TOPIC 2

REFUSAL OF MUTUAL LEGAL ASSISTANCE OR EXTRADITION

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I. INTRODUCTION

This group looked at the refusal of mutual legal assistance or extradition based upon the following grounds:

a) The principle of non-extradition for political crimes.
b) The principle of non-extradition of nationals.
c) Existence of the death penalty in the requesting state.
d) Insufficiency of case that is the basis for the request for mutual legal assistance or extradition.

Transnational crime is a global problem. Countries all over the world are concerned about the increase in the level and sophistication of transnational crime. To facilitate international concerted efforts to combat this problem, Mutual Legal Assistance and Extradition procedures have been emphasized.

According to the U.N. Model Treaty on Extradition and Mutual Legal Assistance in criminal matters Article 1, stipulates in specific terms the obligation to extradite. "Each party agrees to extradite to the other, upon request and subject to the provisions of the present treaty, any person who is wanted in the requesting state for prosecution for an extraditable offense or for the imposition or enforcement of a sentence in respect of such an offense." Therefore, the basis and focus of treaties on Mutual Legal Assistance and Extradition is the surrender of the persons to another state and not geared to creating impediments for the surrender of such persons.

However, in practice extradition or mutual legal assistance maybe refused by the requested state. The following are some of the grounds upon which extradition or mutual legal assistance maybe refused.

a) The principle of non-extradition for political crimes.
b) The principle of non-extradition of nationals.
c) Existence of the death penalty in the requesting state.
d) Insufficiency of cases that is the basis for the request for mutual legal assistance or extradition.

The rationale for refusal on the above grounds varies from State to State. However, reasons include; mistrust among states and the lack of confidence in one

another's justice system. Others are; political considerations, protection of human rights, sovereignty, tradition, notions of fundamental justice and fairness embodied in domestic legal system, and discrepancies between legal systems.

II. REFUSAL OF EXTRADITION BASED UPON NON-EXTRADITION FOR POLITICAL CRIMES

Among the mandatory grounds for refusal of extradition in many states is the exception of non-extradition for political offenses. If the offense for which extradition is requested is regarded by the requested state as an offense of a political nature, then extradition is denied. This principle became prominent after the French Revolution. There was great resistance to oppression and tyranny thus embracing the fundamental rights and freedoms of citizens. The principle has been reinforced since the last century with the growing concern and expansion of the human rights concept. This exception also has been used extensively to cover freedoms of political and religious opinions and the expression of these opinions.

The U.N. Model Treaty on extradition Art. 3 sub-paragraph (a), stipulates 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." This principle has been incorporated in most of the bilateral and multilateral agreements signed between and among nations all over the world.

However, the application of this principle has evolved in the last 30 years as a result of the changing global political climate as well as the way the political offences are now perceived by society. Efforts have been made to suppress the use of violence by denying perpetrators the privilege of political cover to escape justice.

The implicit and explicit definition of what constitutes a political offense is complex and no consensus has been reached about its definition. In practice, offenses of a political nature have enlisted a broad range of definitions. These vary from the motive of the offense, effect of the offence, purpose of the offence, identity of the victim, democracy, human rights and the immediate circumstances of political conflicts in different countries. Through the use of a so called negative definition, the scope of political offences has been delineated by specifying conduct, or behavior that is not considered as constituting a political offence.

Various international conventions have been elaborated and signed to specify acts that shall not be regarded as offenses of a political character. These include:

i) 1963 - Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention).
ii) 1970 - Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention).
iii) 1971 - Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation (Montreal Convention).
iv) 1973 - Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.
v) 1979 - Convention on the Physical Protection of Nuclear Material.
vi) 1979 - International Convention Against the Taking of Hostages.
vii) 1988 - Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Extends and supplements the Montreal Convention on Air Safety).
viii) 1988 - Convention for the Suppression of Unlawful Acts Against Safety of Maritime Navigation.
ix) 1988 - Protocol for the Suppression of

Unlawful Acts Against the Safely of Fixed Platforms Located on the Continental Shelf.

x) 1991 - Convention on the Marking of Plastic Explosives for the Purpose of Detection.

xi) 1997 - International Convention for the Suppression of Terrorist Bombings.

xii) 1999 - Convention for the Suppression of Terrorist Financing.

Therefore, some countries acting on the basis of the above conventions, have explicitly stated in their treaties what does not constitute a political offense.

In Thailand, "a murder or willful crime against the life of a head of state or one of the connecting parties of a member of that person's family, including attempts to commit such an offense" is excluded from the scope of political offense.

In Malaysia, Article 3(2) of the Extradition Treaty Act, 1972, stipulates that "the taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political crime for the purpose of this treaty."

The European Union Convention on Simplified Extradition, adopted in 1995 and ratified to date by the six (6) Member States, states as a general rule that the political offense exception shall not apply between the Member States. There maybe some reservations with respect to offenses which are covered by the Council of European Convention on the Suppression of Terrorism from 1977. These include not only offenses defined in a number of U.N. Conventions (on high-jacking), the safety of civil aviation and the taking of hostages mentioned above, but more generally serious offenses of violence affecting the life, physical integrity or health of persons.

III. THE PRINCIPLE OF NON-EXTRADITION OF NATIONALS

The United Nations Model Treaty on Extradition, Article 4 (a), enables a requested state to refuse extradition of its nationals, but includes "prosecution in lieu" alternatives. This is an optional ground. However, the international treaty practice is that nationality of the requested person is a ground for optional refusal in some treaties but mandatory in others.

There is a firmly held belief that many countries do not want to extradite their nationals. This has been deeply entrenched in their constitutions.[1] Previously, this practice was mainly held by civil law countries. On the contrary, common law countries, such as the United States of America, do not have such a policy. Such opposing policies are said to derive from the different policies regarding how to establish criminal jurisdictions in criminal cases. The civil law countries tend to establish jurisdiction over both crimes committed in their territories and crimes committed by their nationals abroad while common law countries tend to establish only territorial jurisdiction. Therefore, since it is generally possible for civil law countries to try their own nationals who commit crimes on a foreign soil, they have a policy to decline such requests, and vice versa. It is also understood that the ground of the restriction stems from distrust in foreign criminal justice systems and the protection of its own nationals.

However, in practice, there is no sharp distinction between the two legal systems. Some common law countries especially in

[1] For an in-depth analysis of the problem of non-extradition of nationals, see Michael Plachta, *(Non-) Extradition of Nationals: A Neverending Story?*, 13 Emory International Law Review 77-159 (1999).

the European Union, can extradite their nationals only to requesting countries within the Union, while Scandinavian countries which are civil law countries also extradite their own nationals among themselves.

The exception of non-extradition for nationals jeopardises international efforts to fight transnational organized crime. However, several multi-national conventions, such as the U.N. Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, obligate member states to establish jurisdiction over cases when they do not extradite a fugitive who is alleged to have committed a crime defined in the conventions. In the European Union for example, the political will of the Member States is to make no distinctions, within the Union, and between citizens of the Union. This is a great stride towards erasing such an exception from their extradition laws and treaties. However, it is important to note the following.

(i) States should take giant strides towards enacting laws that allow their nationals to be extradited. Germany for example, has submitted a bill to the parliament seeking to amend article 16 of its constitution by allowing extradition of its nationals to other member States in the European Union and international criminal tribunals.
(ii) States can extradite their own nationals for trial abroad on condition that convicted fugitive offenders will serve their sentences in their respective countries.
(iii) Extradition of a national can be allowed with the consent of the offender.
(iv) Surrender of nationals can be considered as a new form of bringing fugitives to face justice. This has enabled many offenders who committed crimes in Yugoslavia and Rwanda to be tried before the Ad Hoc International Criminal Court for the former Yugoslavia and the Ad Hoc International Criminal Court for Rwanda, respectively. However, some countries still refuse to surrender their nationals to international tribunals because they consider surrender as amounting to extradition.
v) The principle of *aut dedere aut judicare* (extradite or prosecute) should be implemented to bring fugitive offenders to justice. If the possibility of an offender's impunity is recognised as the most serious danger caused by the practice of non-extradition of nationals, then from the point of criminal justice it should not matter in the territory of which State he/she is prosecuted and punished as long as justice is done.

However, this principle should be applied to serious international crimes that affect human society generally. The principle should not be used as a last resort when extradition is based on the grounds of nationality of the fugitive offender. Participants found it desirable to supplement the system based on the principle *aut dedere aut judicare* by the protection against double jeopardy (*nebris in iden*) to avoid the prosecution and conviction of the sentenced person in the requesting country, based on the same facts of the offence.

IV. EXISTENCE OF THE DEATH PENALTY IN THE REQUESTING STATE

Article 4 sub- paragraph (d) of the UN Model Treaty, provides an optional ground for refusing extradition. This arises when the offense for which extradition is being

sought carries the death penalty, unless the requesting state undertakes not to impose the death penalty or not to carry it out if it is imposed.

While some countries have capital punishment, other countries have abolished capital punishment. It can generally be observed that the latter countries tend to refuse extradition of fugitive offenders to the former based on the ground that capital punishment may possibly be imposed. In reality, the exception becomes a mandatory one as most countries in Western Europe for example refuse to surrender a fugitive if he/she faces the risk of being sentenced to death. Some examples of this exception include:

i) In the recent past, Uganda made a request to the United Kingdom through the diplomatic channel for the extradition of two persons involved in a murder case. They faced the death penalty in Uganda if convicted. The request was not granted on the grounds that the United Kingdom had abolished the death penalty. The two fugitives are still believed to be at large in the United Kingdom.

ii) In a recent case where an Iranian fugitive was sought by both Japan and Iran from the Netherlands the latter's government granted extradition to Japan, because the offender faced a death penalty in his mother country while Japan gave an assurance that the prosecutor would not seek a death penalty and therefore it would not be imposed.

Therefore, many countries are amending their domestic laws to accommodate the requirement that in cases where capital punishment is likely to be imposed, the requesting state will not carry it out. One of such countries is India. In 1993, India amended its extradition law providing that in extradition cases, the original death sentence in the requesting State will be substituted with life imprisonment or a lesser sentence.

In the recent past, there is a call for the abolition of capital punishment especially emanating from human rights advocates. However, the death penalty exception to extradition is opposed by countries that still retain capital punishment in their legal systems. The arguments forwarded by those countries have been as follows;

i) Insisting on the death penalty exception hampers the smooth flow of extradition between states thereby diminishing the spirit of international cooperation to suppress crime.
ii) It interferes with the judicial discretion of the requesting state thereby encroaching upon the sovereignty of another state.
iii) Diplomatic treaties and the judicial system are two different and independent institutions. Whereas the requesting state may assure the requested state that capital punishment will not be imposed, the court may go ahead and impose it thereby straining the relationship and cooperation of the two countries.

However, these countries should,

i) Provide an adequate assurance that the death penalty, if imposed, would not be carried out.
ii) Involve making use of the executive authority to commute the sentence by taking advantage of the prerogative of mercy or pardon available in their legal system.
iii) Amend their domestic laws to accommodate the requirement of not imposing capital punishment in extradition matters. Such states

should adopt a provision that stipulates the surrender of an accused from the requested country. A trial court is bound by the conditions laid down by the requested state and agreed upon by the executive of the requesting state.

iv) Apply the principle of *aut dedere aut judicare* in cases where extradition is completely denied as a result of refusal to assure the requested state by the requesting state that capital punishment would not be imposed.

V. INSUFFICIENCY OF EVIDENCE THAT IS THE BASIS FOR THE REQUEST FOR MUTUAL LEGAL ASSISTANCE OR EXTRADITION

Article 3, of the U.N. Model Treaty, stipulates mandatory grounds for refusal of an extradition request. However, countries are free to add to this article the following further mandatory ground for refusal " if there is insufficient proof, according to the evidential standards of the requested State, the person whose extradition is requested is a party to the offence." Inherently, this means that a requested country can refuse an extradition request on the ground that the evidence accompanying the request is insufficient.

In the past, common law countries required that extradition requests sent to them showed proof of apparent guilt while civil law countries only required a minimum amount of evidence. However, in contemporary extradition practices, there are no sharp distinctions between the two legal systems. The *prima facie* case requirement, developed by England and adopted by several common law countries is an old and outdated concept. Even England has partly abolished this requirement in extradition matters. Focus now is becoming increasingly placed on the amount of evidence required to grant an extradition request.

However, extradition procedures are different in different countries, therefore, it is difficult to determine how much evidence would be required in order to grant an extradition request. The U.N. Model Treaty does not specifically define how much evidence is required and who should decide on such an issue. Therefore, there is no universal standard on the amount of evidence required to grant an extradition request. Different countries set different standards.

It may be far fetched to envisage a situation where no evidence would be required to grant an extradition request by a requested State. Practical experience has tended to show that even countries that do not require any amount of evidence to grant an extradition request are reluctant to grant it. This may arise when during the process of extradition, an offender claims that he/she is being persecuted as there is no evidence to show that he/she committed the offence. This may result in an acquittal of the offender. It is therefore advisable that countries should keep track of the standard of evidence that is required by different countries. This helps in establishing the standard of evidence when making requests.

If the request concerns a fugitive that is sought for trial, it should only be required that evidence be adduced that he/she committed the offence. In order for this evidence to be taken as satisfactory, it has to be consistent with the extradition request. However, it is very difficult for a requesting country to provide all the required evidence in the early stages of the proceedings. This renders extradition or mutual legal assistance even more difficult to be obtained. Several countries have moved away from insisting on being furnished with all the evidence in order to grant an extradition request. This has helped to expedite extradition requests.

The following are some of the good practices.

i) The United Kingdom abolished the *prima facie* case requirement in 1989 in relation to non-commonwealth countries only.
ii) Australia has tried to make their extradition laws analogous to those of the civil law countries.
iii) In 1990, the Commonwealth scheme for the Rendition of Fugitive Offenders was amended to permit the Commonwealth countries to opt to abrogate the *prima facie* case requirements.
iv) The United States of America insists on evidence though not the whole evidence. The requirement is what is considered sufficient to warrant extradition but not establishing the apparent guilt of the offender.
v) Pakistan has liberal provisions for receiving evidence against a fugitive offender because it admits authenticated official certificates of facts and judicial documents stating the facts against fugitive offenders as evidence. Similarly, in magisterial inquiry in Pakistan, the warrants, depositions of Statements on oath which purport to have been issued, received or taken by any court of justice outside Pakistan of copies there of or certificates or judicial documents stating the fact of conviction before any such court are also admitted.

The above examples show that extradition jurisprudence requires just enough evidence to issue an arrest warrant and not to establish the totality of the evidence.

As far as mutual legal assistance is concerned, theoretically, there should be no requirement imposed on the requesting country to provide evidence at its request. It could be said that the opposite rule should apply to this form of international cooperation to that applicable to extradition. However, in practice, evidence may be required in certain requests such as seizure of assets, searches, and obtaining copies of bank records, which are secret. Various countries require some evidence before mutual legal assistance can be granted. The U.S.A. for example, in the bilateral treaties it has signed with different countries, requires that evidence be adduced if mutual legal assistance is to be granted in specific cases such as obtaining bank records in money laundering cases.

VI. RECOMMENDATIONS

i) States should take giant strides towards enacting laws that allow their nationals to be extradited.
ii) States can extradite their own nationals for trial abroad on condition that convicted fugitive offenders will serve their sentences in their respective countries.
iii) Extradition of a national can be allowed with the consent of the offender.
iv) Surrender of nationals can be considered as a new form of bringing fugitives to face justice.
v) The principle of *aut dedere aut judicare* (extradite or prosecute) should be applied and implemented in cases where extradition is denied on two grounds: nationality of an accused and the death penalty.
vi) It is advisable that countries should keep track of the standard of evidence that is required by different countries. This helps in establishing the standard of evidence required by various countries when making requests.
vii) As far as mutual legal assistance is concerned, theoretically, there should be no requirement imposed on the requesting country to provide evidence

in its request. It could be said that the opposite rule should apply to this form of international cooperation to that applicable to extradition. However, in practice, evidence may be required in certain requests such as seizure of assets, searches, and obtaining copies of bank records.

viii) States that still retain the death penalty should take advantage of the prerogative of mercy or pardon available in their legal systems to commute the death sentence to life imprisonment or a lesser sentence.

ix) In Japan, the political offence exception is defined in terms of pure and relative terms. Pure political offence is whereby the political motive of the offender overrides the intention to commit an offence and vice versa. In future the feasibility of this definition may be considered by other countries to determine possible extradition of fugitive offenders.