sup>st</sup> 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/20/AR2008122002096.html> (accessed 10 March 2010).

<sup>1237</sup> See Chapter 1.

whether it is the internet or the international financial system - to recruit, to co-ordinate and to sustain itself.

We have much to learn from the many and skilful ways in which Saudi Arabia has from its own initiative and in its own interests also used their leadership in the Muslim world to encourage others to adopt a similarly comprehensive approach. We value highly our close partnership with them. And you can actually see- not least because of the efforts of the Saudi government - a sea change in the region.”<sup>1238</sup>

Having compared and contrasted the extradition systems of Saudi Arabia and Britain from different standpoints, it is now possible to return to the research questions raised in Chapter 1 and throughout the previous discussion. The repetition or reference to earlier questioning is intentional, for the sake of further classification and analysis.

1. Judged from the perspective of their performance, are the extradition systems in both countries, even though founded on theological and secular bases respectively, functioning effectively?
2. Are failures in any one of the systems, if any, attributable to its foundation?
3. Are extradition arrangements possible between an Islamic and a non-Muslim country?
4. How can both systems benefit from each other’s experiences, and in what way can they be turned into a more effective tool for the curtailment and prevention of organised crime at an international level?
5. How can extradition systems be used as a means of enhancing global co-operation against international crimes, particularly with reference to global terrorism?

These questions are discussed in the following sections.

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<sup>1238</sup> See generally Straw, see n.38.

#### **6.4 Are the British and Saudi extradition systems functioning properly?**

Although the British system began as purely administrative, it has gradually become almost completely judicial. However, the Secretary of State still has an important role and a number of decisions in the process rest with him. The well-known and oft-cited example is *Pinochet*. When a Spanish request for the extradition of Pinochet was being processed, and his appeal to the House of Lord was turned down on the grounds of refusing him head of state immunity and the validity of the human rights violations application, he appealed to the Secretary of State on ill-health grounds, which was granted, and he was allowed to return to his country as he was found medically unfit to stand trial.<sup>1239</sup>

To the question of whether the British extradition system is working effectively, the answer can be affirmative in many ways. Measured against the standard of the UN Model Treaty on Extradition, the British extradition system does rather well. This can be accounted for in terms of the fact that Britain has a long history of extradition law spanning over two and half centuries. As pointed out above,<sup>1240</sup> the extradition law is quite elaborate and detailed, which gives it the character of being transparent and ‘objective’. It lays down the functions of all the state organs involved in the process, the Secretary of State, the appropriate judges, the High Court, and the House of Lords. Every functionary has a well-defined role to play and its writ has been elaborately laid down with almost pinpoint precision.

Another reason why British extradition law is appropriate is because of its accommodation of international law principles and human rights protection. This has been illustrated in this discussion by a number of examples, where Britain refused to extradite many alleged offenders and suspects, even to its allies like France and the U.S., on humanitarian or other grounds of principle.<sup>1241</sup> The existing act has been designed with all the emerging norms and trends in international law in mind. For instance, this can be seen when compared to the UN Model Treaty on Extradition, which places a great deal of emphasis on making extradition against a valid request an obligation and statutory requirement. Similarly, the international law principle of

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<sup>1239</sup> Immunity as head of state is discussed in section 6.2.2 (g) (ix) and ill-health as a bar to extradition in section 6.2.2 (g) (x) of this Chapter.

<sup>1240</sup> See Alotaibi, n.73, at 244-245.

<sup>1241</sup> See, for example, section 6.3 of this Chapter.

making exceptions to extradition in certain circumstances has also been allowed for. For example, in comparing British extradition law with the Model Treaty, Britain has made it obligatory to refuse an extradition request to a territory where the death penalty is imposed. Similarly, it refuses extradition requests made for an offence of a political character. This conformity emerges from the desire on the part of the British government to make its extradition law compatible with international law principles and other developed European nations in the region.

EA 2003 also incorporated the human rights standards by virtue of Britain being a member of the UN. Britain tends to refuse requests for extradition to countries where human rights are not observed or where there is danger of the accused, if returned, being subjected to torture or inhuman treatment. This behaviour is in conformity with the modern requirements that pay attention to human rights conditions. The United Nations Model Treaty has focused on the protection of these rights, and British law has adopted and fulfilled these issues.

For instance, the right of appeal bestowed on fugitive criminals under the statutory provisions is also motivated by and is consistent with the human rights concerns. The Act of 2003 gives the accused a right of appeal against the decision, either in the High Court or the House of Lords.

However, the very virtues of elaboration, human rights standards, and a thoroughly worked out process, in fact can be equally presented as weaknesses of the system. There are two main criticisms. One is the 'unduly' lengthy process and the dual appeal system provides the accused with many opportunities to exploit the system and hence result in failure of a legitimate and valid extradition request. One of the best examples here is that of the Al-Qaeda suspects, who were claimed by a number of countries to stand trial. Britain, which is seen still as their sanctuary, rejected requests to extradite them for reasons of human rights, as well as for legal and technical reasons. Pratik Chougule noted that:

“The seeming indifference to violence was not an isolated lapse; it represented one act in the Brits' larger pattern of inaction. Over the years the governments of India, Saudi Arabia, Turkey, France, Algeria, Peru, Yemen and Russia, among others lodged

complaints about terrorist operations in Britain. In response, Britain refused a string of requests to extradite suspected terrorists including:

- Morocco's request to extradite the man who planned the May 2003 attacks, which killed forty-five. He was the founder of the Moroccan Islamic Combatant Group, which the United Nations cited as a terrorist network connected to al-Qaeda with sleeper cells preparing a bombing campaign in multiple European cities.
- A Spanish request for the extradition of Abu Qatada, an al-Qaeda terrorist operation operating in London, on whom the French had passed information to the British.
- Saudi Arabia's request to extradite Dr. Mohammad al-Massari, suspected of launching attacks in Saudi Arabia and establishing al-Qaeda's London office.
- France's request to extradite Rachid Ramda, suspected of organising a series of bombings in Paris in 1995. Britain allowed this extradition in 2005 [after 10 years].<sup>1242</sup>

Another example is that of Abu Qatada, the alleged Al-Qaeda suspect, who has been requested for extradition by a number of countries. His case in the British courts is still pending.<sup>1243</sup>

As noted in the detailed discussion of the Extradition Act 2003,<sup>1244</sup> many terms used in the Act have not yet been clearly defined and are open to subjective interpretations. For instance, it is difficult to determine what would constitute an 'unjust and oppressive' extradition by reason of passage of time.<sup>1245</sup> The ambiguity in terms like these can be interpreted subjectively and often to the advantage of the criminals. The appeal system is another method of causing delay to the process. The disposal of appeals is rather slow and may take a long time to furnish the final decision. It is quite likely that by the time a decision is reached the accused may already have become eligible for another 'concession' on the grounds of human rights.

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<sup>1242</sup> P. Chougule, 'Finsbury Park: Inside the British Jihad', 8/4/2007, <http://globalpolitician.com/23205-jihad> (accessed 12 March 2010).

<sup>1243</sup> Reported, for example, in *The Guardian*, X. Rice and R. Booth, 'Al Qaida group demands release of Abu Qatada or British hostage will be killed', April 27, 2009, <http://www.guardian.co.uk/world/2009/apr/27/alqaida-north-africa-hostages> (accessed 12 March 2010).

<sup>1244</sup> See generally Chapter 4.

<sup>1245</sup> Extradition Act 2003, n.39, s.82.

As noted above, one of the bars to extradition provided for in the 2003 Extradition Act substitutes for the political offences exception that survived up to EA 1989.<sup>1246</sup> It has also been discussed in an earlier chapter that support for political dissent, once viewed as liberal ideal, has eroded because generally aggressive dissent can become violent resistance which can easily develop into terrorism.<sup>1247</sup> Barring extradition on the grounds of difference of political opinion therefore is against the doctrine of the 'war on terror' which aims to suppress terrorism in all its forms and manifestations.

Britain has been criticised for protecting and sheltering political dissidents from various parts of the world. These dissidents find a safe haven where they can plot and execute plans against their governments and muster international support using modern technology and means of communication. Yet their extradition can be refused to requesting countries under the pretext of the right to a political opinion. One view is that these dissidents are used as leverage against their parent countries for political aims. A typical example of the phenomenon is Saudi dissidents who are operating from British soil, as described below.

In 2004, the Saudi government sought the extradition of two 'dissidents' named Mohammed Almasri and Sa'ad Alfaqih, who were based in and operating from Britain.<sup>1248</sup> They were alleged to be planning to dethrone the Saudi government.<sup>1249</sup> The extradition request was rejected on the grounds that there was not enough evidence to indict them.<sup>1250</sup> There is a paradox in this situation. The people who, in the eyes of the Saudi government are 'dissidents' and are guilty of plotting against the government, are not seen as involved in any crime in the view of the British government until found guilty, as in the case of Abu Hamza.<sup>1251</sup> Prior to that period, a number of suspects – who were claimed by a number of countries, including Saudi Arabia - were enjoying

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<sup>1246</sup> Extradition Act 2003, n.39, s.13, see section 6.2.2 (g) (iii) of this chapter.

<sup>1247</sup> See Chapter 3, section 3.5.1.

<sup>1248</sup> M. Abadin, 'The dangers of silencing Saudi dissent', *Asia Times*, 21 January 2005, [http://www.atimes.com/atimes/Middle\\_East/GA21Ak01.html](http://www.atimes.com/atimes/Middle_East/GA21Ak01.html) (accessed 12 March 2010).

<sup>1249</sup> P. Ghafour, 'Al-Qaeda claims Yanbu attacks', *Arab News*, 15 May 2004, <http://www.arabnews.com/?page=1&section=0&article=45013&d=15&m=5&y=2004> (accessed 12 March 2010).

<sup>1250</sup> U.S., Citizenship and Immigration Services, 'RIC Query – Saudi Arabia', 16 June 2004, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dd7653bc46d8d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=d2d1e89390b5d010VgnVCM10000048f3d6a1RCRD> (accessed 12 March 2010).

<sup>1251</sup> Chougule, see n.1242; K. Altaweel, 'Eleven terror charges by the US against Abu Hamza', *World News*, 28 May 2004, [www.daralhayat.com/worldnews/europe/05-2004/20040527](http://www.daralhayat.com/worldnews/europe/05-2004/20040527) (accessed 12 March 2010).

safe haven and enjoying full protection under the British system. As noted earlier,<sup>1252</sup> around the second half of the twentieth century, it was the policy of the developed nations to ‘encourage’ or support dissenting elements in a state to bring about a change of government with a view to establishing or restoring democracy. The right to dissent was backed by the UN resolutions. This doctrine lies at the heart of the political offences exception. Political dissidents struggling to compete for the establishment of a government of their own ideology were considered under the rubric of political offences and any extradition request for their return was more likely to fail than to succeed.

The allegation of harbouring the dissidents and allowing them to operate from British soil against the Saudi government represents the typical predicament. The British government would say it does not mean any harm but since its laws allows freedom of speech, what these dissidents are doing comes under the category of the human rights standards. The Saudi government sees this situation as being against its interests and blames the British government for protecting, abetting and furnishing a launching pad for anti-Saudi government elements.<sup>1253</sup>

The problem seems to stem from the lack of a clear distinction between ‘legitimate’ human rights and activities leading to the conception, planning, and execution of law and order situations and/or terrorist activities for the parent governments. What is regarded as ‘freedom of speech’ may in fact be an inchoate crime, leading to a more serious and horrific terrorist act. That seems to have happened in Mohammad Almasri’s case. The Saudi government has been insisting on the extradition of the two ‘wanted persons’, but the British government has been pleading ‘lack of evidence’ until their involvement in terrorism and links with Al-Qaeda were established and their extradition was demanded by the U.S. In particular, Almasri’s threat to kill the sitting Prime Minister of Great Britain, should the latter go to Iraq, from its very soil by someone the British government had been pleading as not guilty is a fine example of Frankenstein’s monster.

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<sup>1252</sup> See Chapter 3, section 3.5.1.

<sup>1253</sup> History Commons, ‘Complete 911 timeline: A. Al-Masri’, [http://www.historycommons.org/timeline.jsp?timeline=complete\\_911\\_timeline&complete\\_911\\_timeline\\_possible\\_moles\\_or\\_informants=complete\\_911\\_timeline\\_abu\\_hamza\\_al\\_masri](http://www.historycommons.org/timeline.jsp?timeline=complete_911_timeline&complete_911_timeline_possible_moles_or_informants=complete_911_timeline_abu_hamza_al_masri) (accessed 12 March 2010).



The right to apply for asylum granted to the accused is yet another potential source of leakage in the system. EA 2003 provides that the accused can apply for asylum at any stage of the extradition process.<sup>1254</sup> It is not difficult to imagine many pretexts for seeking asylum in such a long process which diminishes the chances of the extradition failing. By and large, fugitives may be able to take advantage of this lengthy process and escape justice.

On these grounds, Britain is sometimes referred to as a safe haven for criminals. Given the choice, for example in cases of multiple requests for extradition, many accused or convicted would prefer to be tried in Britain as they perceive the system provides many loopholes which can be recruited to the advantage of the accused or convicted.

The extradition framework prevalent in Britain appears particularly unsuitable to deal with modern crimes like terrorism and other international crimes such as Internet crimes. There are several interrelated factors which contribute to this ‘unsuitability’. Even if able to prevent the crime through a co-ordinated intelligence system and international services like Interpol, these criminals if captured may find shelter in Britain under the protective wings of human rights, such as freedom of speech or freedom of opinion which in fact may be sowing the seeds of a well-organised international group and may well qualify as an inchoate crime. Complex and lengthy procedures to be followed may provide a breeding ground for international crime.

The case of Abu Hamza is a good example.<sup>1255</sup> A number of observers, especially these who accused him of terrorism and inciting violence, believe that he still being protected, exploiting the British ‘soft’ judicial system despite his alleged crimes. Andrew McCarthy asked “did England have to let Abu Hamza appeal to the ECHR? Smith’s office says the U.K. was simply honouring its European treaty obligations.”<sup>1256</sup>

Another challenge for the judicial system in Britain is its ability to deal with inchoative crimes. In international law, inchoate crimes are as serious as the principal crimes themselves. They are

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<sup>1254</sup> Extradition Act 2003, n.39, s.121 and see section 6.2.2 (g) (xiv) of this Chapter.

<sup>1255</sup> CNN, ‘Ashcroft announces arrest of Muslim cleric Abu Hamza’, 27 May 2004, <http://transcripts.cnn.com/TRANSCRIPTS/0405/27/se.01.html> (accessed 12 March 2010).

<sup>1256</sup> A. McCarthy, ‘Extradition Delayed Is Justice Denied’, August 6, 2008, <http://article.nationalreview.com/?q=YjljZTcyNjJhMTdjYjVkmMWM5MDY3N2ViMmM3MGVmYTE=> (last accessed 4 March 2010).

preparatory to the main crime and are treated as such. U.K. extradition law is not able to circumscribe inchoative crimes efficiently. For instance, instigating to commit a crime is as grave as the crime itself, yet it may not be criminalised under a claim of ‘freedom of speech’.

Another limitation of the extradition law in Britain is its listing of extraditable crimes. As discussed earlier,<sup>1257</sup> extradition systems in the world can be divided into two categories – one that lists crimes for which extradition can be sought or granted, also referred to as “enumerative” crimes, and one where there is no list and it is the gravity of the crime (i.e. the punishment awarded) that is the eligibility criterion. The problem with such lists of extraditable crimes is that with modern globalisation and information technology it has become possible to devise a plan in one place and have it organised and carried out somewhere else. Inchoative and other types of crime may not appear in the extraditable crimes list. This can be harnessed with considerable advantage to the criminals.

As noted above, globalisation and modern technology have made the organisation and commission of international crimes a lot easier than it would have been in the past. Previously, sedition, incitement to and instigation of aggression and violence might have local and limited effects and therefore be easily controllable. Now, with the availability of modern tools of technology, the effects are far-reaching and crime can be organised globally from posting provocative literature on websites, to mass producing terrorism-related training manuals, to establishing contact networks between terrorist groups and individuals.

These observations point to the conclusion that British law may be out of step with modern developments and many steps behind meeting the challenges of terrorism facing the world today, because of its lengthy procedures involved in extradition requests. Based on democratic values and human rights concerns, presuming a person innocent until proven guilty, the system does not appear responsive enough to address the phenomenon of international terrorism. This was in fact, also, the view of Britain’s closest ally in what became known as the “war against terrorism.”<sup>1258</sup> Nonetheless, with the rise in the perceived threat of terror network worldwide, the British

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<sup>1257</sup> See section 6.3 of this Chapter on Article 2 of the UN Model Treaty.

<sup>1258</sup> Discussed in relation to the legal difficulties arising from the U.S. use of Guantanamo Bay by David Cole, ‘Closing Guantanamo: the problem of preventive detention’, *Boston Review*, 13 December 2008, <http://bostonreview.net/BR34.1/cole.php> (accessed 14 March 2010).

government resorted to what became known as fast-track removal of terrorist suspects alongside the extradition of a number of them.

Despite these new fast-track regulations, the system of extradition with legal appeals as a fundamental part may be used against the extradition of genuine offenders. The examples of Mohammad Alamasri and Sa'ad Alfaqih, discussed above, the Saudi dissidents who planned terrorism under the protection of British law, were revealing. What the international community in general, and the British government in particular, need to do is to make laws which allow law-enforcing agencies to proceed promptly at the smallest evidence or even on suspicion. The evidence requirement, for instance, is one of the biggest hurdles in taking prompt action to counter violence. It may be the case that by the time satisfactory evidence becomes available, it might be too late. Viewed in this light, British extradition law requires drastic modification with a view to re-vamping and re-aligning it, to meet more effectively modern challenges and threats of terrorism. It is basically now a question of human *rights* versus human *lives*. What is important, in fact, is which is deemed to have the higher priority.

Despite the British extradition system being judicial, governed by statute, it is also influenced by world politics and foreign policy considerations. One example of the phenomenon has been hinted at above. The Saudi request for the extradition of the two dissidents on the grounds of sedition, dissemination of hatred, and instigation to commit violence was not supported by the British government and the action against them was delayed, lack of evidence being given as the reason. On the other hand, the British government was prepared to extradite Mohammad Almasri to the U.S. on charges of committing terrorist acts in Yemen and his links with Al-Qaeda. This behaviour points to the conclusion that political relations with the requesting state play a considerable role in dealing with extradition requests. These circumstances are likely to have a negative impact on the British and Saudi relationship.

However, as discussed earlier,<sup>1259</sup> national interests, in the final analysis, could influence any decision. Further, a strong alliance sometimes plays a part in strengthening relations and understanding between countries that are committed. Sharing the same threat may not be the only factor in bringing countries together. There is probably another dimension which may

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<sup>1259</sup> See Chapter 4, section 4.6.11.

characterise this behaviour, and that is shared values and ideas as well as political principles. In the case of Britain and the U.S., these are beyond description, despite the refusal of the former to extradite a number of its citizens, suspects of terrorism and criminal acts, to the U.S. Jack Straw (the former British Home Secretary) said: “I want to underline the enormous importance to us – in fact, the indispensability – of our alliance with the United States in the struggle against international terrorism. It is a partnership which has saved many lives of many nationalities.”<sup>1260</sup>

In view of the discussion above, it can be safely concluded that despite many of its virtues, the British extradition system has not been able to overcome the problems it attempted to tackle with EA 2003, to speed up the extradition process. The intent of the new Act has not been met. Particularly, there is a need to recast the statutory provision with a view to combating terrorism in its new forms.

With regard to the extradition system in Saudi Arabia, the strength of the system is that because it is administrative and because of the way the *Shari’a* works, decisions on extradition requests can be reached without undue delay. Since the Ministry of the Interior and the committee established for the purpose have to deal with requests the procedure is quite quick and produces an outcome within a relatively short period. The system works particularly well when dealing with terrorism, due to the relatively quicker decision-making. Speedy disposal, however, does not necessarily mean denial of justice.

“The procedures in Islamic criminal justice are distinguished by the focus on the individualisation of justice and the extensive discretionary powers enjoyed by the judge. Judges have the authority to prosecute, examine witnesses, and pass judgement (including determining the specific parameters of the punishment). The primary mode of evidence is direct testimony by eyewitnesses.”<sup>1261</sup>

As noted above,<sup>1262</sup> the general Western perception of Islamic criminal justice procedures is that they do not allow human rights to the accused. This is a misguided notion and arises from lack of familiarity with the Islamic justice system. As noted by Bassiouni, the Islamic criminal justice

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<sup>1260</sup> See generally Straw, see n. 38.

<sup>1261</sup> See Alotaibi, n.73, at 287.

<sup>1262</sup> See section 6.2.1 of this Chapter.

procedures encompass a range of due process and human rights protection. To emphasise the point, it is worth repeating the protection offered: “the right to life, liberty and property; the right to petition for redress of wrongs and grievances; the requirement of a fair and impartial trial without distinction of colour, creed, or origin are fundamental to them. Protection against unreasonable deprivation of any such right is subject to judicial scrutiny, and prompt legal determination is commanded. This is deemed essential not only as a human right, but also, as a political right that is indispensable for the maintenance of a scheme of ordered liberty and fundamental freedom.”<sup>1263</sup>

As for the Saudi extradition system, as noted earlier,<sup>1264</sup> the Basic Law provisions are very brief and not as elaborate as the British extradition law. In fact, it only, consists of a few lines, and has been left to the statutes and international agreements to determine the modalities. This lack of prescription and detail is perhaps, in fact, one of its strengths. Rendering extradition law in general terms allows room for manoeuvre and easier alignment with the principles of international law and emerging trends. Saudi law does not impose any prohibitions as to what provisions are allowed, nor to what is barred. As a signatory to a number of regional and international bilateral treaties and multilateral conventions, Saudi Arabia has adopted most of their provisions. On the basis of these facts, discussed at length earlier,<sup>1265</sup> it can be asserted that there is nothing in the *Shari'a* or the Basic Law in the Kingdom, which prevents Saudi Arabia from entering into any bilateral or multilateral treaties and conventions.

However, the biggest drawback of the Saudi extradition system is conducting extradition business through confidential diplomatic channels. For example, a summary of the new accord by the Secretary of the Arab League noted that “appeals for extraditing should be exchanged between the concerned officials directly or through the Justice Ministries by diplomatic channels.”<sup>1266</sup> Thus, the extradition procedures are “opaque”<sup>1267</sup> and undecipherable, which means that extradition decisions are likely to be influenced by political and foreign policy

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<sup>1263</sup> See Bassiouni, n.996, at 1-3.

<sup>1264</sup> See section 6.2 of this Chapter.

<sup>1265</sup> See for example, Chapter 5, section 5.6.11.

<sup>1266</sup> See Alotaibi, n.73, at 272-273.

<sup>1267</sup> *Ibid*, at 272.

considerations, which can often be in disregard of the legal and human rights of the accused or convicted. This may constitute a violation of human rights standards.

At a broad level, the generalisation would be that the two systems are at opposite extremes, with Saudi extradition law being too brief with regard to extradition procedures, whereas British extradition law is too lengthy. The former allows the government room to make the decision of its choice, while the latter allows a fugitive accused or convicted person to drag out the procedure whereby he may find an easy exit at any point of the process. In sum, the strength of one country is the weakness of the other and vice versa.

### **6.5 Is an extradition treaty possible between Saudi Arabia and Britain?**

With regard to the third research question, as to whether extradition arrangements are possible between an Islamic and a non-Muslim country the answer seems to be a definite 'yes', as will become progressively clear below. As was noted earlier,<sup>1268</sup> the only arrangement that exists between Saudi Arabia and Britain so far on the extradition and pursuit of suspects and criminals is a Memorandum of Understanding concluded between the two countries on 12 April 1989. This latter has been couched in very general terms, with nothing specific being spelled out in the memorandum. Saudi Arabia is neither classified as a Category 1 or Category 2 territory in Britain's designation, since no formal extradition treaty exists between the two countries.<sup>1269</sup> This does not mean, however, that there are no close links between the two countries. Britain has been significantly involved in the extradition practices in Saudi Arabia as well as other gulf states. For instance, Kuwait and Saudi Arabia, in accordance with the Jeddah treaty, concluded on April 20 1942, conducted their extradition business through the British commission in Jeddah.<sup>1270</sup>

The non-existence of a treaty between the two countries does not appear to be due to any religious or legal hurdle, as might be perceived by many in the Western and Islamic worlds. On the contrary, as noted above, there is nothing in Islamic law which forbids Saudi Arabia from entering into a bilateral extradition arrangements with a non-Muslim country. In this context, it is

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<sup>1268</sup> See generally n.784.

<sup>1269</sup> See Knowles, n.477, at 24-25.

<sup>1270</sup> See Chapter 5, section 5.5, n.713 (c).

worth pointing out that Saudi Arabia and the U.S. are close allies and have a warm political relationship, even if some tension has crept in recently. Yet there is no formal extradition treaty between the two countries.

It is also important to remember that Saudi Arabia, Great Britain and the U.S. were all part of the allied forces that liberated Kuwait from Iraqi occupation. They joined to reverse the aggression and Saudi Arabia allowed the allied forces to use its territory to operate against the occupation forces in Kuwait.<sup>1271</sup> If Saudi Arabia and Britain can co-operate and collaborate with each other in waging a war against an Islamic country, there does not seem to be a 'religious' or 'legal' hurdle in signing a formal extradition treaty.

There are two reasons, which may be cited here to account for the absence hitherto of a formal bilateral treaty between the two countries.

Firstly, it may be that if the existing arrangements between the two countries are working quite satisfactorily, both parties may consider there to be no serious need for concluding a formal bilateral extradition treaty between the two countries. Perhaps, in the same vein, Saudi Arabia does not feel a need for a treaty precisely because it has an administrative extradition system and conducts most proceedings through confidential diplomatic channels. Saudi Arabia appears quite comfortable with this method as it manages to avoid lengthy proceedings and open trials.

Secondly, non-existence of a formal extradition treaty may be attributable to a traditional view. As Saudi Arabia has not signed any formal bilateral treaties with any non-Muslim countries, it appears to be more of a matter of tradition and lack of precedent than anything else.

It is pertinent to also point out that Saudi Arabia is a member of a number of several multilateral conventions on terrorism including the Tokyo, Hague, and Montréal Conventions, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, the International Convention Against the Taking of Hostages, and the applicable provisions of the UN Convention on the Law of the Seas.<sup>1272</sup>

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<sup>1271</sup> Noted by Global Security, 'Saudi facilities', 2004?, <http://www.globalsecurity.org/military/facility/saudi-arabia.htm> (accessed 14 March 2010).

<sup>1272</sup> See Alotaibi, n.73, at 294.

As noted earlier, there exist in Islam a number of religious schools, to explain authoritatively the *Shari'a*.<sup>1273</sup> The *Hanafi* for instance, are against the idea of handing over an accused Muslim fugitive to a non-Muslim country or would qualify the return with certain condition. For example, the place to which a Muslim is extradited should have relatives or friends of the accused, to support him.

Secondly, the majority of Saudis follows the Imam Hambal, and hence is called *Hambali*. According to Imam Hambal, contracting with non-Muslim states is permitted. That is, a Muslim state is allowed to conclude a bilateral or multilateral treaty with any country, regardless of its being a Muslim state or otherwise.<sup>1274</sup> Saudi Arabia therefore does not find any religious prohibition that forbids it from covenanting with a non-Muslim state. Also, there is nothing in the basic sources of the *Shari'a*, the Qur'an and the *Sunnah*, which expressly forbids concluding treaties with a non-Muslim state.

In addition, according to the Basic Law of Saudi Arabia, the King appoints the Council of Senior Scholars, who then assists him. He and the Council are the only legal interpreters of the constitutional rules implicit in the *Shari'a*. The King, whose authority derives from the *Shari'a*, as stipulated in Article 7 of the Basic Law, "remains in effect the final arbiter of any interpretation of authority, including religious authority itself."<sup>1275</sup> Most of these decisions are announced through Royal Decrees. Saudi Arabia does not appear therefore to have any problems in maintaining political relations with non-Muslim states.

The major stumbling block, however, is the death penalty, which is permitted by the *Shari'a*. Human rights concerns discourage the extradition of an accused or convicted person to a country where the death penalty is imposed. This rule is receiving increased acceptability in most European Union countries. EA 2003 stipulates that "the Secretary of State must not order a person's extradition to a Category 2 territory if he could be, will be, or has been sentenced to death for the offence concerned in the Category 2 territory."<sup>1276</sup> However, the second part of the relevant section stipulates that "subsection (1) does not apply if the Secretary of State receives a

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<sup>1273</sup> See Chapter 5, section 5.3.1 (c).

<sup>1274</sup> Noted in Chapter 5, section 5.5.5 (b) (ii).

<sup>1275</sup> See Alotaibi, n.73, at 274.

<sup>1276</sup> Extradition Act 2003, n.39, Article 94 (1).



written assurance which he considers adequate that a sentence of death (a) will not be imposed, or (b) will not be carried out (if imposed).”<sup>1277</sup> It is to be noted, however, that Saudi Arabia is not the only country where the death penalty may be imposed. “The U.S. would not face European countries’ constraints with regards to concerns over the death penalty, since the U.S., like Saudi Arabia, applies the death penalty.”<sup>1278</sup>

It is also pertinent to point out here that this human right exception clashes with the principles of international law. While international law encourages member countries to harmonise with international norms and conventions, at the same time it recognises and respects the sovereignty of every state by allowing a state to practice its local laws. In this sense, international law is superimposed at a higher level of hierarchy without compromising the authority of the state. Since the death penalty in Islam is permitted by the *Shari’a*,<sup>1279</sup> in principle it cannot be legally banned – it is irrevocable and undiscardable. This difficulty is not insuperable though, and ways around it can be found. The Bulgarian example discussed earlier<sup>1280</sup> could be a good solution to the problem. Bulgaria, which has no treaty with the Kingdom, agreed to the latter’s request for the extradition of a drug smuggler, distributor and manufacturer. In this case, Saudi Arabia relied on the help of Interpol to negotiate the said extradition with Bulgaria. As with Bulgaria, a special clause dealing with the death penalty could be included in a treaty, which provides that in case of allowing extradition the death penalty will not be imposed.

In view of the foregoing, the answer to the as to question whether Saudi Arabia and Britain can have a formal extradition treaty is positive. In fact any of the European Union states could enter into an extradition treaty with Saudi Arabia with the precondition that if the punishment for the fugitive’s crime is the death penalty, it will not be imposed nor carried out.

## **6.6 What lessons can the two countries learn from each other’s experiences?**

The next question investigated was how the two systems could benefit from each other’s experience and in what way they could be turned into a more effective tool for the curtailment and prevention of organised crime at an international level.

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<sup>1277</sup> *Ibid*, Article 94 (2).

<sup>1278</sup> See Alotaibi, n.73, at 305.

<sup>1279</sup> Noted in Chapter 5, section 5.5 in discussion of *Qasas* crimes.

<sup>1280</sup> See Chapter 5, section 5.5.

In answering the first two questions (in section 6.4 of this Chapter), it was concluded that the extradition systems in Saudi Arabia and Britain, though functioning adequately, leave something to be desired and hence should be reviewed to make them more effective. To begin with, the British extradition law, despite its emphasis on human rights standards and international law, has been accused of being too lengthy a process. This weakness came to light in the case of Pinochet, which also exposed other drawbacks of the system, and which were acknowledged by the then Secretary of State. Pinochet got away with the crimes he committed partly because of the lengthy extradition process British law affords. The appeals and re-appeals hearings in the House of Lords took such a long time that he fell ill and the extradition process was terminated by the Secretary of State on medical grounds.<sup>1281</sup> The Pinochet case is the tip of the iceberg. Many writers have blamed Britain as a haven for fugitives because the process is so lengthy and lends itself to the accused finding ways to ‘escape’ the extradition request.

This, as was noted above,<sup>1282</sup> is another indication that the existence of an agreement between even strong allies would not guarantee a swift extradition of suspects and alleged criminals between them. What is probably more important is that the delaying country would meet two challenges in order to succeed. One, to reform its legal and judicial system to make it up-to-date and conform to new pressures, and second, to attempt to convince human rights organisations and other pressures groups that the correct balance between individual rights and justice is being achieved. This latter would not be an easy task, simply because of the fast growing number of civil organisations throughout the world. In the British case, this issue is still not resolved, despite the fast-track procedures noted above. Alleged fugitives may stall the legal process, especially with lengthy appeals.<sup>1283</sup>

In contrast, the Saudi extradition process is quite brief and requests are disposed of quite speedily. It is not suggested through that British extradition law should be reduced to that of Saudi Arabia, but measures could be taken to shorten the process whereby extradition requests

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<sup>1281</sup> See earlier in this Chapter, section 6.3, discussion of Article 4 of UN Model Treaty.

<sup>1282</sup> See section 6.4 of this Chapter, concerning Britain’s refusal to extradite, even to close allies.

<sup>1283</sup> See generally Whitlock, n.1236, stating that “[o]bstacles to extradition have loomed especially large in Britain, where al Qaeda suspects have exploited a cumbersome legal process and slow-moving bureaucracy to stave off deportation...defense lawyers have filed a succession of appeals that will further stretch out the proceedings in that case and the others, probably for years.”

are decided more speedily, while still meeting the requirements of justice. The Extradition Act 2003 aimed to speed up the process, but in practice, it has not achieved the desired effect.

Another area where British extradition law needs to be reviewed is in respect of bars granted to an accused or convicted person in respect of offences committed on account of his race, religion, nationality, gender, sexual orientation or political opinions. This is a grey area, in which political considerations may appear in to influence the whole process. For instance, how would one distinguish between a legitimate difference of political opinion with a government and the planning of terrorism in league with international organisations? The situation of Saudi dissidents discussed above is a case in point. Saudi Arabia viewed the dissidents as miscreants and those advocating terrorism are indicated by their connection with Al-Qaeda, whereas Britain saw them as not doing anything illegal and that they had the right to freedom of speech.

Human rights criteria are a concern. Many human rights concerns can be exploited in order to escape justice. For example, the right to life and the right to family are examples which have been invoked as a plea to avoid extradition. As has been noted, some extradition cases take a long time, as in the case of Rachid Ramda, (the Algerian accused of terrorism), whose case took ten years before the suspect was extradited from Britain to France.<sup>1284</sup> In such cases, by the time the proceedings come to an end the accused may plead that he and his family have become accustomed to the British life style and they might not be able to adjust to the environment of the requesting state country environment. No one would dispute the human rights standards, but under British extradition law, such ‘concessions’ could be misused to escape justice and the system is open to such exploitation. This is another reason why Britain is called a safe haven for criminals.

In particular, British extradition law can learn from terrorism cases dealt with by Saudi Law. This might be controversial in political and intellectual circles in Britain. However, it could be argued that the administrative system practiced in Saudi Arabia deals with terrorists better than Britain’s judicial system. With modern technology and means of communication, criminals can move from one country to another to cope with this new phenomenon. Lengthy procedures can be detrimental to any efforts to curtail and prevent terrorist acts and bring criminal justice.

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<sup>1284</sup> See Whitlock, n.1236.

In turn, Saudi Arabia could learn a few useful lessons from the British experience. British extradition law has a much longer history than Saudi law. Despite some weaknesses, British extradition law has matured over time and has been working adequately, though still wanting. Although Saudi extradition law can be characterised as ‘quicker’, it lacks a judicial aspect. Under Saudi law, the judiciary has a recommendatory role only. The executive component of the government has the ultimate authority to decide on the matter and as noted above, other factors such as the political position of the requesting state and foreign policy issues have a significant bearing on decisions. In such a system, there is no regard for humanistic considerations. Executive decisions driven by other forces may lead to the trampling of human rights. As happened after the 9/11 terrorist attacks on the U.S., suspects have been delivered up to the U.S. without trial and adequately establishment of the allegations against them. A number of persons have been detained merely on suspicion and have been imprisoned in Guantanamo Bay in inhuman conditions. The suicides and attempted suicides in this jail stand witness to what these accused are being subjected.<sup>1285</sup> Accordingly, a reasonable involvement of the judiciary and human rights standards could be incorporated into the current Saudi extradition proceedings.

In a nutshell, it appears that the solution to these problems is to strike a reasonable balance between the judicial and administrative extradition systems of both countries. The positive virtues of both systems could be selected and those which either allow the accused to escape justice or which lead to a denial of human rights may be dropped on either side to hammer out an extradition system which is efficient, fast, and based on justice.

### **6.7 Proposed extradition treaty and global co-operation**

The final and most important question is concerned with how extradition systems can be used as a means of enhancing global co-operation against international crimes, particularly, those related to global terrorism.

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<sup>1285</sup> See, for example, the BBC, ‘Triple suicide at Guantanamo camp’, 11 June 2006, <http://news.bbc.co.uk/1/hi/world/americas/5068228.stm> (accessed 14 March 2010). “Since the Sept. 11, 2001, hijackings, the United States has managed to extradite a handful of minor terrorist figures. Oussama Kassir, accused of running terrorist web sites and other crimes, was extradited from the Czech Republic in September 2007. Wesam al-Delaema, charged with trying to kill Americans in Iraq, was extradited from the Netherlands in January 2007. But most al-Qaeda leaders in U.S custody have been apprehended overseas by the CIA, in secret operations designed to avoid judicial oversight.” See generally Whitlock, n.1236.

It was pointed out at the beginning of this study that where modern globalisation has created new opportunities for co-operation and coordination in the fields of technology, trade, and economic activities, it has at the same time facilitated the organisation of crime at an international level.<sup>1286</sup> The Internet is the most recent tool which has given a new impetus to international crimes. Most importantly, the terrorist attacks carried out in various parts of the world reveal the links between various terrorist groups internationally.<sup>1287</sup>

It was also emphasised that in order to combat crimes of this magnitude a matching scale of response is essential. No single nation can counter this gigantic threat single-handedly. Global co-operation and collaboration of effort is vital to combat this problem. The allied forces operating in Afghanistan after the events of 9/11 is one such example. Afghanistan was accused of protecting terrorists and training camps on its territory organised by Al-Qaeda, which was later alleged to have links with the terrorists who carried out the attack on the Twin Towers in New York. Nevertheless, despite the fact that the attacks were launched at the U.S. alone, the fear that, if allowed to flourish terrorists could target other countries, brought many nations together in 'the war on terror' unleashed by the U.S. The heavy development of allied forces in Afghanistan is undoubtedly, one of the best illustrating examples of international co-operation against 'terrorism'.

A contemporary example of international crime requiring international co-operation are the acts of piracy occurring in Somali waters. The Somali state has effectively collapsed, Somali pirates are making successful attacks against vessels of many nations. With the lack of any government, the only effective response is a joint international effort to fight this international crime.<sup>1288</sup>

Therefore, it is now possible to see the efforts of international agencies, such as the United Nations or the Council of Europe, combining their forces and creating laws to counter modern threats. In such times as these, every sovereign state has a moral responsibility to contribute to strengthening the hands of the international community to effectively combat international crime.

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<sup>1286</sup> See generally Chapter 1.

<sup>1287</sup> This was confirmed by Jack Straw in his address to the audience at an international conference in Saudi Arabia, stating that "what we have seen develop over the last decade is of a different order of magnitude to previous domestic and international terrorism. It combines global ambition, global reach and powerful means in an unprecedented way. See generally Straw, n. 38.

<sup>1288</sup> CNN, 'Piracy upswing expected off Somalia', 27 July 2009, <http://edition.cnn.com/2009/WORLD/africa/07/27/somalia.piracy/index.html> (last accessed 10 March 2010).

One such positive step would be the actualisation of a formal treaty on extradition between Saudi Arabia and Britain.

In this modern era of information and technology, no state can remain aloof and unconcerned about what is happening around the world. An incident in one part of the world is bound to impact significantly on other nations, regardless of their location on the map. Political pressures usually force a state to choose a side. A suitable example, in this respect, is the pressure the U.S. put on Pakistan to support efforts to hunt down those responsible for the attack on the Twin Towers.<sup>1289</sup> Similarly, Iraqi aggression in Kuwait drew many regional states into the problem, and a number of countries, willingly or under American pressure, collaborated to meet the necessary challenge.<sup>1290</sup>

Likewise, with modern means of communication, the mobility of criminals and alleged offenders is easy and sometimes difficult to spot. Despite the efforts of international organisations, such as Interpol and intelligence services, fugitives can hide in one country with the co-operation of accomplices residing in that country. While in that country of refuge, they could actively, work, plan and even, execute terrorist acts that might harm the concerns and assets of the perceived enemy country. This happened in Kenya, where Al-Qaeda terrorists attacked the US embassy (discussed below).

Extradition of fugitive criminals is therefore essential to prevent further crime and not allow terrorism in the country of refuge. Allowing such offenders to continue, under any pretext, may turn out to be a fatal mistake since they can organise further crime, as distance has become meaningless. International co-operation and collaboration is again essential to meet the challenge. The disputes on extradition and the frequency of refusal of requests is a clear piece of evidence that achieving co-operation between states on the extradition of criminals is not an easy task. From this particular perspective, a necessity for a formal extradition treaty that would

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<sup>1289</sup> Although the Pakistan government was not implicated in any way, “‘they’ve got to choose sides,’ Mr. Biden said. ‘There is no question. You’re either our friend or our enemy here,’ he said.” BBC, ‘Pakistan weighs up US demands’, 14 September 2001, [http://news.bbc.co.uk/1/hi/world/south\\_asia/1543846.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1543846.stm) (accessed 14 March 2010).

<sup>1290</sup> The allied contribution is enumerated by Global Strategy, ‘Operation Desert Storm’, [http://www.globalsecurity.org/military/ops/desert\\_storm-allied.htm](http://www.globalsecurity.org/military/ops/desert_storm-allied.htm) (accessed 14 March 2010).

exceed a normal understanding agreement between for example, Saudi Arabia and Britain is essential.

However, there are many hurdles that need to be overcome before global co-operation is achieved. At one level, all states need to exchange information and intelligence on criminals and work in close collaboration. Organisations like Interpol have already been established where information about criminals is pooled and exchanged amongst the member states to help in locating and capturing criminals at large. This network is assisted by various local offices and institutions which provide Interpol with necessary information so that it is able to keep pace with the movement of criminals.<sup>1291</sup>

Yet not all the countries are connected through this network and criminals may operate in territories which do not have access to this organisation. So, from this point of view it can be asserted that international co-operation, intelligence exchange, and communication on alleged criminals and fugitives are vital. This may be seen in the American case, when the US managed – through its worldwide channels – to spot Al-Qaeda suspects who attacked its embassy in Kenya and were still operative on British soil. They quickly contacted the U.K. for their arrest. It was noted that:

“Soon after al-Qaeda bombed two U.S. embassies in East Africa in 1998, a U.S. federal judge issued a warrant for Khalid al-Fawwaz, an accused conspirator in the attacks and a confidant of Osama bin Laden.

British police promptly arrested Fawwaz, a Saudi national, at his home in London. Two other al-Qaeda suspects were later detained nearby. British authorities pledged to extradite the men to the United States as swiftly as possible so they could stand trial.”<sup>1292</sup>

Another hurdle in the way of an efficient extradition system is the national laws of the state. Every state is sovereign and has an inalienable right to frame its own laws governing the country.

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<sup>1291</sup> See Chapter 3, section 3.9.1.

<sup>1292</sup> See generally Whitlock, n.1236.

No country can impose their laws on another country. Doing so would be an invasion of the sovereignty of the country. This is an established principle in international law.<sup>1293</sup>

The question then is how the extradition system can be transformed into an efficient tool against the curtailment and prevention of international crimes. This is not an easy task to tackle. Many extraneous national and regional interests come into play. Just as a state might be under tremendous political pressure to extradite a person, a state might be forced or may choose not to extradite a person under a different set of circumstances. For example, a country might not extradite the anti-government elements of a state it does not enjoy good relations with, to maintain pressure on that state, or it may have other ulterior motives.

These issues still occur between countries in either extraditing or refusing to hand over suspects. For example, in Yemen when the U.S. requested the extradition of two suspects charged with the bombing of the *USS Cole* in 2000, the Yemeni government refused to return them to the U.S. on the grounds of their being Yemeni citizens. Moreover, it even refused to imprison them, ignoring a \$5 million reward that was posted by the U.S. for their capture. So here the issue of sovereignty plays an important role in blocking extradition. Further, there is also the factor of independent decisions of nation-states in deciding whether to arrest, extradite, or free alleged suspects, who might be potential terrorists, and already requested by other countries.<sup>1294</sup>

So, in order to maintain international peace and harmony it is essential that the international community join hands in achieving this goal. For this purpose, states need to work at various levels towards this end – national and international. International organisations like the UN can be harnessed to strengthen the hands of states in meeting the challenge.

At a national level, the strategy would be to review and update extradition laws in order to make them effective as a tool against combating crime. As stated above, a state has the authority to frame whatever laws it deems appropriate. This sovereign right of a state has also been

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<sup>1293</sup> See section 6.2.2 (a) of this Chapter.

<sup>1294</sup> It was observed for instance, on this issue that “[i]n December 2005, Germany freed terrorist Mohamed Ali Hammadi, who has hijacked a TWA flight in Europe in 1985 and was serving a life sentence. Instead of deporting him to the United States, where he had been indicted for murdering a U.S. navy diver during the hijacking, Germany allowed him to return to his native Lebanon, which does not have an extradition treaty with Washington. U.S. officials filed a diplomatic protest in Berlin and are offering a \$5 million reward for Hammadi’s arrest.” See generally Whitlock, n.1236.



recognised in international law, in that it is up to a state whether it adopts and adapts an international principle. However, it is essential that states harmonise their extradition laws with other states, without compromising their sovereignty, as far as possible, so that genuine and legitimate extradition requests have the maximum chances of meeting success. Each state may make attempts to conform to principles of international law as closely as possible.

At the international level, states need to become part of international forums and sign bilateral and multilateral treaties and conventions so that all the nations of the world join in exploiting laws, including extradition, to counter the terrorist threat, which has affected nearly every continent and nation of the world, directly or indirectly.

It would also be greatly helpful if all treaties and conventions accommodated principles of international law and human rights conventions so that disparity in the provisions does not hinder the smooth functioning of the system at the international level. This would greatly assist the efficiency of the extradition system. This is crucial, as the difference in extradition systems can pose hurdles which appear at times difficult to overcome. The UN, for example, has circulated its Model Extradition Treaty.<sup>1295</sup> Staying as close as possible to this pattern might be helpful in the internationalisation of the extradition framework.

The *Pinochet* and *Lockerbie* cases stand witness to how disparity in national laws can cause difficulties and can lead to confrontation, the souring of political relations, and undue delay in dealing with the extradition requests.<sup>1296</sup>

Finally, it can be concluded that after having thoroughly discussed the two countries' extradition systems in this chapter and earlier, the conclusion may be drawn that the two sovereign entities do indeed share a number of factors, with both having the desire to use their extradition systems to fight against crime in all its forms, and both aiming to use their systems as effective tools in this respect. It was this common interest, and the shared perceived threat of global terrorism, which brought Saudi Arabia, and Britain (as well as a significant number of other sovereign countries) together. In the context of this study, Saudi Arabia and Britain became even closer,

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<sup>1295</sup> See generally Model Extradition Treaty, n.5.

<sup>1296</sup> Discussed in detail in Alotaibi, n.73, at Chapter VI.

especially, after higher level visits between the leaders of the two countries.<sup>1297</sup> Nonetheless, it may be that the two entities do have more links currently that exceed the current simple bilateral treaty of understanding, especially often the initiation of what has been termed the “dialogue of the two kingdoms.”<sup>1298</sup> In addition, both countries do have regard for human rights, although from different perspectives, due to their different perceptions, history, traditions, and sources of law. All in all, it may be added that both entities share a will to combine efforts to combat the threat of terrorism.

On the other hand, the two systems also differ from each other in a number of important ways. Not the least of these is that the two countries derive their inspiration from different sources. Saudi Arabia as an Islamic country bases its laws – those concerning extradition – on the *Shari’a*, and the brevity of the Basic Law derived from it allow the law to be expressed through statutes, and carried out by Royal decrees, and international agreements. Britain, as a secular country, has elaborate prescriptive laws. Those concerning extradition are mostly judicial and transparent, whereas Saudi law is administrative and opaque. The laws relating to bars on an extradition tend to be, in the British environment, very clear, including extraneous considerations linked to age and other concerns, as well as human rights considerations, whereas in the Saudi Basic Law they are completely missing.

Using the UN Model Treaty on Extradition as a tool to measure how closely the extradition system of the two countries match its ideals in their extradition practice and procedures, it can be sad that British extradition was evaluated, overall, as better than the Saudi system. The former has largely incorporated international law principles and human rights in its extradition law framework, whereas the latter operates through strict, confidential diplomatic channels, and is therefore far less transparent.

However, in general, the extradition systems in both countries are working adequately, but need to be drastically, reviewed. It has been stressed above that British extradition law is too lengthy and therefore too lenient, allowing a number of suspects to exploit it and avoid punishment on

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<sup>1297</sup> P. Ghafour, ‘King’s visit to take UK ties to new heights’, *Arab News*, 29 October 2007, <http://www.arabnews.com/?page=1&section=0&article=102962&d=29&m=10&y=2007> (accessed 15 March 2010).

<sup>1298</sup> Kingdom of Saudi Arabia, Ministry of Foreign Affairs, ‘Prince Saud Al-Faisal, David Miliband hold press conference’, 8 April 2009, <http://www.mofa.gov.sa/Detail.asp?InNewsItemID=92217> (accessed 15 March 2010).

various grounds and pretexts. It has also been stressed that Saudi extradition is faster than it perhaps ought to be, denying suspects the right to appeal and failing to conform to other international human rights conventions. So an up-to-date review, as has been suggested in the foregoing, is not only important, but also vital for extradition matters. It has also been suggested above that the Saudi Basic Law needs to be assessed and updated in the light of international as well as regional currents. The British have indeed required the government to pass a number of amendments and bills in this field. It was observed for instance, that after the September 11 attacks on New York and Washington, the British Government acknowledged the problems and pledged to fix them.<sup>1299</sup>

Finally, it was determined that both countries, because of their political weight in their respective domains could play important roles in promoting global co-operation and collaboration against the threat of terrorism. An extradition arrangement would therefore be a welcome development in the fight against international crime.

Indeed, in the British Saudi case, extradition agreements became not only a reality that should be attained, but almost a necessity. After the tragic events of 11 September 2001, and the London bombings of 7 July 2005, as well as other tragedies in Iraq and Afghanistan, the security situation has become a priority not only in these countries, but worldwide. The world has experienced a significant rise in international crime, money laundering, human trafficking and drugs as well as global terrorism.<sup>1300</sup> This has, in a way, worsened in the current global financial crisis,<sup>1301</sup> which perhaps requires both regional and international efforts to curb it. From this angle, one could see a formal extradition treaty as a pre-emptive tool to not only hasten the process of surrendering alleged criminals if found guilty, but to curb global crime, including terrorism.

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<sup>1299</sup> The *Washington Post* reported that "...then-home secretary David Blunkett called his country's laws 'outdated and arcane.' 'There's no good having a good extradition arrangement with another country if your own internal process is so cumbersome and slow you can't actually implement it,' he said. That year, Britain negotiated a new extradition treaty with the United States and later approved a new law designed to 'fast track' extraditions to several countries." See generally Whitlock, n.1236.

<sup>1300</sup> Noted by, for example, Alotaibi, n.73, at 318.

<sup>1301</sup> M. Klare, 'Global crime wave?', 11 April 2009, <http://www.zmag.org/znet/viewArticle/21138> (accessed 16 March 2010).

Of course, it is important to remember that agreeing and approving a treaty is not always enough. The real step would be in fulfilling the agreement and commitment to the cause. In the British-Saudi case, this has not been attained yet, although the will of the two entities seems to be available. Apart from the need discussed above for closer co-operation and collaboration to deal with a growing common threat, why is a formal treaty on extradition between Britain and Saudi Arabia necessary? A formal treaty of this sort will not always guarantee the swift return of alleged criminals. The difficulty that the U.S. has faced with its close ally, Britain, to obtain the return and trial of Al-Qaeda suspects has been noted in this study.<sup>1302</sup> On the other hand, it has been also noted that an absence of a treaty on extradition does not bar countries from exchanging or returning criminals. This has happened and still does.<sup>1303</sup> This form of extradition is viewed by human rights and humanitarian organisations as an attack on civil liberties.<sup>1304</sup> This view does not enhance or endorse the spirit of international law and justice.

As has been noted earlier,<sup>1305</sup> despite the radical differences between Britain and Saudi Arabia in history, value systems, economies, culture, and religion, necessity has dictated – under the current security situation – that both countries in some sense meet. There are a number of factors which have led to a rapprochement between the two countries, and which might, in the near future, allow the two sovereign entities to conclude a formal treaty on extradition. The factors are:

1. International relations are relationships of competition, co-operation, and conflict, and both countries are benefiting from co-operation with the aim of curbing, or containing any regional conflict that might threaten their national interests.
2. Globalisation and mobility of goods, ideas, and particularly people, including criminals and suspected terrorists that might be difficult to identify and track down. A Saudi-British formal treaty would play a part in deterring alleged offenders from operating between the two countries.

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<sup>1302</sup> See, for example, section 6.3 of this Chapter, discussion of Article 4 of the UN Model Treaty.

<sup>1303</sup> The example of an extradition from Bulgaria to Saudi Arabia has been given in Chapter 5, section 5.5.

<sup>1304</sup> See, for example, Friends Committee on National Legislation (FCNL), 'Legislative action message - stop expansion of U.S. Patriot Act', *Peacework* March 2003,

<http://www.peaceworkmagazine.org/pwork/0303/0303short.htm> (accessed 16 March 2010).

<sup>1305</sup> See section 6.2.2 of this Chapter.

3. Both countries – besides the shared security and economic interests – are committed to fighting global terrorism. Both are victims, and this shared experience may be useful if translated into a formal treaty on extradition. This would make an agreement legal and justified, and would honour international law and its spirit.
4. Both countries are also committed to promoting peace and stability, as well as understanding. In order to become role models for regions and other countries, to help them overcome their differences, a formal treaty would be not only an ideal, but a paradigm.

To reach this stage, the two countries need to highlight a number of issues. Two are to agree on key concepts like who is a criminal, or rather, what is a crime that requires extradition, and also to define ‘political offence’, bearing in mind political and human rights exceptions in a formal treaty. There is also a need to deal sensitively with the death penalty. It was observed on this issue that “extradition agreements usually decree that the offence which has triggered the extradition request must be considered a crime in both countries.”<sup>1306</sup> A double jeopardy rule is also commonly evoked to protect a person from being tried twice for the same crime in different countries. Dealing with these issues would create a helpful legal document for both sovereign countries.

Many treaties provide for political and human rights exemptions that can prevent the extradition of a person who is accused of political crimes from seeking sanctuary in a country which believes the extradition-seeking state will prosecute them. In November 1998, “French authorities refused a British warrant for the extradition of former spy David Shayler on such grounds.”<sup>1307</sup>

In the U.K., the courts are totally independent, and the judge is master of his case even if his decision goes against the wishes of the government or sees otherwise. A good example of this is when an al Qaeda suspect, Abu Qutada, was accused of terrorism and convicted. When the British Home Secretary, Jackie Smith signed a deportation order against Abu Qutada, a judge blocked it on the grounds that he might not face a fair trial in his native country of Jordan. In

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<sup>1306</sup> See generally Barkham, n. 27.

<sup>1307</sup> *Ibid.*

Saudi Arabia, the Basic Law makes it clear that the King is the point of reference for judicial, executive, and regulatory authority.<sup>1308</sup> As such, the intervention of the King in a judicial matter is not unheard of, as the case of the two nurses convicted of murder demonstrates.<sup>1309</sup>

A formal extradition treaty would be helpful because of its legality and transparency. The more covert forms of extradition,<sup>1310</sup> particularly irregular rendition, tarnish the reputation of legal and judicial systems globally. It has been noted that:

“one school of thought holds that the tightening of extradition arrangements could create a global legal mechanism capable of bringing dictators to justice for their crimes against humanity. The other interpretation is that it could come to constitute an international system of oppression, with extradition used against ordinary individuals such as political activists, allowing one states oppression to spread beyond its frontiers.

At present, it remains easier to extradite ordinary individuals suspected of straightforward crimes. The extradition of prominent political figures, such as General Pinochet, arouses more controversy.”<sup>1311</sup>

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<sup>1308</sup> See Basic Law, n.13, Article 44.

<sup>1309</sup> Discussed in Chapter 5, section 5.5.

<sup>1310</sup> Discussed in Chapter 3, section 3.3.

<sup>1311</sup> See generally Barkham, n. 27.

## Chapter Seven

### Conclusions

This study has primarily addressed the broad question of whether bilateral extradition arrangements are possible between Saudi Arabia and Britain and, if the answer to this is affirmative, what influence would such an agreement have on global co-operation in fighting against international crimes, particularly the current rising threat of terrorism?

To this end, a number of questions were framed in Chapter 1 with a view to providing answers that would be helpful in contributing to the overall question. In order to ascertain whether the two extradition systems in Britain and Saudi Arabia were functioning properly, it was necessary to assess them both historically and currently in relation to a number of cases and issues. The assembling of similarities and differences in the two systems was significant in that the issues raised helped prove that there is a distinct possibility of the successful conclusion of an agreement on extradition between the two states. This process has rebutted a number of perceptions still adopted today in the West.

To answer the questions posed to evaluate the overall question, the extradition systems of Britain and Saudi Arabia were analysed in detail in Chapters 4 and 5, traced from a historical prospective, discussing major developments, until the current position was presented.

The British extradition system, examined in detail in Chapter 4 has a much longer history, dating from 1843 when the first law dealing explicitly with extradition came into being, not without shortcomings. A significant observation of British extradition law is that compared to systems in Europe, it has always lagged in development and has operated sluggishly. At different points in time, countries like France gave notice of terminating extradition treaties with Britain, either because the rate of success of extradition requests was very low, or procedures were so demanding in terms of evidence that extradition requests stood little chance of succeeding.<sup>1312</sup>

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<sup>1312</sup> See Jones and Doobay, n.33, 1-008-1-009, at 9-10.

In 2000, the weaknesses of the British extradition system became the focus of the world in the Pinochet case, which caused embarrassment to the British government. The main charge brought against the British extradition system was the unduly lengthy procedures involved in disposing of extradition requests. For example, it was noted that despite the mutual understanding that exists between France and Britain, as well as the common threat of terrorism, extradition requests have not been easy. The ten years it took to extradite Rachid Ramda (noted in Chapter 6, section 6.3, in discussion of Article 6 of the UN Model Treaty) is a case in point. Delay was a feature of the Pinochet case, despite the fact that Britain and Spain had concluded a new agreement in 1985. As noted, some cases may take many years before a final decision is reached.

The system of appeals and re-appeals allows the accused or convicted to buy time, which can, in turn, be claimed as the basis of other rights. The asylum system of Britain is another contribution to failure in extradition requests. For example, an accused or convicted person can lodge an asylum claim at any point during the proceedings. Human rights standards are yet another hindrance to speedy resolution of extradition cases, giving fugitives exit points from the process.

Rights such as freedom of speech, sexual orientation, and the right to religious or political opinions provide many opportunities for requests to fail. The Extradition Act 2003 was introduced to overcome these weaknesses. Whether the new Act has produced the intended results remains to be seen. In practice, it is still seen by a number of critics as not being fully effective when it comes to speed and smoothness of extraditing alleged offenders. Dealing with a number of cases, Craig Whitlock remarked “despite British approval of a ‘fast track’ extradition law in 2003 and a new treaty with the United States, the defendants have thwarted every attempt to deport them, aided by a British bureaucracy in no hurry to move the cases along.”<sup>1313</sup>

Similarly, the Saudi extradition system was analysed in Chapter 5 and found equally wanting in many respects. First, there is a difference of opinion between various schools of thought in Islam over the issue of whether bilateral extradition treaties are possible with a non-Muslim state and, more importantly, whether a Muslim can be extradited to a non-Muslim state. It was found that there is nothing in the basic sources of *Shari’a*, the Qur’an, and the *Sunnah* which expressly forbids Muslims from covenanting and having bilateral relationships with a non-Muslim state.

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<sup>1313</sup> See generally Whitlock, n.1236.



The difference however is at the jurisprudence level, where scholars like Imam Abu Hanifa have ruled that a Muslim could not be extradited to a non-Muslim country, or if extradited at all, certain conditions have to be fulfilled. On the other hand, other schools of thought, for instance *Hambalis*, followers of Imam Hambal, do not see any problem in covenanting with a non-Muslim state and having bilateral extradition arrangements. Saudi Arabia is one of the countries which follow the latter school of thought.

This Saudi view is evident from its Basic Law, which provides for making statutes, mostly promulgated through royal decrees, and entering into international agreements. As noted throughout this study, this law does not distinguish between Muslim and non-Muslim states in regard to concluding such arrangements. One of the shortcomings of the Basic Laws is their brevity and lack of detail. Another view, in contrast, is that this brevity is an index of strength as it allows enough room for Saudi Arabia to adjust and adapt to emerging trends and changing circumstances. From this perspective, the Basic Law is strong, and its strength is reflected in its flexibility. This flexibility is aided by the opaqueness of Saudi procedures: the extradition system is of the administrative type, mostly operating through diplomatic channels. Saudi Arabia has managed to conclude a number of regional and bilateral treaties, mostly with Muslim countries. Most have been on a range of matters, including extradition, dealt with under co-operation and security treaties. Of these, it is worth adding that their provisions on extradition mostly conform to international law principles.

Using the Model Treaty on Extradition as a measure, the two extradition systems were compared in Chapter 6, in section 6.3. On the whole, British extradition law scored higher as it was found to be closer to the ideals enshrined in the Model Treaty, and that the orientation of its extradition laws moved it towards human rights protection as well as international standards as prescribed in the Model. Saudi Arabia's over-riding concern with swift disposal – in contrast – has pushed it away from the Model's ideals. It is important to remember as has been noted, that the existence of a formal treaty, although helpful, does not always guarantee the successful and smooth extradition of an alleged offender. Likewise, as also noted in Chapter 6 (section 6.4), the absence of a extradition treaty is not necessarily an impediment to extradition, as has occurred in a number of instances and still does, through the use of multiple channels, often secretly. The Kingdom has collaborated with a number of countries on these extraditions, and other matters.

The close alliance with the U.S., especially after the 9/11 attack, in its war against Iraq to free Kuwait in the 1990s, as well as its full commitment to the war on terror are cases in point.

As for Britain, Saudi Arabia has signed a memorandum of understanding, which outlines the broad areas of co-operation and collaboration, including extradition, yet there is still no formal bilateral extradition treaty between them. It was noted nevertheless in Chapter 6 (section 6.5), that there are two possible reasons for not entering into such a formal arrangement. One is that either one or both parties are happy with the existing situation, conforming to the dictum that has been developed in previous discussion: in the absence of a formal treaty, an extradition of alleged offenders and criminals is perfectly possible. The other reason for not concluding a treaty could be reluctance on the part of Saudi Arabia. It has not been the tradition for the Kingdom to sign such a treaty with a non-Muslim state. This is understandable, given the nature of the establishment of the Kingdom, as an archaic, new-born sovereign kingdom constrained by a strict religious orthodoxy. However, without compromising its religious principles, with change, the country has embraced modern institutions that allow it to further interact with both Muslim and non-Muslim nation-states. For instance, in practice, Saudi Arabia has handed over alleged suspects and offenders even in the absence of a formal extradition treaty with the other country.<sup>1314</sup> Not all countries would do this, because it can be viewed as a breach of sovereignty and human rights conventions, especially if undertaken in secrecy. Accordingly, and with regard to Saudi's interactions with a number of Muslim and non-Muslim states, the conclusion of a formal treaty on extradites would endorse legality, provide an element of justification, and the evidence presented would suggest that agreement between Britain and the Kingdom would be very possible.

The most likely source of setback in this regard is the Saudi adoption of the death penalty (which has undoubtedly deterred a number of European countries from seeking formal arrangements with the Kingdom) in its laws. Given the changing attitude of Saudi Arabia, this deterrent is surmountable by including a special clause in any treaty that would prevent its imposition. As noted in Chapter 5 (section 5.5), the example set by Bulgaria in reaching agreement on such a clause is evidence that should agreements are eminently achievable.

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<sup>1314</sup> For example to Kuwait, see Alotaibi, n.73, at 299.

The question of what the two countries can learn from each other was also addressed. A better question would perhaps be what can both countries learn from each other's weaknesses, rather than their strengths? The criticisms brought against either of the two systems could be instructive for both, and attempting to remove these shortcomings would benefit both systems a great deal. The British extradition system has been long accused of its protracted procedures. The law first insists on reliable evidence from the requesting country before the process gets under way. This is the first bottleneck. The requesting state might take a long time in gathering evidence. Then the law allows the right of appeal to either party after the decision at the hearing. It can be challenged in the High Court and if the decision is not to the satisfaction of either party, an appeal might be heard by the House of Lords. In some cases, there may be a re-hearing as new pieces of evidence emerge. By the time a final decision is reached, the accused may have become entitled to other rights (the right to life, the right to family, and so forth) which may serve as a basis for eventual refusal of the extradition request. During all this, the accused can lodge an asylum claim at any point. In short, there are many holes in the net and the accused has many 'chances' of finding a safe passage at any of these points. For this reason, many critics refer to Britain as a safe haven for terrorists.

Another accusation brought against the British extradition system is that it allows people to be involved in terrorist acts or inchoative crimes which may lead to terrorist acts, under the pretext of freedom of speech or the right of people to hold their own political opinions. As discussed in the previous chapter, Britain has allowed Saudi dissidents to operate from its soil. The justification has been that they were political opponents, who had not committed any offences against British law. Over time, it has been established by the British authorities that some were directly or indirectly linked to Al Qaeda operatives responsible for a number of terror attacks in Saudi Arabia as well as against American targets elsewhere.

As for Saudi Arabia's extradition system, it can be said that it too suffers from a number of serious flaws. One is to be found in Saudi's adoption of an administrative system of extradition. The weakness of this appears in the conduct of its extradition proceedings, whereby diplomatic channels are the only means available. Furthermore, the judiciary has a very limited part in the entire process, with a recommendatory role only. As a result, the executive component of the state has wide discretionary powers as to whether to accept recommendations or to reject them.

Decisions in the administrative type of extradition can be influenced by other factors, such as the political and economic status of the requesting state. With the discreet nature of this kind of system, a state may be quietly coerced into acquiescing. The extradition request may succeed at the cost of denial of human rights to the accused as noted previously. Extraditions requests may be made for a number of reasons. Disallowing a judicial proceeding may amount to denial of justice. The administrative system may deal more quickly with extradition requests, but this virtue is most compelling when compared to the denial of a chance for the accused to defend himself. Saudi Arabia does not, judging by how its conduct is viewed, seem to give due consideration to human rights in the places to where accused people may be extradited. In short, whereas Britain perhaps places too much emphasis on human rights and their protection, as well as protecting the right to a difference of opinion, Saudi Arabia, focuses upon the use of speedy extradition with the intent of preventing or curtailing crime to save human lives. Ultimately, this raises the question of which is a higher priority: human rights and their protection or human lives and their safety.

As stated in Chapter 1, the final question addressed in this study is how can extradition systems be used as a means of enhancing global co-operation against international crimes, particularly with reference to global terrorism? A question like this could be dealt with from a number of approaches. Nevertheless, it can be said that with the advent of globalisation and the more rapid movement of goods and people, international and domestic crimes have both flourished and proliferated. As a result, international co-operation between states to curb, reduce, suppress, or contain crimes has become not just a duty, but also a necessity for all. In the present environment, no single nation is immune from international crime, particularly terrorism. Nor can an individual state single-handedly fight criminal activities which have become diverse, dangerous, and trans-national. This calls for joint international efforts. A lack of co-operation at the global level to combat this international phenomenon would be ruinous, as it would lay any country open, vulnerable to terrorist threats. The example of piracy off the coast of Somalia requiring international co-operation was given in Chapter 6 (section 6.7).

Therefore, it is now possible to see the efforts of international agencies, such as the United Nations or the Council of Europe, combining their forces and creating laws to counter modern threats. In such times as these, every sovereign state has a moral responsibility to contribute to

strengthening the hands of the international community to effectively combat international crime. One such positive step would be the actualisation of a formal treaty on extradition between Saudi Arabia and Britain.

There are other benefits which are likely to flow from concluding such an arrangement. It could be an encouragement to a number of countries to follow suit, once they realise the strategic benefits. For example, Saudi Arabia enjoys a special place in the community of Islamic countries. The position of its King as the custodian of the two holy shrines would influence, directly and indirectly, other Muslim countries to follow its example and look favourably themselves upon concluding formal extradition agreements. Saudi Arabia's example has been discussed in Chapter 4, in dealing with its multiple agreements on such issues as extradition, co-operation, and security.

Similarly, Britain occupies a special place in the EU community and the world, and just as Saudi Arabia's example would be a model for the rest of the Islamic world to follow, the European states may also draw inspiration from a British action, although possibly still controversial. In this sense, such an arrangement could lead to generally fostering and strengthening of global co-operation in fighting international crime and terrorism.

Regarding the current international situation, extradition is not only common practice between nation states but is becoming a necessity. After the world has experienced a number of terrorist attacks in the U.S., Europe, Asia, and the Middle East, a global response has become a real need. In this light, a full and formal conclusion of an extradition treaty between nations, including Saudi Arabia and Britain, would fit perfectly. Also, a formal extradition would be an excellent response to the number of lobbying organisations and human rights organisations who have criticised Saudi Arabia, being presented as it would within legal, visible, and conventional rules. Nevertheless, as the analysis in this study has shown, inevitably problems would remain regardless of the success or failure of extraditing criminals. Political and cultural diversities are always present between sovereign countries and societies. Bureaucracy, reciprocity, legal systems, and lobbying groups will always play their part in influencing decisions on extradition and related policies. However, the benefits of formal arrangements are worth the effort.

In exploring the possibilities of a formal extradition treaty between Britain and Saudi Arabia, the value of this study is in demonstrating in detail that there are no political, cultural, or religious reasons which would prevent such an agreement. The argument has a wider significance as it also holds true for such agreements between other strictly Islamic countries and Western secular countries. The study thereby also challenges any perception that Islam is so 'different' that it is immune to co-operative and mutually beneficial interaction with the Western world.

As noted in Chapter 1, there is a paucity of materials relating directly to Saudi Arabia in this area, and a corresponding lack of comparative materials. By assembling the material that could be obtained, a starting point for further work has been established. Such further work might include the assembling of more material as it becomes available from a wider span of sources. It would be particularly advantageous if details of relevant cases could be analysed and published to throw light on the somewhat opaque extradition proceedings in Saudi Arabia.

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