EXTRADITION AND HUMAN RIGHTS A COMPARATIVE STUDY OF PAKISTANI EXTRADITION LAW WITH OTHER JURISDICTIONS

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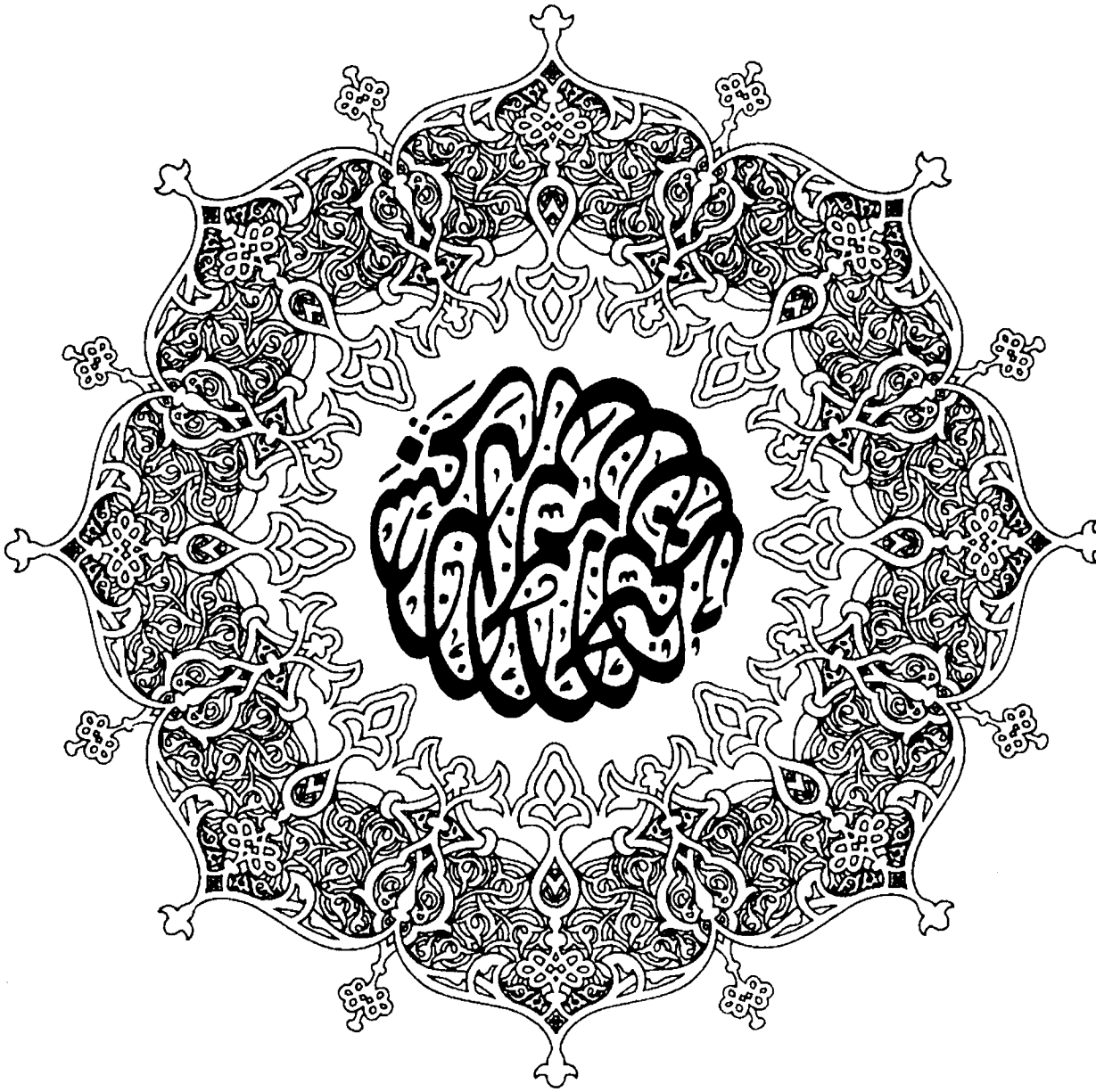

APPROVAL SHEET

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Table of Contents

Abstract

Extradition is the formal request by one State (the requesting State) to the authorities of other State (the requested State) for the surrender of fugitive offenders to the latter for their prosecution or punishment. It is a method which has been adopted by States over the centuries to ensure that fugitive offenders do not go unpunished. Historically extradition was granted for the surrender of political offenders and the sovereign rulers had full authority to deal with the fugitive offenders according to their own wishes. This had left extradition with more political considerations than legal. However, with the development of human civilization extradition has developed into a proper legal concept. It has really played a very important role in controlling transnational crime and bringing fugitive offenders to justice.

Moreover, the human rights movement which got acceleration after World War II has made serious impact on all branches of law including extradition. Almost everyone in the world today is talking about the protection and promotion of human rights. The standard of civilization of States even is considered closely linked with their commitment for the protection of human rights both at national and international level. Many civilized States, therefore, refuse to surrender a fugitive offender if there are serious threats to his/her rights in the requesting State. Usually, the surrender is refused if the fugitive would be executed in the requesting State, or he/she has been convicted in absentia without having a right to retrial. Similarly, any kind of discrimination with respect to the fugitive in the requesting State is also considered a bar to extradition. Likewise a mandatory bar to extradition is provided where he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment in the requesting State.

Extradition law is, in fact, a blend of national and international law. In international law, there is no general duty to extradite a fugitive offender in the absence of an extradition treaty. Therefore, States usually enter into bilateral or multilateral extradition treaties. Moreover, some other international instruments especially on suppression of terrorism also contain provisions regarding extradition. On the other hand, no international custom prevents a State to extradite in the absence of an extradition treaty. Therefore, to fulfill their international obligations or exercise their sovereign discretion States usually

have national extradition laws such as the Extradition Act of Pakistan 1972, the UK Extradition Act 2003, the Indian Extradition Act 1962, and so on.

It should be noted, however, that national extradition law is more important than that of international. It is so because an extradition request is determined according to the national extradition law of the requested State. Therefore, it is the national extradition law of the requested State which determines the stages of procedure and the rights of the fugitive offender. If the national extradition law of a State provides sufficient procedural safeguards and protects the basic human rights of the fugitive offenders, it will serve the interests of both the States as well as the fugitive offenders. That is way civilized States have incorporated human rights provisions and procedural safeguards in their extradition laws, for example, the UK Extradition Act 2003 provides for refusing the surrender of a fugitive to a State where his/her human rights as contained in the UK Human Rights Act, 1998 would be violated. Moreover, the 2003 Act provides a right of appeal to the High Court against the decision of the extradition judge.

However, the Extradition Act of Pakistan, 1972 lags far behind in providing procedural safeguards to the fugitive offenders and protecting their basic human rights. The 1972 Act does not contain any provision which provides for refusing the surrender of a fugitive to a State where he/she might be subjected to torture, cruel, inhuman or degrading treatment or punishment. Similarly, this Act does not provide a right of appeal against any decision made under this Act.

Pakistan should amend its extradition law to include in it the provisions which protect the human rights of the fugitive offenders and provide them procedural safeguards. This will show its commitment for the protection and promotion of human rights. Moreover, it will be a step forward towards attaining an honored place amongst the nations of the world- a goal which the people of Pakistan have set for themselves.

DEDICATION

I dedicate this research work, with great love and affection, to my cute children, Muhammad, Husnaa, Ruhmaa, and Dania.

Ghufran Ahmed

DECLARATION

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD
STATEMENT OF UNDERSTANDING

I, Ghufran Ahmed, bearing the university registration number 108-FSL/LLMIL/F08, declare in the name of Allah that my thesis titled,

"Extradition and Human Rights

A Comparative Study of Pakistani Extradition Law with Other Jurisdictions,"

submitted to the Department of Law, Faculty of Shari'ah and Law, is a genuine work of mine originally conceived and written down by me under the supervision of Mr. Osman Karim Khan, by Allah's will and approbation.

I do, hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the hereafter.

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Acknowledgments

I would like to express my utmost gratitude, in the first place, to my parents. In spite of their old age which requires me to spend more time with them, they have always insisted and encouraged me to focus on my studies. I honestly believe that I could not have been able to write even a single word without their sincere prayers for me. It would not be justifiable on my part if I do not express my most special thanks to my mother in particular. Her hands are always raised before Allah Almighty praying for my distinguished success.

The idea of working on this topic first came to my mind when my worthy teacher, Mr. Mushtaq Ahmed, taught us Public International Law. He gave me a class assignment on extradition while discussing jurisdiction. When I worked on this assignment, I came across different research articles on this topic. Some of these articles, which I have used as reference as well, pointed out the relationship between extradition and human rights. This led me to analyze the provisions of the Extradition Act of Pakistan, 1972 in the light of human rights norms which bar extradition. The idea got flourished further when I studied the extradition laws of some other States, such as the Extradition Act of Canada, 1999, the Extradition Act of the United Kingdom, 2003 and others.

I would like to express my gratitude to my learned supervisor, Mr. Osman Karim Khan, as well. He has really been a source of guidance for me to complete my thesis with success. He went through my entire thesis and guided me on every step how to make it a valuable work.

Finally, I owe my sincere thanks to all those who have been helpful to me in any way in conducting this research. It is worth mentioning that my wife has helped me more than anybody else in completion of this research work.

CHAPTER I

1. INTRODUCTION

Extradition is the process by which States have made sure that fugitive offenders do not go unpunished by bringing them into the State which has jurisdiction over them. The term fugitive offenders may seem to mean only the convicted persons who flee the jurisdiction of the State which convicted them, in order to avoid their sentence. However, it is not so because this term is also used for the accused persons who flee the jurisdiction of the State where they are to face a criminal trial, which may obviously result in acquittal. Section 2(1)(d) of The Pakistani Extradition Act, 1972 defines fugitive offender as:

> "Fugitive offender means the person who, being accused or convicted of an extradition offence is, or is suspected to be, in any part of Pakistan."

The terms fugitive offender and fugitive criminal are interchangeable. Mr. Justice Mohammad Afzal Cheema in Jose Gonzalo De Garcia De Balseras vs. State explains that extradition means the delivery of a fugitive criminal to a State where the crime was committed for prosecution in case the fugitive is an accused or punishment where he/she has already been convicted. Mr. Justice Cheema says:

> "Extradition in its ... technical or legal sense ... means handing over of a person to the authorities of a foreign State, especially the delivery of a fugitive criminal to the authorities of the foreign State in which the crime was committed, for trial or punishment."[1]

Moreover, The Indian Extradition Act, 1962 defines fugitive criminal in similar terms:

> "Fugitive criminal means a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State."[2]

Extradition can be legally defined as the formal process whereby one State (the requesting State) requests to the authorities of other State (the requested State) for the formal hand over of fugitive offenders for prosecution or punishment.

Harvard Research Draft Convention on Extradition, 1935 defines extradition as: "Extradition" is the formal surrender of a person by a State to another State for prosecution or punishment.[3]

Ms. Sibylle Kapferer, a UNHCR consultant, defines extradition as: *"A formal process*

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[1] PLD 1969 Lah.129, para 8.
[2] Section 2(f).
[3] Art. 1(a), "Draft Convention on Extradition" *The American Journal of International Law* Vol. 29, Supplement: Research in International Law (1935), 21-31. http://www.jstor.org/stable/2213621 (accessed October 9, 2009).

whereby States grant each other mutual judicial assistance in criminal matters on the basis of bilateral or multilateral treaties or on an ad hoc basis."[4]

The concept of extradition has also been described by a distinguished jurist, Mr. J. G. Starke. According to him extradition is the surrender of a person who is accused or convicted of a crime by one State to another State on the request of the latter. The basis of the request can either be a treaty or reciprocity. Mr. Starke explains:

> "The term extradition denotes the process whereby under treaty or upon a basis of reciprocity one state surrenders to another state at its request a person accused or convicted of a criminal offense committed against the laws of the requesting state, such requesting state being competent to try the alleged offender. Normally, the alleged offence has been committed within the territory or abroad a ship flying the flag of the requesting state, and normally it is within the territory of the surrendering state that the alleged offender has taken refuge."[5]

Extradition has had an extended history. Mr. Bassiouni notes that the first recorded extradition agreement was concluded around 1280 B.C. as part of a peace treaty between Ramses II, Pharaoh of Egypt, and Hattusili III, the king of Hatti.[6] However, at that time it was always for political offences that the extradition was claimed. By the treaty of Paris, concluded in 1303 A.D between England and France, it was agreed that neither Sovereign should grant protection to the enemies of the other.[7] Similarly, by a treaty made by Charles V of France with the Duke of Savoy in 1378 it was provided that all malefactors who had fled from Savoy to Dauphiny, or from Dauphiny to Savoy, should be delivered up even if they were subjects of the State surrendering them.[8]

Besides these political considerations, extradition had long been regarded as the sole prerogative of sovereign rulers and subject entirely to their discretion as it could have been the best method to surrender political offenders. Mr. Justice Cheema writes:

> "Historically, extradition was mainly sought or granted for political purposes in respect of persons who having incurred the displeasure of their own Government left the country and sought asylum in another country. The grant or refusal of a request for extradition depended on the whims of the sovereigns who passed arbitrary orders."[9]

However, with the development of human civilization other crimes have also become the subject of extradition. According to some authors, the reason for the inclusion of ordinary crimes in extradition agreements is the modern methods of transportation which provide greater facilities for the escape of criminals. Therefore, the modern extradition agreements

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[4] Sibylle Kapferer, "The Interface between Extradition and Asylum" v, http://www.unhcr.org/protect. (accessed May 12, 2009).

[5] J.G. Starke, *Introduction to International Law*, (London: Butterworths, 1984), 339.

[6] M.C. Bassiouni, *International Extradition and World Public Order,* (Leyden: A.W. Sijthoff, 1974), 3, 4.

[7] Sir Edward Clarke, *A Treatise Upon The Law of Extradition With The Conventions Upon The Subject Existing Between England and Foreign Nations,* (London: Stevens and Haynes, 1888), para 18.

[8] Ibid. para 19.

[9] Supra note 1.

are more general and wide. As Mr. Fenwick observes:

> "The earlier treaties provided chiefly for the surrender of political fugitives; but by the time Vattel published his treatise Droit des gens in 1758, ordinary criminals were also surrendered upon specific demand. In the second half of the nineteenth century the urgent need of offsetting the greater facilities for the escape of criminals provided by modern methods of transportation led to the conclusion of extradition treaties of a more general nature, covering stipulated crimes and applicable to any offenders; and by the opening decade of the twentieth century the scope of these treaties had widened greatly."[10]

At the same time with the recognition of freedom of thought and expression, political offences which once formed the sole basis of extradition have been totally abandoned. Consequently, today it is a well established principle that States do not extradite in case of political offences. Mr. Glahn explains it as follows:

> "Up to about the middle of the eighteenth century, these extradition treaties covered primarily the surrender of political fugitives. Gradually, ordinary crimes began to be included as reasons for the surrender of an alleged offender. By the second half of the last century, however, the revolution in transportation had made the speedy escape of criminals ever easier; hence extradition treaties became increasingly general in character. Interestingly enough, as the scope of these agreements expanded to include ever more numerous categories of criminal offences, political offences ceased to play a part and today such latter offences no longer form a basis for the surrender of fugitives."[11]

It should be noted that under the customary international law in the absence of an extradition treaty a State is neither under a duty to extradite nor under a duty not to extradite. Therefore, States usually enter into bilateral and multilateral extradition treaties. In order to fulfill these treaty obligations States usually have municipal extradition laws, The Extradition Act of Pakistan 1972, The UK Extradition Act 2003, The Indian Extradition Act 1962 are a few examples. Extradition, therefore, is a blend of national and international law .With these developments extradition once regarded as the sole prerogative of sovereign rulers has now transformed into a proper concept of law. Mr. Justice Cheema writes:

> "With the development of democratic institutions and responsible forms of Governments, extradition gradually acquired legal basis. With the growing consciousness of international cooperation in different spheres of State activities and prevention of crime and to deal with the criminals for whom international frontiers offered no difficult barriers to be crossed. In short, it is one of the most important means of combating international crime. National legislation, extradition treaties, bilateral or multilateral accession to international conventions and international courtesy now form the usual bases of extradition, governing the grant or refusal of a request by the asylum country."[12]

Moreover, human rights movement which got acceleration after World War II has influenced almost all branches of law. Extradition is no different. Therefore, human rights law has placed many restrictions on extradition. Consequently, extradition is generally refused if the wanted person is likely to be exposed to serious human rights violations. So a conflict has

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[10] Charles G. Fenwick, *International Law*, (London: George Allen and Unwin Ltd. 1948), 330,331.
[11] Gerhard Von Glahn, *Law Among Nations an Introduction to Public International Law*, (London: Collier Macmillan Ltd., 1970), 252,253.
[12] Supra note 1.

arisen between the State obligations under extradition agreements on one hand and the human rights obligations on the other.

A balance is, therefore, required to be struck to ensure that criminals do not go unpunished and at the same time they are provided procedural safeguards and their basic human rights are not violated. This research work aims to explore the extradition law of Pakistan in comparison to that of various other jurisdictions. The thesis, "Extradition once regarded as the sole prerogative of sovereign rulers is now subject to basic human rights and procedural safeguards but Pakistani extradition law does not provide for the protection of these rights and safeguards as compared to that of various other States," is under review.

1.1 Need and Importance of Extradition

1.1.1 Crime and Society

It can be safely presumed that nowhere in the world exists a society free of crime. The history of crime is as old as the man himself. The first crime was committed on the earth when one son of Adam killed the other. Since then the earth has not witnessed a time when crime was eliminated on it. The rate of crime, however, varies in different societies from a very high to a mere nominal depending upon different factors such as poverty, unemployment, illiteracy, discrimination, law and order situation and others.

Another undeniable fact is that a society will collapse if crime is not controlled. Therefore, in order to avoid this threat the rate of crime, in civilized societies, is minimized by an effective criminal justice system. By an effective criminal justice system one would simply mean a system where criminals do not go unpunished. This, however, cannot be interpreted to mean that every individual accused of a crime should be punished without fair trial and fulfilling legal formalities. In order to give an accused a fair trial, a very important issue is that of jurisdiction.

1.1.2 Jurisdiction and its Forms

Jurisdiction generally refers to powers exercised by a State over persons, property or events. There are three main forms of jurisdiction. These are legislative or prescriptive jurisdiction that is the powers to legislate in respect of the persons, property or events in question, judicial or adjudicative jurisdiction that is the powers of a State's courts to hear cases concerning the persons, property or events in question and the executive or enforcement jurisdiction that is the powers or physical interference by the executive such as the arrest of persons, seizure of property and so on. However, this thesis will be mainly concerned with the latter two forms.

Since some authors have discussed only two forms of jurisdiction -prescriptive and enforcement -it will be useful to differentiate between judicial and executive jurisdiction. This can be done with the help of a simple illustration.[13] For instance, if a person commits a murder in Pakistan, the Pakistani courts have the jurisdiction to try him/her for this crime (judicial jurisdiction).But if he/she manages to flee to another State say, for example, India, Pakistani police cannot arrest him/her there (executive jurisdiction).

1.1.3 Principles of Jurisdiction

In international law there are various different principles of jurisdiction. These were discussed in the unofficial 1935 Harvard Draft Convention on Jurisdiction with respect to Crime.[14] These can be discussed under five heads. These are as follows:

1.1.3.1 The Principle of Territorial Jurisdiction

Article 3 of the Convention talks about the territorial jurisdiction, it states as:

> "A State has jurisdiction with respect to any crime committed in whole or in part within its territory.
> This jurisdiction extends to
> (a) Any participation outside its territory in a crime committed in whole or in part within its territory; and
> (b) Any attempt outside its territory to commit a crime in whole or in part within its territory."[15]

This means that a State has jurisdiction over all crimes committed on its territory. The commission of crime within the territorial jurisdiction of the State is relevant and not the nationality of the criminal be he/she a national or a foreigner.

However, it may happen that a criminal action initiates in one State but completes in another: for instance, a person shoots across a border and kills someone on the other side. In such a case both the States have jurisdiction; the State where the act initiated has jurisdiction under the subjective territorial principle while the State where the act completed has jurisdiction under the objective territorial principle also known as the 'effects doctrine'.

Moreover, Article 4 of the Convention refers to crimes committed upon a ship or aircraft, and gives jurisdiction with respect to such crimes to the State which has its national character. It states as:

> "A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character.
> This jurisdiction extends to

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[13] Martin Dixon, *Textbook on International Law*, (Glasgow: Blackstone Press Ltd., 1996), 126.
[14] "Draft Convention on Jurisdiction with Respect to Crime" *The American Journal of International Law* Vol. 29, Supplement: Research in International Law (1935), 439-442. http://www.jstor.org/stable/2213634 (accessed October 9, 2009).
[15] Ibid.

(a) Any participation outside its territory in a crime committed in whole or in part upon its public or private ship or aircraft; and
(b) Any attempt outside its territory to commit a crime in whole or in part upon its public or private ship or aircraft."[16]

1.1.3.2 The Principle of Nationality Jurisdiction

According to this principle a State has judicial jurisdiction over all its nationals wherever they are. So according to this principle the courts of nationality of the concerned person can try him/her for any crime against the national law regardless of the fact that the crime is committed in a foreign State. The continental countries extensively follow this principle, however, common law countries also recognize it even Pakistan Penal Code, 1860 has extraterritorial jurisdiction.[17] Some authors call this principle of jurisdiction active nationality principle in contrast to passive nationality principle where the victim of a crime is the national of the State which exercises jurisdiction.[18]

Article 5 of the Convention gives jurisdiction over nationals, it states as:

"A State has jurisdiction with respect to any crime committed outside its territory,
(a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or
(b) By a corporation or other juristic person which had the national character of that State when the crime was committed."[19]

1.1.3.3 The Principle of Universal Jurisdiction

Under International law, there are certain crimes which are considered so heinous that any State may exercise jurisdiction in respect of them. Crimes like piracy, war crimes, crimes against humanity, the slave trade and many other crimes are considered of this category. Any State may exercise jurisdiction in respect of them irrespective of the fact that where these crimes are committed and who commits them.

Article 9 of the Convention gives universal jurisdiction with respect to piracy while Article 10 talks about other crimes. Article 9 states as:

"A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law."[20]

1.1.3.4 The Principle of Protective Jurisdiction

According to this principle a State can exercise jurisdiction in respect of offences which are prejudicial to its security, even when they are committed by foreigners outside its territorial boundaries. Plots to overthrow the government of a State, forging its currency, espionage and

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[16] Ibid.
[17] S.4 PPC (XLV OF 1860).
[18] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 1997), 111.
[19] Supra note 14.
[20] Ibid.

others are the crimes which are considered against the security and welfare of a State.

Articles 7 and 8 talk about the security of the State and counterfeiting respectively. According to Article 7 security of the State includes its political independence and territorial integrity, it states as:

> "A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed."[21]

Article 8 of the Convention enlists counterfeiting of seals, currency, instruments of credit, stamps passports, or public documents, it states as:

> "A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority."[22]

1.1.3.5 Passive Personality Jurisdiction

This principle is almost the reverse of the principle of nationality jurisdiction although both are essentially concerned with the nationality of the persons concerned with the crime. Unlike the principle of nationality jurisdiction which is concerned with the nationality of the wrongdoer, the passive personality principle is concerned with the nationality of the victim of the crime.[23] In the Lotus case Turkey claimed jurisdiction on the additional ground that the persons killed were Turkish nationals.[24]

1.1.4 Concurrent Jurisdiction

In order to understand it considers the following illustration:

A French national X forges Indian currency in Pakistan.

In this case Pakistan has jurisdiction based on territorial principle, India has jurisdiction based on protective principle and France has jurisdiction based on nationality principle. This is known as **concurrent jurisdiction.**

Nevertheless, the accused can be tried only in one jurisdiction because of the well established principle of non-bis-in-idem. It means that no one can be tried twice for the same offence. It is similar to the double jeopardy bar in the constitutions of civilized nations. The Draft Convention on Jurisdiction, 1935 also recognizes this bar in Article 13 which states as:

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[21] Ibid.
[22] Ibid.
[23] Supra note 13, 135.
[24] PCIJ, series A, no. 10 (1927).

> "In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien after it is proved that the alien has been prosecuted in another State for a crime requiring proof of substantially the same acts or omissions and has been acquitted on the merits, or has been convicted and has undergone the penalty imposed, or, having been convicted, has been paroled or pardoned." [25]

Which State will actually exercise the jurisdiction depends upon a number of factors. One of these factors is which State suffers the most. So in the above illustration India will be justified if it exercises the jurisdiction. However, India can only exercise judicial jurisdiction since Indian police cannot arrest the accused in Pakistan. So if India wants to exercise judicial jurisdiction it has to request Pakistan for the extradition of the accused. If Pakistan refuses the extradition to India still France can request for the extradition. Even if French request is turned down, Pakistan itself can exercise jurisdiction to ensure that the criminal does not go unpunished. Therefore, the objective discussed above that is to eliminate the crime or at least minimize it by ensuring that criminals do not go unpunished can still be achieved.

1.1.5 Exclusive Jurisdiction

There may arise a situation where only one State has jurisdiction, and if the offender escapes the jurisdiction of that State into another State he/she will go unpunished thus defeating the common objective of minimizing the crime. Extradition is the best suitable process by which this objective can be achieved.

The above discussion can be summarized in the words of Dr. S.K.Kapoor:

> "Ordinarily each state exercises complete jurisdiction over all the persons within its territory. But sometimes there may be cases when a person after committing crime runs away to another country. In such a situation, the country affected finds itself helpless to exercise jurisdiction to punish the guilty person. This situation is undoubtedly very detrimental for peace and order. In such a situation peace and order can be maintained only when there is international cooperation among the States. There is social need to punish such criminals and in order to fulfill this social necessity the principle of extradition has been recognized."[26]

Today the world has become a global village and the movement of persons from one jurisdiction to another has become ever easier. The development and advancement of means of transportation especially in the second half of the nineteenth century has made the escape of criminals as easy as anything. This has emphasized the need of effective extradition agreements between the States. The European Court of Human Rights in Soering vs. United Kingdom observed that:

> "As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe heavens for fugitives would not only result in danger for the state obliged to harbor the protected person

[25] Supra note 14.
[26] Dr. S. K. Kapoor, *International Law and Human Rights* (Allahabad: Central Law Agency, 2004), 335.

but also tend to undermine the foundations of extradition."[27]

Moreover, the need and importance of extradition cannot be over emphasized in the post 9/11 world. The war on terror seriously demands that no State should ever give refuge to terrorists. That is why many conventions on combating international terrorism talk about either to prosecute or extradite the culprits such as the Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1999.[28] Likewise, the schedule of The Extradition Act of Pakistan, 1972 has been amended to include *"Financing for terrorism"* in the list of extradition offences.[29]

1.2 Human Rights Movement and Extradition

Today almost everyone in the world is talking about the protection and promotion of human rights. The standard of civilization of States even is considered closely linked with their commitment for the protection of human rights both at national and international level. This global movement has had a serious impact on every instrument related to individual's rights and freedoms. Similarly, extradition is also subject to basic human rights. There are certain violations of human rights which put a complete ban on extradition such as torture, cruel, inhuman, or degrading treatment or punishment in the requested State.[30] It should be noted, however, that extradition itself is not considered a violation of human rights. This all emphasizes the need of incorporation of basic human rights provisions and procedural safeguards in extradition instruments.

Mr. Dugard and Mr. Wyngaert stress the above point as:

> "The human rights movement, which has had such a powerful impact on international law ... in the post world war II period, has in recent years turned its attention to extradition. Treaties, executive acts and judicial decisions on extradition have all been affected. At the same time, transnational and international crime has increased. The international community has responded by ... expanding the network of bilateral and multilateral treaties ... to outlaw transnational crime, promote extradition, and authorize mutual assistance. Inevitably, there is a tension between the claim for the inclusion of human rights in the extradition process and the demand for more effective international cooperation in the suppression of crime ... 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."[31]

As discussed above, extradition is subject to basic human rights, in practice; nevertheless, political considerations still play a more significant role than that of extradition law. These

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[27] 161 Eur.Ct.H.R.(ser.A) para899 (1989)

[28] Articles 5-8, Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1999, http://www.oicun.org/7/38/ (accessed May 9,2009)

[29] S.R.O. 1051 (I)/2008, dated 8-10-2008

[30] Supra note 4, viii.

[31] John Dugard, Christine Van den Wyngaert, "Reconciling Extradition With Human Rights," *The American Journal of International Law*, Vol. 92, No. 2 (Apr. 1998), 187. http://www.jstor.org/stable/2998029 (accessed Oct. 8, 2009).

political considerations many times result in the violation of basic human rights and lack of procedural safeguards in municipal laws of developing States such as Pakistan even the proper extradition procedure is abandoned in favour of disguised extradition. The case of Mir Aimal Kansi serves a good example to support this claim. He was accused of murdering two CIA officials and injuring some others with an AK-47 rifle in Langley, Virginia, U.S. on January 25, 1993. After more than four years of this incident Kansi was picked up from a hotel in Dera Ghazi Khan on June 15, 1997, by a team of Pakistani officials and FBI special agents. Mr. Roedad khan, a former bureaucrat, says:

> "No formal request for his extradition was ever made to Pakistan and no extradition proceedings were initiated .A few dozen heavily armed personnel, several vehicles and an American C-141 plane took part in the operation. The four-and-a-half year manhunt was finally over ... the day he was arrested and delivered to FBI agents, in violation of the constitution and laws of Pakistan ... will go down in our history as a day of infamy."[32]

Unfortunately, this did not stop there. Ms. Amna Masood Janjua, the Chairperson of Pakistan's Human Rights Defense group, says, *"The U.S. has abducted over 10,000 Pakistani nationals during the last 10 years,"* and *"in most cases the U.S. agents have also tortured their Pakistani abductees."*[33] The recent conviction of Dr. Aafia Siddique is yet another example. Her capture and detention violated some fundamental human rights. The brief facts of this case are as follows:

Dr. Aafia Siddiqui, a Pakistani Muslim woman, resided for nearly twelve years in the United States, graduated from the Massachusetts Institute of Technology (MIT) and got PhD from Brandeis University. She returned to Pakistan on January 2, 2003. On March 25, 2003, her name appeared in the FBI's *"wanted for questioning"* global alert list. It is claimed that Khalid Sheikh Muhammad, the alleged master mind of the 9/11 attacks, revealed her name during interrogation.

On March 30, 2003, Dr. Aafia, the neuroscientist, with her three children got missed. The next day a man went to her home and threatened her family to keep their lips sealed if they ever wanted to see Aafia and her children again. Since then her whereabouts were not public until the press conference of Yvonne Ridley, a British journalist, in July 2008 in Pakistan. In this press conference Ridley revealed that Dr. Aafia had been detained in Bagram, Afghanistan since her disappearance in 2003.

After a few days of this disclosure on July 17, 2008, it was reported that Dr. Aafia Siddiqui

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[32] Roedad Khan, "In Search of Truth." *The Dawn*, November 24, 2002 http://www.dawn.com/2002/11/24/op.htm#3 (accessed November 2, 2010).

[33] http://www.english.farsnews.com/newstext.php?nn=8908151347 (accessed Nov. 15, 2010).

has been detained in Ghazni, Afghanistan by Afghan National Police (ANP) on suspicion while carrying objectionable things in her hand bag outside the Governor's compound. The statement describing these things reads:

> "A number of items were in her possession; including handwritten notes that referred to a mass casualty attack and that listed various locations in the United States, including Plum Island, the Empire State Building, the Statue of Liberty, Wall Street, and the Brooklyn Bridge. Other notes in Siddiqui's possession referred to the construction of dirty bombs, and discussed various ways to attack enemies, including by destroying reconnaissance drones, using underwater bombs, and using gliders. Siddiqui also possessed a computer thumb drive that contained correspondence referring to specific cells, attacks by certain cells, and enemies. Other documents on the thumb drive discussed recruitment and training."[34]

It is alleged that on July 18, 2008, a team of United States officials attempted to interrogate Dr. Aafia at an Afghan police compound in Ghazni where she had been detained. While the team was discussing the issue with Afghan officials, Aafia who was in the same room suddenly appeared from behind the curtain and grabbed a U.S. warrant officer's M-4 rifle, and fired two shots at the team but missed. Meanwhile, she expressed her distress for Americans and said she wanted to kill Americans. Moreover, she assaulted the U.S. officials when they tried to get the rifle back and subdue her.

Dr. Aafia was then taken to the United States for facing a trial against the charges of attempt to murder and assault. On September 2, 2008, the official website of the Department of Justice announced her indictment which reads:

> "Siddiqui is charged in the Indictment with: (1) one count of attempting to kill United States nationals outside the United States; (2) one count of attempting to kill United States officers and employees; (3) one count of armed assault of United States officers and employees; (4) one count of using and carrying a firearm during and in relation to a crime of violence; and (5) three counts of assault of United States officers and employees."[35]

On September 23, 2010, Judge Berman M. Richard of the U.S. federal court in Manhattan convicted Dr. Aafia for the above charges and sentenced her to 86 years imprisonment. Ms. Liz Davies, a British barrister and political activist, in her article comments about this judgment:

> "All we know is that she has not been treated according to the rule of law or received due process. The circumstances of her arrest, her trial and her punitive sentence are extremely concerning."[36]

Besides Davies, much has been said about this case. Most human rights activists believe that Aafia had been kidnapped from Karachi, Pakistan by the intelligence agencies of Pakistan and America; then she was handed over to Americans to be detained in Bagram during the

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[34] http://www.justice.gov/opa/pr/2008/September/08-nsd-765.html (accessed November 12, 2010).
[35] Ibid.
[36] Liz Davies, "The Sinister Case of Aafia Siddiqui."
www.morningstaronline.co.uk/index.php/news/layout/set/print/content/full/96686 (accessed Nov. 14, 2010).

time she remained disappeared, where she was brutally tortured. Yvonne Ridley said before the court had announced its final judgment:

> "Dr. Aafia Siddiqui is a bright, intelligent woman who has been through hell having been kidnapped, tortured in secret prisons, gunned down by US soldiers and renditioned to America where she is now facing attempted murder charges against those who shot her."[37]

All this stresses but one thing that the States in order to punish the criminals must respect the basic human rights. Abduction cannot be allowed even in the name of achieving the so called international peace. In fact, international peace can be achieved by protecting and promoting human rights. Modern extradition law provides the mechanism for dealing with fugitive offenders and at the same time protects their basic human rights and provides them procedural safeguards. However, these basic human rights protections and procedural safeguards can be best availed through the municipal laws regulating the extradition process.

1.3 Importance of Municipal Extradition Law

As mentioned earlier extradition is a blend of national and international law. However, the role of national law in extradition is more important than that of international law. This is because treaties may provide for the extradition of fugitive offenders but it is for municipal law to determine whether the fugitive is to be delivered under the extradition treaty or not. It is the case especially in dualist States such as Pakistan where international treaties do not get effect directly in municipal courts without national legislation.

It should be noted that in such cases an individual can best benefit from the grounds available for refusing extradition such as political offence, double criminality, double jeopardy, discrimination and others in municipal extradition law. Moreover, the State requesting the extradition usually has to make out a prima facie case against the person whose extradition is sought. It is again the municipal law that will determine whether a prima facie case is made out or not. Therefore, the importance of municipal extradition law cannot be undermined.

Mr. Starke says:

> "International law concedes that the grant of and procedure as to extradition are most properly left to municipal law and does not, for instance, preclude states from legislating so as to preclude the surrender by them of fugitives, if it appears that the request for extradition had been made in order to prosecute the fugitive on account of his race, religion, or political opinions, or if he may be prejudiced thereby upon his eventual trial by the courts of the requesting state."[38]

Therefore, if the municipal extradition law provides for procedural safeguards and protects

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[37] Dr. Aafia was shot in her stomach when US officials wanted to get the rifle back and subdue her. http://www.wordpress.com/2010/02/05/yvonne-ridley-on-dr-aafia-siddiqui/ (accessed November 12, 2010).

[38] Supra note 9, 341.

basic human rights in extradition process, it will serve the interests of both the individual and the international criminal law enforcement.

States have long since cooperated with one another in the form of extradition to ensure that fugitives from justice do not defeat the law. However, there has been enormous development in the extradition process from the arbitrary discretion of sovereign rulers to a proper concept of law. Moreover, the awareness and recognition of human rights and fundamental freedoms since the last sixty years or so have brought fundamental changes in the extradition law. Under the modern extradition law, therefore, the rights and freedoms of individuals are better protected. Since individuals usually get the protection of law from the municipal courts which in dualist States such as Pakistan generally give effect to municipal laws, therefore, municipal extradition law should contain provisions better protecting basic human rights and providing for procedural safeguards.

Chapter 2 reviews the international extradition law and practice. In this chapter issues like legal basis of extradition, general principles of extradition, grounds for refusing extradition request and the like are discussed. Chapter 3 describes certain human rights norms which bar extradition. In chapter 4 extradition procedure with special reference to Pakistani extradition law and its other provisions are discussed along with relevant provisions of extradition laws of other jurisdictions. Finally a conclusion is drawn by analyzing the rules and practices discussed in the preceding chapters. Recommendations to improve The Extradition Act of Pakistan, 1972 by including human rights provisions and procedural safeguards are also made in the conclusion.

CHAPTER II

2. International Extradition Law and Practice

This chapter deals with the general practice of States with respect to extradition. It is discussed through the bilateral and multilateral extradition treaties between different States and other international instruments providing for extradition with respect to certain specific offences such as Articles 5-8 of the Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1999.[39] The relevant provisions of the Draft Convention on Extradition, 1935 and the United Nations Model Treaty on Extradition, 1990 are also discussed.[40]

Mainly the general principles of the extradition law such as speciality, double criminality and others are discussed. Similarly, the grounds for refusing extradition request such as the political offence exemption, non-bis-in-idem, military and religious offences exemptions and others are also discussed. The practice of States with regard to extradition of nationals is also discussed in this chapter. The procedure of extradition varies widely because of the sharp variations in municipal extradition laws of different States. Therefore, it is discussed in chapter no. 4 with special reference to the extradition law of Pakistan. The prima facie case requirement for the surrender of a person claimed forms the part of the general principles, nevertheless, it is discussed in chapter no. 4 with extradition request.

2.1 Basis of Extradition

Since a State, under the customary international law, is not under a duty to extradite in the absence of an extradition treaty. States usually enter into extradition treaties with other States. The definition of extradition given by Ms. Sibylle Kapferer in the previous chapter provides legal basis for extradition.[41] According to this definition it is either an extradition treaty or an *ad hoc* agreement in this respect. Besides these two, another basis for extradition is the international instruments providing for extradition with respect to certain specific offences.

2.1.1 Extradition Treaties

Extradition treaties can either be bilateral that is between two States only or they can be multilateral extradition treaties that is between three or more States. Both these are discussed

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[39] Supra note 28.

[40] Model Treaty on Extradition, Adopted by the Eighth Crime Congress, Havana, 27 August-7 September 1990 www.uncjin.org/Standards/Rules/r17/r17.html (accessed May 9, 2009).

[41] Supra note 4.

below separately.

2.1.1.1 Bilateral Extradition Treaties

Bilateral extradition treaties establish a mutual duty for States parties to the treaty to extradite under the conditions provided by the treaty. Most of the extradition treaties which are still in force are bilateral. Pakistan has more than twenty extradition treaties with different States which include America, France, Saudi Arabia and many others.[42] All these treaties are bilateral. The realities of treaty negotiation are complex because of the sensitivity of sovereignty interests. Obviously then bilateral treaties are easier to negotiate than multilateral extradition treaties.

2.1.1.2 Multilateral Extradition Treaties

A general multilateral binding extradition treaty does not exist so far. The UN General Assembly in its 45th session adopted a Model Treaty on Extradition, 1990 which, of course, is not binding.[43] However, States at regional level have binding multilateral extradition treaties such as Inter-American Convention on Extradition (1981), Convention on Extradition of the League of Arab States (1952), European Convention on Extradition (1957), Montevideo Convention on Extradition (1933) and many others.

2.1.2 *Ad Hoc* Extradition Agreements

The customary international law does not impose a duty not to extradite upon a State in the absence of an extradition treaty. Therefore, a State may extradite in the absence of a treaty to that respect if its laws allow it to do so. Ms. Sibylle Kapferer notes that:

> "A number of common law countries have recently amended their extradition laws to allow for the possibility of extradition without pre-existing extradition relations with the requesting State such as Canada."[44]

Section 4 of The Extradition Act of Pakistan, 1972 provides for such an arrangement. It has two subsections. Subsection (1) requires only a formal notification by the Federal Government in the official Gazette to that effect if the Government considers the extradition arrangement with a non-treaty State expedient. Such a State, after the notification, will be considered a treaty State according to subsection (2). Section 4 states as:

> "(1) Where the Federal Government considers it expedient that the persons who, being accused or convicted of offence at places within, or within the jurisdiction of, a foreign State, are or are suspected to be in Pakistan should be returned to that State, it may, by notification in the official Gazette, direct that the provisions of this Act, shall, with respect to such offences and subject to such modifications, exceptions, conditions and qualifications, if any, as may be specified therein, have effect in relation to that State.

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[42] S.R.O. 211 (I)/73, dated 20-02-1973 & S.R.O. 427 (1)/80, dated 20-04-1980.
[43] Supra note 40.
[44] Supra note 4, 4.

(2) Where a direction under subsection (1) to a foreign State is in force, the provisions of this Act shall, with respect to the offences specifies in that direction, have effect in relation to such State as if it were a treaty State."

2.1.3 Extradition under other International Instruments

There are a number of other international instruments which provide a basis for extradition. South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (1987),[45] for example, provides basis for extradition. According to Article III (4) the States Parties to this Convention which do not extradite in the absence of an extradition treaty may consider this Convention as a basis for extradition. It states as:

> "If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, the requested State may, at its option, consider this Convention as the basis for extradition in respect of the offences set forth in Article I or agreed to in terms of Article II. Extradition shall be subject to the law of the requested State."

Article III (5) of this Convention talks about the States Parties which do not require an extradition treaty for extraditing. This article makes the extradition obligatory on such States subject to their domestic laws in respect of offences stated in article I or agreed to in terms of article II. It states as:

> "Contracting States which do not make extradition conditional on the existence of a treaty, shall recognize the offences set forth in Article I or agreed to in terms of Article II as extraditable offences between themselves, subject to the law of the requested State."

On the basis of these provisions India demanded the extradition of the Pakistani nationals suspected to be involved in the Mumbai attacks of November 26, 2008. However, Pakistan refused the Indian demand on the basis of article IV of the same Convention. According to this article the principle *aut dedere aut judicare* that is extradite or prosecute is provided. Pakistan has shown its willingness to prosecute the suspects provided that India provides sufficient evidence. Article IV states as:

> "A Contracting State in whose territory a person suspected of having committed an offence referred to in Article I or agreed to in terms of Article II is found and which has received a request for extradition from another Contracting State, shall, if it does not extradite that person, submit the case without exception and without delay, to its competent authorities, so that prosecution may be considered. These authorities shall take their decisions in the same manner as in the case of any offence of a serious nature under the law of that State."

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 also contains similar provisions. Article 8(2) of this Convention provides a legal basis for extradition in case of the States which do not extradite in the absence of an

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[45]South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism(1987), http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_36.html (accessed May 9, 2009).

extradition treaty.[46] While Article 8(3) talks about the States which do not require the existence of an extradition treaty for extraditing. However, it says that the offences mentioned in article 4 of this Convention shall be considered extraditable offences between the States Parties to this Convention subject to their domestic laws.[47]

Another international instrument which provides basis for extradition is the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.[48] Article 2 of this Convention defines the crime of genocide as killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the physical destruction, imposing measures intended to prevent birth and forcibly transferring children of a national, ethnical, racial or religious group to another group with intent to destroy in whole or in part such a group. It states as:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."

Article 3 makes the genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide as punishable offences. According to Article 1 it is irrelevant whether such an offence is committed in time of peace or in time of war. Article 7(1) says that the acts mentioned in Article 3 shall not be considered as political offences for the purpose of extradition. While Article 7(2) provides the basis for extradition with respect to such offences, it states as:

> "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."

Pakistan is a party to all the above three conventions. There are a number of other such instruments, for example, United Nations Convention against Illicit Traffic in Narcotic Drugs

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[46] The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, http://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf (accessed May10, 2009).

[47] Ibid.

[48] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, http://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf (accessed May 9, 2009).

and Psychotropic Substances (1988)[49], Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973),[50] and many others. The study of all these instruments is beyond the scope of this thesis. The point to be made here is that besides extradition treaties and *ad hoc* agreements, there are other instruments which provide basis for extradition.

2.2 General Principles of Extradition

There are certain principles which are similar in all extradition instruments. Almost all such instruments, for example, contain a list of extraditable offences, the principle of double criminality and the principle of speciality. These can be called the general principles of extradition. Moreover, there are certain common grounds for refusing extradition request in all such instruments. These are discussed under a separate head- Grounds for refusing extradition. The general principles of extradition are discussed below.

2.2.1 Extraditable Offences

An extradition arrangement between the States is with respect to only certain serious offences specifically mentioned in the arrangement. There does not exist an extradition relation between any two States of the world with respect to all punishable offences. Rather, trivial offences provide a ground for refusing extradition request, as is discussed below. There are two methods employed for describing the extradition offences. These are known as the enumerative method and the eliminative method. According to the enumerative approach the extraditable offences are named in a list such as murder, kidnapping, rape and the like. The eliminative approach, on the other hand, does not provide a list of offences. Rather, it describes the extraditable offences with respect to the duration of imprisonment provided for the offence.

2.2.1.1 Enumerative Approach

Traditionally the enumerative method has been followed in extradition treaties between the States. Most of the treaties to which Pakistan is a party follow the same method. Thus the extradition treaty between Pakistan and Portugal enumerates thirty three offences to be

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[49] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), http://treaties.un.org/doc/Treaties/1990/11/19901111%2008-29%20AM/Ch_VI_19p.pdf (accessed Nov. 12, 2010).

[50] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents(1973) http://treaties.un.org/doc/Treaties/1977/02/19770220%2011-31%20PM/Ch_XVIII_7p.pdf

(accessed November 12, 2010).

extraditable. This is the highest number of extraditable offences enumerated in any extradition treaty between Pakistan and any other State. These offences include murder, kidnapping and false imprisonment, rape, bigamy and many others. Moreover, participation in any of the offences enumerated in the list is also extraditable if such participation is punishable under the laws of both the States. This list of offences, however, is not exhaustive, and extradition for any other crime can be granted at the discretion of the State to which extradition is requested if according to the laws of both the States extradition for that offence can be granted.[51] Likewise, the schedule of The Extradition Act of Pakistan, 1972 contains a list of twenty four extraditable offences. The last offence is recently added.[52] This number does not include the offences provided in an extradition treaty with a particular State or specified in a direction issued under section 4 of the Act.

The enumerative approach, however, has caused complications in extradition relations. The reason is simple that is the definition of the same offence may not be the same in different States. The offence of bigamy, for example, may not be the same in Portugal as is in Pakistan, considering that bigamy or even polygamy is not an offence in Islamic law. Another reason is that the list of offences may require amendments with the changing needs of time. Ms. Sibylle Kapferer points out this problem as:

> "As the precise definition of crimes may vary from one State to another, the practice of enumerating extraditable acts in lists has often led to complications in extradition relations. Moreover, many of the older extradition treaties have become outdated, as their lists of extraditable offences no longer correspond to current needs."[53]

In order to avoid this problem, modern extradition instruments employ the eliminative approach although the enumerative approach is still practiced in many recent extradition instruments.

2.2.1.2 Eliminative Approach

By following the eliminative approach all the offences which are punishable for a certain period of imprisonment according to the laws of both the requesting State and the requested State are declared as extraditable. This period of imprisonment is usually a minimum of one or two years. It should be noted that this duration is relevant in case of an accused person only whose extradition is sought for a trial. If, on the contrary, the extradition of a convict is sought, the threshold is usually four to six months' sentence which the convict is still to

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[51] S.R.O. 427(1)/80, dated 20-04-1980.
[52] Supra note 29.
[53] Supra note 4, 19.

undergo.

The extradition treaty between Pakistan and Maldives describes extraditable offences by following the eliminative method. According to this treaty all the offences punishable under the laws of both the States by imprisonment for at least one year or by a more severe penalty are extraditable.[54] The extradition treaties of Pakistan with Italy and Iran also follow the same approach.[55] The notification declaring Iran a *"Treaty State"* within the meaning of section 3 of The Extradition Act of Pakistan, 1972 reads as:

> "(a) Where extradition is requested for purposes of trial, the act or transaction is punishable under the laws of both countries with imprisonment for not less than one year.
> (b) Where extradition is requested in the case of a person who has been convicted of the crime for which the extradition is requested , the crime is punishable according to the laws of both countries with imprisonment for not less than one year and the person has been sentenced upon conviction to effective imprisonment for not less than six months."[56]

Besides the offences specifically declared as extraditable, there are certain other extraditable offences under customary international law such as war crimes, crimes against humanity and torture. With respect to these offences any State can itself exercise jurisdiction or extradite to the requesting State. Ms. Kapferer establishes this point in the following words:

> "Acts which constitute crimes under international law are also extraditable offences. This applies not only to States parties to the international treaties which establish a duty to extradite ... the prohibition of war crimes and crimes against humanity forms part of jus cogens ... every State is entitled to assume jurisdiction over, and to extradite, the perpetrators of such crimes. This also applies to acts of torture."[57]

2.2.2 Double Criminality

It means that the act with respect to which extradition is requested should be an offence under the laws of both the requesting and the requested States. A reference to this principle has already been made above while discussing extradition treaty between Pakistan and Iran.[58] Moreover, all the extradition treaties to which Pakistan is a party require the double criminality for extradition. The extradition treaty between Pakistan and Belgium, for example, requires the principle of double criminality in the following words:

> "In no case can the surrender be made unless the crime shall be punishable according to the laws in force in both countries with regard to extradition."[59]

This principle has also been discussed in many cases such as Gerbart Eisler's Case,[60] Factor

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[54] S.R.O. 1021(1)/85 dated 07-10-1985.
[55] Supra note 42.
[56] Ibid.
[57] Supra note 4, 21.
[58] Supra note 42.
[59] Ibid.
[60] George A. Finch, "The Eisler Extradition Case", *American Journal of International Law*, Vol. 43(1949), 487-491.

vs. Laubenheimer,[61] the Queen's Bench decision of 1896 in Re Arton,[62] and the recent decision of the House of Lords in General Pinochet's Case.[63] The former two cases are briefly discussed here.

Eisler, an alien Communist, fled illegally to Great Britain from the United States while he was at liberty on bail. Decision on his appeal was pending from conviction under a United States Federal statute which made it an offence *"knowingly to make any false statement in an application for permission to deport or enter the United States with intent to induce or secure the granting of such permission."* The United States government argued that Eisler got convicted of perjury in connection with his application to leave the United States and requested Great Britain for his extradition under the United States - United Kingdom Extradition Treaty which covered perjury. According to section 1 of the English Perjury Act, 1911 the definition of perjury only extended to sworn statements made in the course of or for the purpose of a judicial proceeding. The British court decided that the act of Eisler did not constitute perjury in English law and refused to order Eisler's surrender.[64]

In Factor vs. Laubenheimer, the British government requested the United States government for the extradition of Jacob Factor on a charge of receiving money which he knew to have been obtained fraudulently in London. In pursuance to this request Factor was apprehended in the State of Illinois. The District Court for Northern Illinois, upon a writ of habeas corpus by Factor ordered him released on ground that under the law of Illinois this act was not an offence. However, the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court. The Supreme Court affirmed the judgment of the Court of Appeals and held that according to the criminal law generally of the United States the act was a punishable offence. The Court explained that substantial similarity of the alleged extradition offence to the offence punishable according to the legal system of the requested State is sufficient to meet the requirement of double criminality. Otherwise the extradition might fail only because the fugitive would succeed in finding in the requested State some place in which the offence charged was not a punishable offence.[65]

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[61] 290 U.S. 276 (1933).
[62] [1896] 1 Q.B. 509.
[63] Frances Webber, "The Pinochet Case: The Struggle for the Realization of Human Rights", *Journal of Law and Society,* Vol. 26, No. 4(Dec. 1999), 523-537 http://www.jstor.org/stable/1410552 (accessed May 9, 2009).
[64] Supra note 59.

[65] Supra note 60.

2.2.3 Speciality

It means that the requesting State is entitled to prosecute or punish the person who is extradited only for the offences mentioned in the extradition request and it may not prosecute or punish him/her for any other offence alleged to have been committed prior to the surrender. It should be noted, however, that if he/she leaves the requesting State after prosecution or sentence and then returns to it, the principle of speciality does not apply. Similarly, if he/she does not leave the requesting State after prosecution for a certain period when he/she is free to do so, this principle again is inapplicable.

The principle of speciality has been incorporated in section 5(2) (d) of The Extradition Act of Pakistan, 1972. It has been declared as a ground for refusing extradition, it states:

> "(2) No fugitive offender shall be surrendered--
> ... (d) if there is no provision in the law of, or in the extradition treaty with, the State asking for the surrender that the fugitive offender shall not, until he has been restored or has had an opportunity of returning to Pakistan, be detained or tried in that State for any offence committed prior to his surrender, other than the extradition offence proved by the facts on which the surrender is based; ..."

Likewise, the extradition treaties between Pakistan and other States also talk about this principle. Article 7 of the extradition treaty between Pakistan and the United States, for example, states as:

> "A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.
> This stipulation does not apply to crimes or offences committed after the extradition."[66]

This principle has also been discussed by the Supreme Court of the United States in U.S. vs. Rausher in 1886.[67] Rausher was extradited to the United States from Great Britain to face a murder trial. However, he was tried for inflicting cruel and unusual punishment. The Supreme Court held that when a person is brought under the jurisdiction of the court under the extradition treaty, he/she may be tried only for such offence for which the surrender is made.[68]

An extension of the principle of speciality is that the requesting State cannot re-extradite the person whose extradition has been sought from the requested State to a third State. Article 23 of the Draft Convention on Extradition, 1935 talks about the *"Trial, Punishment and*

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[66] Dawes-Simon Treaty of Dec. 22,1931, U.S. Treaty Series 849.
[67] 119 U.S. 407(1886).

[68] Ibid.

Surrender of Extradited Person." It has two paragraphs (1) and (2): Paragraph (1) has been sub-divided into three sub-paragraphs (a), (b) and (c); according to sub-paragraph (a) the requesting State is restricted to prosecute or punish only the offence for which extradition has been sought; while sub-paragraph (b) prevents the requesting State from surrendering that person to any other State. It should be noted, however, that the principle of speciality with its extension can be suspended with the consent of the requested State. Article 23 states as:

> "(1) A State to which a person has been extradited shall not, without the consent of the State which extradited such person:
> (a) Prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited;
> (b)Surrender such person to another State for prosecution or punishment; ...
> (2) Paragraph (1), sub-paragraphs (a) and (b), of this Article shall not apply, if the person who was extradited voluntarily remains within the territory of the State to which he was extradited for a period of thirty days, or voluntarily returns thereto."[69]

2.3 Grounds for Refusing Extradition

In this section certain grounds for refusing extradition requests are discussed. These grounds are common to almost all extradition instruments. The most notable among these grounds are the political offence exemption, non-bis-in-idem, the military offence exemption, the religious offence exemption, lapse of time and others. Similarly the traditional view about the fiscal offences and modern developments thereto are also discussed. Moreover, it should be noted that most continental countries do not extradite their nationals. It is, therefore, expedient to discuss nationality as a ground for refusing an extradition request as well.

2.3.1 Political Offence Exemption

As discussed above, the earlier extradition treaties were concluded mainly for the surrender of political offenders.[70] However, with the recognition of political liberalism, it had been settled that those fighting against tyranny and oppression should not form subject of extradition.[71] Some authors refer this development to the French and American Revolutions.[72] The first extradition treaty which provided the political offence as a ground for refusing an extradition request is a bilateral treaty between Belgium and France of 1834.[73] Since then international extradition instruments as well as national extradition laws of most States have incorporated provisions to this effect. Article 5 of the Draft Convention on

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[69] Supra note 14.
[70] Supra note 11.
[71] Ibid.
[72] M. Cherif Bassiouni, *Legal Responses to International Terrorism U.S. Procedural Aspects,* (The Netherlands: Martinus Nijhoff Publishers, 1988), 204.
[73] I. Stranbrook and C. Stranbrook, *Extradition: Law and Practice, 2nd Edn.*, (London: Oxford University Press, Oxford, 2000), 4.

Extradition, 1935 for example, provides for the non-extradition of political offenders. This Article also attempts to define the meaning and application of political offence, it states as:

> "(a) A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offence, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offence .
> (b) As it is used in this Convention, the term "political offence" includes treason, sedition and espionage, whether committed by one or more persons; it includes any offence connected with the activities of an organized group directed against the security or governmental system of the requesting State, and it does not exclude other offences having a political objective."[74]

Similarly section 5(2) (a) of the 1972 Act provides a ground for refusing an extradition request in this regard. According to this provision if the offence for which the extradition request is made is of a political character, the fugitive shall not be surrendered. This Act, however, does not define the meaning of an offence of a political character. It states as:

> "(2) No fugitive offender shall be surrendered--
> (a) if the offence in respect of which his surrender is sought is of a political character or if it is shown to the satisfaction of the Federal Government or of the Magistrate or Court before whom he may be produced that the requisition for his surrender has, in fact, been made with a view to his being tried or punished for an offence of a political character ..."

According to some authors the purpose of the wide recognition of the political offence exemption is to maintain friendly relations among sovereign States. Ms. Sibylle Kapferer notes:

> "Acceptance of a general rule of non-extradition for political offences meant that the refusal of extradition on this ground would not be viewed as an unfriendly act or undue interference with the internal affairs of the requesting State."[75]

It is interesting to note, however, that in spite of its wide recognition, a precise definition of a political offence is not available in a single document. Nevertheless, there are a number of decisions of municipal courts which have discussed the meaning and nature of a political offence and a good amount of jurisprudence in this regard has gathered.

A classic case in this regard is Re Castioni.[76] The brief facts of this case are that Anglo Castioni, a Swiss citizen, had participated on September 11, 1890, in an uprising in the Canton of Ticino. The reason for this uprising was that the Cantonal government refused to revise the Ticino constitution or to hold a plebiscite on this question. A large group of citizens including Castioni tried to capture the municipal palace by forcefully entering into the building. A number of government officials including M. Rossi tried to resist the crowd. During this struggle M. Rossi was shot dead by Castioni with a revolver. The crowd was successful in capturing the palace and organizing a provisional government until it was

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[74] Supra note 3, Art. 5.
[75] Supra note 4, 27.

[76] [1891] I Q.B. 149.

dispersed when the Swiss Federal troops arrived. Castioni fled to Great Britain in order to avoid the consequences of his actions. The Swiss Government formally requested the arrest and extradition of Castioni on charges of having committed willful murder.

Castioni, after his arrest petitioned for the writ of habeas corpus claiming that he had been demanded only for a political offence. The court issued the writ in his favor and released him. Denman, J. discussing the nature of a political offence suggested that:

> "For such an act as murder ... it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands."[77]

Similarly, in 1894 the Queen's Bench Division again discussed the nature of a political offence in Re Meunier.[78] The brief facts of this case are that Meunier, a French citizen, in March 1892 caused two explosions in Paris, one of which occurred at a military barracks resulting in at least two casualties. Both the explosions were part of an effort to revenge the execution of the anarchist Ravachol. Having done so Meunier escaped to Great Britain. A French court tried him in absentia and sentenced him to death on charges of murder. An extradition request was then made to Great Britain for his arrest and surrender to France. On April 4, 1894, Meunier was arrested in London. He challenged his arrest and claimed that his act was an offence of a political character. The court rejected his claim and ordered his continued detention until he could be surrendered to agents of the French government. Cave, J. explained:

> "In order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not."[79]

The court further said that Meunier was an anarchist and the party of anarchy is the enemy of all Governments. The court said:

> "The party of anarchy is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens."[80]

In Ex parte Kolczynski,[81] the court explained the nature of a political offence in a different manner and deviated from the notion of inter-party strife within a State. The brief facts of this case are that a group of Polish seamen seized control of the trawler on which they were

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[77] Ibid.
[78] [1894] 2 Q.B. 415.
[79] Ibid.
[80] Ibid.

[81] [1955] 1 Q.B.540.

serving. They sailed the vessel to an English port and got political asylum there. They alleged that they had been under a constant observation from a party secretary. When a request for their extradition was made, they claimed that their act was a political offence and they had seized the ship in order to escape from political persecution. Moreover, the extradition request had been made with respect to revolt against the master of a ship on the high seas but if they were surrendered, they would be tried for escaping to a capitalist country which amounts to treason under Polish law. The court accepted their claim and did not order for their surrender. Cassels, J. explained:

> "The words offence of a political character must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when Castioni's case was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. ... Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this (present) case ... if they (seamen) were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime."[82]

In Schtraks vs. Government of Israel,[83] the House of Lords further elaborated the nature of the political offence exemption. It was held that the motive and purpose of the accused must be brought into consideration and that may be decisive. An offence may be committed in the course of a political struggle but it may still be an offence of an ordinary criminal nature. Lord Reid said:

> "Not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge I would not think that that could be called a political offence. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause and quite a different thing to commit the same offence for an ordinary criminal purpose."[84]

The above discussed cases lead us to conclude that the actual meaning and nature of a political offence can be best determined by the authority taking the cognizance of the offence in a particular case. It is interesting to note, however, that so far the meaning and nature of an offence of a political character has not been determined by any Pakistani court under The Extradition Act of Pakistan, 1972.

It should be noted that in modern international instruments dealing with terrorism-related crimes the scope of the political offence exemption is limited and restricted. In fact, the numerous assassinations of rulers during the second half of the nineteenth century has resulted in a wide recognition of the attentat clause, providing that the murder of a head of

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[82] Ibid.
[83] [1964] A.C. 556 (H.L.).
[84] Ibid.

foreign State, or a member of his family should not be considered a political offence. Thus Article 2 paragraph C sub-paragraphs 1 and 2 of the Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1999 exclude an aggression against State Officials from the scope of political offences even when politically motivated. It states as:

> "... (C) In the implementation of the provisions of this Convention the following crimes shall not be considered political crimes even when politically motivated:
> 1. Aggression against kings and heads of state of Contracting States or against their spouses, their ascendants or descendants.
> 2. Aggression against crown princes or vice-presidents or deputy heads of government or ministers in any of the Contracting States."[85]

2.3.2 Non Bis in Idem

As discussed above,[86] a person cannot be tried twice for the same act or acts whether the first trial results in a conviction or an acquittal. So if an extradition request is made for the surrender of a person with respect to an offence for which he has already been tried and acquitted whether in the requesting State or in the requested State or even in a third State, the extradition request will be turned down. However, if the trial results in a conviction, and the request is made to ensure that the person claimed may serve an unexpired term of the sentence imposed on him/her as a result of such conviction, this ground does not apply.

Paragraph 1 of Article 4 of the extradition treaty between Pakistan and the United States provides non-bis-in-idem as a ground for refusing an extradition request. According to it no extradition shall take place in respect of a person who has already been tried and acquitted or convicted or is still under a trial in the requested State for the offence in respect of which the request is made. It states as:

> "The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded."[87]

It should be noted that this Article does not consider the possibility that the claimed person may escape after conviction when he/she has yet to serve an unexpired term of the sentence although it is included in the very concept of extradition. This flaw is not present in the Draft Convention on Extradition, 1935. Article 9 of this Convention talks about non-bis-in-idem, it states as:

> "(a) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requesting State for the same act or acts for which his extradition is sought and has been acquitted; or if he has been convicted in such prosecution unless the extradition is sought in order that the person claimed may serve an unexpired term of the sentence

[85] Supra note 28, Art. 2(c).
[86] See 1.1.4 above, 7.
[87] Supra note 66, Art. 4.

imposed as the result of such conviction.
(b) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requested State or by a third State for the same act or acts for which extradition is sought and has been acquitted or convicted."[88]

2.3.3 Lapse of Time

Another ground for refusing an extradition request is the lapse of time. It means that an offence cannot be prosecuted after the lapse of a certain period of time. Generally, criminal offences are not barred by limitation particularly in Pakistan. However, limitation applies to criminal offences in some other jurisdictions; for example, in California it is seven years. Section 5(2) (c) of The Extradition Act of Pakistan, 1972 provides a ground for refusing extradition in this regard. According to this provision a fugitive shall not be surrendered if the offence in respect of which the surrender is claimed is barred by time according to the law of the requesting State. It states as:

"(2) No fugitive shall be surrendered--
... (c) if the prosecution for the offence in respect of which the surrender is sought is, according to the law of the State asking for the surrender, barred by time; ..."

It should be noted that the above provision makes a reference only to the law of the requesting State which, of course, can be any treaty State other than Pakistan. Similarly Article 5 of the extradition treaty between Pakistan and the United States talks about lapse of time. According to this Article in order to ascertain whether a prosecution or punishment for on offence is barred by time laws of both the States will be considered and extradition shall be refused if barred by the law of either party. It states as:

"The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to."[89]

Finally, it is considered useful to make a reference to Article 3(e) of the Model Treaty on Extradition, 1990. This Article provides a mandatory ground for refusing extradition with respect to an offence for which prosecution or punishment is barred by time. It states:

"Extradition shall not be granted in any of the following circumstances:
... e. If the person whose extradition has been requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty; ..."[90]

2.3.4 Military, Fiscal and Religious Offences

Generally, States do not extradite in cases of military, fiscal and religious offences. Military offences are those which are punishable only as violations of a military law or regulation and which are not punishable under ordinary criminal law, for example, desertion. Article 3(c) of

[88] Supra note 3, Art. 9.
[89] Supra note 66, Art. 5
[90] Supra note 40, Art. 3(e).

the Model Treaty on Extradition, 1990 provides a mandatory ground for refusing an extradition request in case of a military offence. It states as:

> "Extradition shall not be granted in any of the following circumstances:
> ... c. If the offense is an offense under military law and not also an offense under criminal law; ..."[91]

A fiscal offence can be defined as an offence in connection with the customs or revenue law of a State, and not involving misuse of public funds.[92] Traditionally, States refuse extradition in such cases. The reason behind this practice seems to be the requirement of double criminality as the fiscal offences in the requesting State may not be the offences in the requested State. However, States have cooperated with another to overcome this difficulty by adopting eliminative approach as discussed above.[93] Therefore, modern approach in this regard is to surrender the claimed persons. That is why the Draft Convention on Extradition, 1935 talks about the fiscal offences in Schedule A reservation number 2, it states as:

> "A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a fiscal offence, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a fiscal offence..."[94]

Likewise, religious offences do not form subject of extradition process. Religious offences are those offences which are made punishable by religious teachings. Drinking, for example, is a religious offence for Muslims living in any State even when the laws of that State do not declare drinking as an offence. Mr. Starke writes:

> "As a general rule, the following offences are not subject to extradition proceedings:
> i. political crimes;
> ii. military offences, for example, desertion;
> iii. religious offences."[95]

2.3.5 Extradition of Nationals

It is a general practice to discuss nationality as a ground for refusing an extradition request in extradition instruments. Generally, there are three types of provisions in this regard. The States may agree that they will not extradite their nationals or they may agree that nationality will not be a ground for refusing extradition. The States may either agree that they are not bound to extradite their nationals, thus making it discretionary. Civil law countries usually do not extradite their nationals while common law countries do not consider nationality as a bar to extradition. In Charlton vs. Kelly,[96] the Supreme Court of the United States affirmed this

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[91] Supra note 40, Art. 3(c).
[92] Supra note 3, Schedule A, Reservation No. 2.
[93] See 2.2.1.2 above, 19, 20.
[94] Supra note 3, Schedule A, Reservation No. 2.
[95] Supra note 5, 342.

[96] 229 U.S. 447 (1913).

practice. In this case, Charlton, an American citizen, murdered his wife in Italy and escaped to America. Italy requested for his extradition and he was arrested in America. He challenged his arrest in a District Court by way of a writ of a habeas corpus on ground that according to the extradition treaty between the United States and Italy neither party was bound to extradite its nationals. Since the domestic law of Italy forbids the extradition of its nationals, the treaty lacks mutuality and to this extent it is abrogated. The Court rejected this argument. On appeal the Supreme Court affirmed the lower Court's decision and explained that the lack of mutuality rendered the treaty voidable but in view of the character of American criminal law the Department of State was entitled to recognize the treaty as binding. Charlton was therefore extradited.[97]

The extradition treaty between Pakistan and Belgium makes the surrender of nationals optional. The relevant provision states as:

> "In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization."[98]

Usually, the argument in favor of non-extradition of nationals is that the nationals of the requested State might not enjoy all the safeguards of judicial process in some foreign States. This argument, however, holds no good ground. The dual standards in extradition with respect to nationals on one hand and with respect to aliens on the other may be objectionable. If justice in other States is not trusted, then there should be no extradition at all. Besides, the non-extradition of nationals is likely to defeat the justice because then they will not be prosecuted. If, however, applying the maxim *aut dedere aut judicare,* they are prosecuted, the trial is likely to result in acquittal. This is so because the transfer of all the witnesses and other proofs from the place of offence to the place of trial is very difficult. It is, therefore, suggested that nationality should not be a bar to extradition. The same is provided in Article 7 of the Draft Convention on Extradition, 1935 it states as:

> "A requested State shall not decline to extradite a person claimed because such person is a national of the requested State."[99]

Besides the above discussion, there are some other grounds for refusing extradition such as the discrimination clause, the death penalty and others. These are concerned with human rights and are, therefore, discussed in the next chapter.

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[97] Ibid.

[98] Supra note 42.

[99] Supra note 3, Art. 7.

CHAPTER III

3. Human Rights Bars to Extradition

This chapter describes certain human rights norms which bar extradition such as the imposition or execution of the death penalty, discrimination, torture, cruel, inhuman or degrading treatment or punishment and fair trial. These are discussed through the relevant provisions of various international instruments such as the International Covenant on Civil and Political Rights, 1966, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, and others. The relevant provisions of the Draft Convention on Extradition, 1935 and the Model Treaty on Extradition, 1990 are also discussed. Moreover, the views of the United Nations Human Rights Committee, the Committee against Torture, and the precedents set by the European Court of Human Rights in various cases are also discussed.

3.1 The Death Penalty

The death penalty means that a person has lost the right to life because he/she has committed such an offence that the law considers the execution of that person as a punishment for such commission justified. This seems in conflict with the well recognized and well established inherent right to life of every human being. However, it should be noted that the death penalty is not considered a violation of international human rights law particularly the right to life. An important provision in this regard is contained in the International Covenant on Civil and Political Rights (ICCPR) in the form of Article 6. Paragraph 1 of this Article gives every human being the inherent right to life. This inherent right enjoys the protection of law and no one can be deprived of this right arbitrarily. It states as:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

However, according to paragraph 2 of this Article the death penalty may be imposed if the conditions set out in this paragraph are met. This paragraph puts seven conditions for imposing the death penalty. These are as follows:

(a) It can only be carried out in States which have not abolished it;

(b) It should be only for the most serious crimes;

(c) It should be in accordance with the law in force at the time of the commission of the crime;

(d) It should not be contrary to the provisions of the International Covenant on Civil and Political Rights;

(e) It should not be contrary to the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide;

(f) It can only be carried out pursuant to a final judgment; and

(g) The final judgment must be rendered by a competent court.

Besides the above mentioned conditions, paragraph 4 of Article 6 says that if a person is given death sentence he/she shall have the right to seek pardon or commutation of the sentence. It further says that amnesty, pardon or commutation of the death sentence may be granted in all cases. Similarly, paragraph 5 of this Article says that death sentence cannot be imposed for crimes committed by persons below the age of 18 years and it cannot be executed on pregnant women.

Therefore, it can be concluded that the death penalty is not prohibited under international law although there is a tendency towards its abolition. Thus, the Second Optional Protocol to the International Covenant on Civil and Political Rights (1990) aims at the abolition of the death penalty. Similarly, Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty (1982) and Protocol No. 13 to this Convention concerning the abolition of the death penalty in all circumstances (2002) are also important in this regard. Moreover, the municipal laws of many States have already abolished the death penalty, for instance, the States parties to the aforementioned Protocols. Therefore, the municipal laws of many States such as Australia, Canada, Spain and many others provide for mandatory refusal of extradition requests unless the requesting State gives assurances that it will not impose the death penalty against the fugitive or the death penalty will not be executed if it has already been imposed.

Consequently, an increasing number of States do not extradite in cases where the fugitive is to face the death penalty. Therefore, according to the Extradition Treaty between Portugal and Pakistan the death penalty is a bar to extradition.[100] However, in order to make sure that criminals do not go unpunished the requested State in such cases seeks assurances from the requesting State that the fugitive, if extradited, will not be prosecuted to face the death penalty or if it has already been handed down, it will not be executed. Whether such assurances from the executive bind the judiciary of the requesting State is an important

[100] Supra note 51.

question which needs to be addressed seriously in a separate research.

The death penalty as a bar to extradition has been discussed by the United Nations Human Rights Committee in Kindler vs. Canada.[101] It has also been discussed by the European Court of Human Rights in Soering vs. the United Kingdom.[102] In both the cases the Committee and the Court did not declare the death penalty as a bar to extradition. The brief facts of the former case are as follows:

Mr. Joseph Kindler, a citizen of the United States of America, was convicted in November 1983 in the state of Pennsylvania, United States, of first degree murder and kidnapping, and was sentenced to death. In September 1984, prior to execution, Kindler escaped from custody. In April 1985, he was arrested in the province of Quebec, Canada. In July 1985, the United States requested to Canada Kindler's extradition. In August 1985, the Superior Court of Quebec ordered his extradition.

Article 6 of the 1976 Extradition Treaty between Canada and the United States provides:

> "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 that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed."

Canada abolished the death penalty in 1976, except in the case of certain military offences. The power to seek assurances that the death penalty will not be imposed or executed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act of Canada. On January 17, 1986 after hearing Kindler's counsel, the Minister of Justice decided not to seek such assurances. Kindler filed an application for review of the Minister's decision with the Federal Court, which was dismissed in 1987. Kindler's appeal against the decision of the Federal Court to the Court of Appeal was rejected in 1988. The Supreme Court of Canada on September 26, 1991 decided that the extradition of Kindler would not violate his rights under the Canadian Charter of Human Rights. He was extradited on the same day.

Kindler then approached the United Nations Human Rights Committee. He claimed that the decision to extradite him violated inter alia Article 6 of the International Covenant on Civil and Political Rights. He argued that the death penalty per se constitutes cruel and inhuman treatment or punishment.

With regard to a possible violation by Canada of Article 6 of the Covenant by its decision to extradite Kindler, two related questions arose. The first question was:

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[101] Kindler vs. Canada (470/1991), 30 July, 1993, UN doc. CCPR/C/48/D/470/1991.
[102] Supra note 27.

Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk of losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

The Committee replied to this question in the negative. It argued that paragraph 1 of Article 6 cannot be read in isolation. Rather, it is to be read along with other relevant provisions. Paragraph 2 permits the execution of the death penalty on fulfillment of certain conditions. In the instant case Kindler is convicted of a serious crime, he is not below the age of 18 years and he never claimed that he has not been given a fair trial by a competent court. Therefore, Canada was under no prohibition to extradite Kindler to the United States. The Committee further explained that had the conditions set out in paragraphs 2, 4 and 5 not met, Canada would have violated its obligations under Article 6 of the Covenant.[103]

The second question which the Committee answered was:

Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not imposed against Mr. Kindler?[104]

This question was also replied in the negative. The Committee argued that Canada had submitted that assurances are requested in special circumstances. The Minister of Justice after hearing Kindler's counsel decided not to request the assurances. The proper procedure had been adopted. Therefore, it cannot be said that Canada violated its obligations by not requesting the assurances.

In Soering vs. the United Kingdom,[105] the European Court of Human Rights did not declare the death penalty as a bar to extradition either. Rather, it analyzed the manner in which the death penalty is to be executed which, of course, can be qualified as cruel, degrading or inhuman treatment or punishment in some cases. It is discussed below under a separate head.

It is concluded, therefore, that the death penalty in itself is not a bar to extradition unless it is included in the extradition treaty. However, if the conditions set out in paragraphs 2, 4 and 5 of Article 6 of ICCPR are not met, the death penalty becomes a bar to extradition.

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[103] Supra note 101.
[104] Ibid.

[105] Supra note 27.

3.2 Discrimination

Another ground for refusing an extradition request is a serious fear of discrimination and prejudice against the person demanded in the requesting State on account of his/her race, religion, nationality and other such accounts. It means that an extradition request is made for the formal surrender of a person with respect to an offence of ordinary criminal nature but the requesting State intends to prosecute or punish that person discriminately. In the absence of human rights protection this practice is not uncommon. Mr. Landgren, in his article, states:

> "In countries where human rights violations occur, political opponents of the government are often charged with criminal law violations ... Governments that wish to take reprisals against their political opponents living in exile [can] simply charge them with a violation of criminal law in order to secure their extradition."[106]

This ground is provided in many national and international instruments dealing with extradition. The bases of discrimination, however, vary in these documents. Section 5(2) (g) of the Extradition Act of Pakistan, 1972, for example, provides a ground for refusing an extradition request if it is shown satisfactorily that the surrendered person will be prejudiced on account of his/her race, religion, nationality or political opinions. It states as:

> "(2) No fugitive offender shall be surrendered—
> ... (g) if it is shown to the satisfaction of the Federal Government or of the Magistrate or Court before whom he may be produced that he might if surrendered be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."

The first international document which linked discrimination with extradition was the European Convention on Extradition, 1957. Article 3(2) of this Convention provides a ground for refusing an extradition request if the person sought will be discriminated in the requesting State. According to this Article if the requested State has substantial grounds for believing that a request for extradition is made with respect to an ordinary criminal offence but that person will be prosecuted or punished on account of his/her race, religion, nationality or political opinion or that person will be prejudiced in the requesting State for any of these reasons, the requested State shall not surrender that person. It should be noted that the discrimination bases provided in this Article -race, religion, nationality or political opinion- are the same as provided in section 5(2) (g) of the 1972 Act. The Model Treaty on Extradition, 1990, however, adds to this list ethnic origin, sex or status. Article 3 of this Treaty provides mandatory grounds for refusing an extradition request. According to Article

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[106] K. Landgren, "Reflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests", UNHCR, New Issues in Refugee Research, Working Paper No. 10, June 1999.

3 paragraph (b) an extradition request shall be refused if the demanded person will be discriminated or prejudiced in the requested State. It states as:

> "Extradition shall not be granted in any of the following circumstances:
> ... If there are grounds to believe the request has been made to prosecute or punish a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that the person's position may be prejudiced for any of these reasons; ..."[107]

Moreover, there are other international instruments which provide for refusing an extradition request if it is not made in good faith or the surrender is not in the interests of justice. Article VII of the SAARC Convention, for example, states as:

> "Contracting States shall not be obliged to extradite, if it appears to the requested State that by reason of the trivial nature of the case or by reason of the request for the surrender or return of a fugitive offender not being made in good faith or in the interests of justice or for any other reason it is unjust or inexpedient to surrender or return the fugitive offender."[108]

This Article also covers the trivial nature of the case which means that the extradition request may be refused in case of an accused of minor offences also called misdemeanors and in case of a convict if the remaining sentence is nominal say a month or two.

3.3 Torture, Cruel, Inhuman or Degrading Treatment or Punishment

Under international human rights law a requested State is under an obligation to refuse an extradition request from a requesting State where the fugitive faces a real risk of torture, cruel, inhuman or degrading treatment or punishment. Torture is defined under Article 1 paragraph 1 of the United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984,[109] commonly known as the United Nations Convention against Torture (UNCAT) which states as:

> "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The main ingredients of this definition are as follows:

(a) Intentionally inflicted severe physical or mental pain or suffering;

(b) Its purpose being to obtain information or confession or to punish or discrimination;

(c) It is inflicted by a person acting in an official capacity or at his instigation; and

(d) It does not include pain or suffering arising from lawful sanctions.

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[107] Supra note 40, Art. 3(b).
[108] Supra note 45, Art. VII
[109] Supra note 46.

According to paragraph 2 of this Article the above definition is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

With regard to what constitutes cruel, inhuman or degrading treatment or punishment, it is stated that no precise definition of this wide phrase is available in a single document. Rather, it is described according to the facts of a particular case and a good amount of jurisprudence exists which describes it.

It should be noted that a number of international human rights instruments as well as constitutions of almost all the civilized States of the world put a complete ban on torture. Thus paragraph 1 Article 2 of the UNCAT requires each State party to take all types of effective measures to prevent acts of torture under its jurisdiction. Paragraph 2 of this Article declares that torture cannot be justified in any circumstances. Likewise Article 7 of the International Covenant on Civil and Political Rights (ICCPR) bans torture and other cruel or degrading treatment or punishment. It states as:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Similarly, Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5 of the 1969 American Convention on Human Rights, Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture, and Article 5 of the 1981 African Charter on Human and Peoples' Rights are important in this regard. Besides, Article 14(2) of the Constitution of the Islamic Republic of Pakistan, 1973 bans torture. It states as:

> "No person shall be subjected to torture for the purpose of extracting evidence."

Moreover, it is argued that the ban on torture and other cruel, inhuman or degrading treatment or punishment forms a part of customary international law. Therefore, it is binding on all States even if they are not parties to the relevant international instruments. There exists judicial evidence to support the argument that this ban not only forms a part of customary international law but also a part of jus cogens. The House of Lords in the famous Pinochet case followed this view. Ms. Sibylle Kapferer, in her aforementioned article, states:

> "The prohibition of torture, cruel, inhuman or degrading treatment is a peremptory norm of international law, or *jus cogens*. This means, it is binding on all States, including those which have not yet become parties to relevant international conventions. It is also non-derogable; that is, it applies in all circumstances, including during armed conflict and in times of national emergency, even where national security or the survival of a State or regime are threatened, and regardless of the conduct of the person concerned."[110]

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[110] Supra note 4, 61.

That is why Article 3(f) of the Model Treaty on Extradition, 1990 provides a mandatory ground for refusal of extradition in such circumstances. It states as:

> "Extradition shall not be granted in any of the following circumstances:
> ... If the person would be subjected to torture or cruel, inhuman treatment or degrading punishment..."[111]

Similarly, the UNCAT puts a complete ban on the extradition of a fugitive to a State where he/she would be in danger of being subjected to torture. It is provided in Article 3 paragraph 1 of this Convention which states as:

> "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

It should be noted that according to the above quoted paragraph extradition is prohibited only when there are substantial grounds for believing that the fugitive would be in danger of being subjected to torture in the requesting State. The determination whether such grounds really exist or not depends upon the facts of a particular case. Paragraph 2 of the above Article provides guidance for such determination. According to this paragraph all relevant considerations including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the requesting State should be taken into account. However, the Committee Against Torture (CAT) established under Article 17 of the UNCAT in Chipana vs. Venezuela,[112] held that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the requesting State is not itself a sufficient reason for such determination. At the same time the Committee also held that the absence of such a pattern does not mean that a person is not in danger of being subjected to torture in his/her specific case. The brief facts of this case are as follows:

Cecila Rosana Nuez Chipana was a citizen of Peru. She was accused of disturbing public order by different unlawful activities including manufacturing and planting car bombs resulting in a large number of casualties (terrorism against the State), and being a member of a subversive movement, Sendero Luminoso. She learned in the press that she was being accused of terrorism and she feared that her freedom and physical integrity were in danger in Peru, so she fled to Venezuela using the legal identity documents belonging to her sister.

In Caracas, Venezuela, Chipana got arrested on February 16, 1998. While on February 26, 1998 the Government of Peru requested her extradition on account of the above mentioned charges. Consequently, the extradition proceedings were instituted in the Criminal Chamber

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[111] Supra note 40, Art. 3(f).

[112] Chipana vs. Venezuela (110/1998). 10 November 1998. UN doc.CAT/C/21/D/110/1998.

of the Supreme Court of Justice against her. While she denied the charges leveled against her although she admitted that she had been a member of the lawful organizations such as *"United Left Movement"*, *"Glass Milk Committees"* and *"Popular Libraries Committees"*. More importantly, she claimed that the nature of accusations against her would place her in the group of persons liable to be subjected to torture. Therefore, if Venezuela extradited her to Peru it would amount to a violation of Article 3 of the UNCAT. She supported her claim by pointing out to the existence of a consistent pattern of violations of human rights especially the frequent use of torture against persons accused of belonging to insurgent organizations in Peru. Such observations had been made by the United Nations bodies, the Organization of American States and various non-governmental organizations. Moreover, Chipana claimed that if she was extradited, she would not be given a fair trial in Peru. The Supreme Court, anyhow, decided on June 16, 1998 that she was liable to be extradited to Peru. The Court's decision was, however, subject to certain conditions, such as:

(1) That she should not be liable to life imprisonment or death penalty;

(2) That she should not be liable to more than 30 years' imprisonment;

(3) That she should not be liable to detention incommunicado, isolation, torture or any other procedure that would cause physical or mental suffering while she would be on trial or serving her sentence.

She was extradited on July 3, 1998.

Meanwhile, on April 30, 1998 Chipana wrote a letter to the Committee against Torture. In this letter she communicated to the Committee the circumstances under which she was arrested, the details regarding her extradition proceedings, and her fears about human rights situation in Peru. She also asked the Committee to request Venezuela to refrain from extraditing her to Peru while her communication was being considered by the Committee.

On May 11, 1998 the Committee asked Venezuela to submit its observations regarding Chipana's communication; meanwhile, Venezuela was also requested to refrain from extraditing her while her communication was under consideration of the Committee.

On July 2, 1998 Venezuela informed the Committee that the Supreme Court had taken its decision to extradite Chipana in accordance with the municipal law as well as the 1928 Convention on Private International Law to which both Venezuela and Peru were parties. Besides, the fugitive had not provided any factual evidence which could have shown that Article 3 paragraph 1 of the UNCAT was applicable.

On the other hand, Chipana submitted that she had been extradited even though legal

remedies for her had not been exhausted. She had filed an application for constitutional *amparo*[113] in the Supreme Court against the decision of 16 June. The decision on this application was announced on July 7, 1998 while she had already been extradited on July 3, 1998. Similarly, her application for asylum which had been filed on March 24, 1998 was still undecided. Moreover, she informed the Committee that:

> "... following her extradition, she was sentenced in Peru to 25 years' imprisonment on 10 August 1998, after a trial without proper guarantees. At present, she is being held in a maximum security prison, where, *inter alia*, she is confined to her cell for the first year (23 hours in her cell and 1 hour outside each day) and can receive family visits in a visiting room for only one hour a week."[114]

The Committee also considered the periodic reports of Peru and numerous allegations from reliable sources about the use of torture by public servants during the investigation of offences of terrorism with a view to obtaining information or confession.

The Committee taking into account all the relevant information provided to it considered that Venezuela had actually acted in violation of Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which prohibits extradition in such circumstances. Furthermore, the Committee also showed its deep concerns that Venezuela had not acceded to its request not to extradite Chipana while the matter was under consideration.

It would not be out of place to quote paragraph 5.6 of the view adopted by the Committee against Torture in the above discussed case as conclusion, and that is extremely relevant to this thesis. It reads as follows:

> "... States and the international community are entitled to take action to combat terrorism. However, such action cannot be carried out in breach of the rule of law and international human rights standards. The right not to be returned to a country where a person's life, liberty and integrity are threatened would be seriously jeopardized if the requesting State had only to claim that there was a charge of terrorism against the person wanted for extradition. Such a situation is even worse if the accusation is made on the basis of national antiterrorist legislation, with open ended criminal penalties, broad definitions of "terrorist acts" and judicial systems of doubtful independence."[115]

At this point it is considered expedient to discuss the other side of the picture; that is, if extradition of a person is requested on charges of torture, even immunity as a former head of a State does not bar the extradition request. In this regard the General Pinochet case provides a good precedent.[116] It is a very important case and needs to be discussed in detail.

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[113] In many countries, an amparo action is intended to protect all rights other than physical liberty. It may, therefore, be invoked by any person who believes that any of his/her rights protected by the constitution or by applicable international treaties is being violated.

[114] Supra note 110, para 5.5.

[115] Ibid. para 5.6.

[116] Michael Byers, "THE LAW AND POLITICS OF THE PINOCHET CASE" www.law.duke.edu/journals/djcil/downloads/djcil10p415.pdf. (accessed Dec. 5, 2010).

Augusto Pinochet Ugarte was the Commander in Chief of the Army of Chile. On September 11, 1973 he got power by way of a military coup against the elected communist government of Mr. Salvador Allender, and became the President of the Governing Junta of Chile till June 26, 1974. Later he became the head of State of the Republic of Chile till March 11, 1990. Once he got the power, Pinochet abrogated the 1925 Constitution and declared a state of emergency. Thus he suspended fundamental human rights relating to arrest, detention, fair trial and imprisonment. Moreover, various torture cells were established in the country and anyone suspected of sympathy with communism whether a national or a foreigner was tortured and killed. A number of different methods of torture were used such as, for example, forced ingestion of vomit, driving vehicles over hands or feet, sexual outrages including the use of specially trained animals, burning sensitive organs with cigarettes, fire or acid and many others. Such brutal activities were practiced over a number of years although there was international pressure from time to time to punish those responsible for the crimes against humanity especially the torture. In 1980, Pinochet gave a new constitution of Chile and a plebiscite was promised. The plebiscite was held in 1988 in which Pinochet lost and he had to leave the power after Mr. Patricio Alwyn won the presidential election in 1989. In 1990 Mr. Alwyn came into power as the President of Chile while General Pinochet remained the Commander-in Chief of the armed forces.

In October 1998, General Pinochet visited Britain to receive medical treatment. Meanwhile the judicial authorities in Spain issued an international warrant for Pinochet's arrest to enable his extradition to Spain on charge of murder of Spanish citizens in Chile over which the Spanish Court had jurisdiction. Similarly, on October 18, 1998 Mr. Baltazar Garzon, a Spanish Judge issued a second international arrest warrant on charge of terrorism and genocide during the period of 1988 to 1990. Pursuant to these international arrest warrants, Metropolitan Stipendiary Magistrates issued two provisional warrants for Pinochet's arrest on 16 and 23 October 1998 and he was arrested.

Immediately after that, the Queen's Bench Divisional Court was approached to seek the quashment of these warrants. Pinochet claimed that he had immunity as a former head of a State so he could not be arrested. Torture was taken as a paradigm offence against him. On 28 October the Court accepted Pinochet's claim; both the warrants were quashed and Pinochet was set free. However, the quashment of the second warrant was stayed and an appeal was filed in the House of Lords to seek the proper interpretation of the question certified by the Divisional Court.

The question read as:

> "What is the proper interpretation and scope of the immunity enjoyed by a former Head of a State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of a State?"[117]

The Government of Spain represented by the Crown Prosecution Service (CPS) was appellant while an *amicus curiae* was also appointed by the House of Lords. Moreover, many human rights organizations were interveners and supported the appellant, most notably Amnesty International which was granted leave to present oral arguments.

The CPS contended that a foreign Head of a State enjoyed immunity during the tenure of his office but once he ceased to hold the office, he was not immune from arrest, trial or extradition in respect of offences alleged to have been committed while he was Head of a State. On the other hand, the respondent contended that he as a Head of a State enjoyed immunity for all times in respect of acts done while he was Head of a State, and therefore, he could not be arrested, tried or extradited for such acts.

The appeal was heard on 4, 5 and 9 to 12 November 1998 by a committee of five Lords including Lord Hoffmann. On November 25, 1998 the appeal was allowed and the warrant of 23 October was restored by a majority of three to two Lords of the committee. In fact, the House was equally divided, by two Lords accepting the appellant's contention while two others accepting the respondent's claim when Lord Hoffmann agreed with the former two without giving his separate reasons. The House held that:

> "...but international law had made plain that certain types of conduct, including torture and hostage-taking, were not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else: the contrary conclusion would make a mockery of international law."[118]

After this decision of the House of Lords, the Home Secretary authorized the continuation of the extradition proceedings under section 7(1) of the Extradition Act, 1989. However, after the judgment of 25th November General Pinochet and his legal advisors were revealed of a link between Amnesty International and Lord Hoffmann who had been a director of the Amnesty International Charitable Trust. Moreover, Lady Hoffmann had been working with Amnesty International since 1977 and had had administrative posts in the organization. Therefore, there was a possibility of bias on part of Lord Hoffmann and he should have disqualified himself because of this link.

On December 10, 1998 General Pinochet filed a petition in the House of Lords asking that

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[117] Judgment in Re Pinochet www.parliament.the-Stationery-office.10.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm. (accessed Dec. 5, 2009).

[118] Ibid.

the order of 25th November be set aside or at least the opinion of Lord Hoffmann should be declared void. The ground on which Pinochet based his claim was that the links between Amnesty International and Lord Hoffmann were such as to give appearance of possible bias. It should be noted that only possibility of bias and not actual bias was claimed, and it was argued that justice should not only be done but it should also seem to have been done.

This petition was heard by the House headed by Lord Browne-Wilkinson. On December 17, 1998 the House of Lords accepted this petition; the impugned order was set aside and a re-hearing by a differently constituted committee was directed. On March 24, 1999 a committee consisting of seven Lords headed by Lord Browne-Wilkinson again held with a majority of six to seven that Mr. Pinochet did not enjoy immunity as a former Head of a State. The committee acknowledged that,

> "...the systematic use of torture on a large scale and as an instrument of state policy is a crime against humanity, possessing the character of jus cogens and justifying States in taking universal jurisdiction over torture wherever committed."[119]

However, the double criminality requirement in extradition reduced the charges against Mr. Pinochet to only those acts which were alleged to have been committed after 1988 since the UNCAT was incorporated into domestic law of Britain by the Criminal Justice Act, 1988. Since the House of Lords held in favour of extradition on reduced charges, the Home Secretary was directed to exercise his discretion to authorize or stop the extradition proceedings afresh. On April 14, 1999 the Home Secretary again authorized the extradition proceedings against Mr. Pinochet. After this authorization an extradition hearing took place in the Bow Street Magistrates Court and on October 8, 1999 it was held that Mr. Pinochet could be extradited to Spain. However, before the General could be extradited to Spain, the government of Chile requested the Home Secretary to consider releasing Mr. Pinochet on medical grounds. In response to this request Mr. Pinochet was medically examined, and on January 5, 2000, the medical report suggested that he was unfit to stand trial. It should be noted, however, that the medical report was not made public; even it was not shared with the authorities requesting the extradition. This decision of not sharing the medical report was challenged in the Divisional Court. On February 15, 2000 the Court held that the medical report had to be shared with the judicial authorities of the States requesting the extradition. Although the Court ordered to share the medical report under strict confidentiality, it got leaked to media and by the next day everyone was aware of the contents of the report. It revealed that Mr. Pinochet was really very ill, his memory had been badly affected and he

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[119] Ibid.

was considered incapable of following the process of a trial so as to instruct his lawyers. This report was not challenged and on March 2, 2000 Mr. Pinochet was sent back to Chile.

The above discussed case is considered a milestone in the struggle for the realization of human rights. Mr. Frances Webber in his article, "The Pinochet Case: The Struggle for the realization of Human Rights" states:

> "Despite the fudging and hedging on the issue of extradition crimes at the second hearing, the Lords' decision to break with the medieval conception of absolute immunity for former heads of state in respect of international crimes is an important milestone in international human rights law."[120]

Having discussed this much about torture, in the following lines "cruel, inhuman or degrading treatment or punishment" is discussed. As noted above,[121] the United Nations Human Rights Committee in Kindler vs. Canada,[122] held that the death penalty per se does not constitute cruel, inhuman or degrading treatment or punishment. However, the manner in which a death sentence is executed may constitute cruel, inhuman or degrading treatment or punishment. Therefore, the Committee in paragraph 6.8 held that:

> "...the methods employed for judicial execution of a sentence of capital punishment may in a particular case raise issues under Article 7 (of the International Covenant on Civil and Political Rights)"[123]

The Committee found that in Pennsylvania where Kindler was to be extradited the method of execution of a death sentence was lethal injection which could not be qualified as cruel, inhuman or degrading treatment or punishment. Another important case in this regard which needs to be discussed here is Ng vs. Canada.[124] In this case the United Nations Human Rights Committee discussed, inter alia, the execution of a death penalty by gas asphyxiation, and held it to be cruel and inhuman treatment within the meaning of Article 7 of the International Covenant on Civil and Political Rights, 1966. The facts and issues in this case are very similar to those of Kindler vs. Canada discussed above, therefore, only the method of execution of the death penalty is discussed here.

On September 25, 1991 Charles Chitat Ng communicated to the United Nations Human Rights Committee that Canada had decided to extradite him to the United States where he was likely to face the death penalty. According to Ng's claim this decision violated, inter alia, Article 7 of the International Covenant on Civil and Political Rights because the death

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[120] Supra note 63, 536.
[121] Supra note 101.
[122] Ibid.
[123] Ibid. para 6.8.
[124] 98 ILR 479. http://www1.umn.edu/humanrts/undocs/html/dec469.htm(accessed (accessed Dec 9, 2010).

penalty in California would be executed by gas asphyxiation which, he claimed, constituted cruel and inhuman treatment or punishment per se. On the other hand, Canada argued that there was no indication that execution by cyanide gas asphyxiation was contrary to the International Covenant on Civil and Political Rights or to international law. The counsel for Ng rebutted this argument and submitted that asphyxiation might take up to twelve minutes during which the condemned person would remain conscious and experience obvious pain and agony. Moreover, he argued that this method of execution was followed in only three states in the United States and there was no evidence to suggest that it was an approved method of carrying out judicially imposed death sentences. The Committee also recalled its General Comment 20[44] on Article 7 of the Covenant (CCPR/C/21/Add.3, paragraph 6) whereby it had commented that the execution of the death penalty *"...must be carried out in such a way as to cause the least possible physical and mental suffering."*

Finally, the Committee concluded on the basis of information provided to it that execution by gas asphyxiation would not meet the test of least possible physical and mental suffering. This method of execution, therefore, constituted cruel and inhuman treatment.

It is interesting to note, however, that the Committee did not discuss in this case the other methods of execution.

Another important factor which should be taken into consideration at this point is the so called *"death row phenomenon."* It refers to the delay between the imposition of a death sentence and its execution. In this regard, the conditions of the prison where the convict is to wait the execution, the age of the convict, the length of time between imposition and execution of the death sentence and alike are taken into consideration to judge whether it constitutes cruel, inhuman or degrading treatment or punishment or not. As far as the jurisprudence of the United Nations Human Rights Committee in this respect is concerned, it has held that:

> "...prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment or punishment if the convicted person is merely availing himself of appellate remedies."[125]

However, the European Court of Human Rights in Soering vs. the United Kingdom had already held that,

> "...in the Court's view, having regard to the very long period of time spent on death row in ... extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, ... the applicant's extradition to the United States would expose him to a real

[125] Supra note 101, para 15.2.

risk of treatment going beyond the threshold set by Article 3 (of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.)"[126]

Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms states as:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

It is considered expedient to discuss Soering's case here briefly.

Mr. Jens Soering was a German national. In 1985, at the age of 18 years he was a student at the University of Virginia, U.S.A. where he fell in love with Ms. Elizabeth Haysom, a Canadian national. However, the parents of Soering's girl friend were opposed to this relationship. Therefore, he and his girl friend planned to kill them. According to their plan they went to Washington to set up an alibi in March 1985. Then, Soering alone went back to Bedford, Virginia where the parents of his girl friend lived. He talked to them and tried to convince them about his relationship with their daughter but they did not agree. Soering then killed them both with a knife. In October 1985 both Soering and his girl friend disappeared from Virginia.

However, in April 1986, they were arrested in England in connection with a cheque fraud. In June 1986, Soering was interviewed in England by a police investigator from Sherriff's Department of Bedford country. During the investigation Soering admitted that he had killed his girl friend's parents. On June 13, 1986 the Circuit Court of Bedford country indicted him on charges of murdering the parents of Elizabeth Haysom. On August 11, 1986 the United States of America requested the United Kingdom to extradite Soering and Elizabeth on the above mentioned charges. On September 12, 1986 a magistrate at Bow Street Magistrate's Court issued arrest warrants pursuant to the extradition request. On October 29, 1986 the United Kingdom requested the United States to give assurances that if Soering was extradited, the death penalty would not be imposed or if imposed would not be executed.

The arrest warrant issued by the Bow Street Magistrate's Court was executed on December 30, 1986 as Soering had been sentenced to imprisonment in connection with the cheque fraud. The same day a German Prosecutor from Bonn interviewed Soering regarding the murders he had committed, as the German Court had jurisdiction to try him for these offences. On February 11, 1987 the local court in Bonn issued an arrest warrant against Soering in respect of the alleged murders. On March 11, 1987 Germany requested the United Kingdom for Soering's extradition to Germany. However, the Britain Secretary of State did

[126] Supra note 27, para 111.

not authorize the extradition proceedings on this request because it contained insufficient evidence to make out a prima facie case against Soering as it consisted of only admissions made to the Bonn prosecutor without a caution, whereas the admissions made to the police investigator from the Sherriff's Department of Bedford country were made with proper caution and in the presence of two United Kingdom police officers.

On April 23, 1987 the United States requested the United Kingdom to prefer its request for Soering's extradition to that of Germany. On May 8, 1987 the United Kingdom extradited Elizabeth Haysom to the United States where she pleaded guilty as an accessory to the murders of her parents and on October 6, 1987 she was sentenced to 90 years' imprisonment. On May 20, 1987 the United Kingdom communicated to Germany that it had decided to prefer the United States' request for Soering's extradition to that of Germany. However, Soering's extradition to the United States would be subject to the receipt of satisfactory assurances regarding the imposition or execution of the death penalty. On June 8, 1987 and on May 17, 1988 the United Kingdom received two assurances in the form of sworn affidavits by the Attorney for Bedford country which read as:

> "I hereby certify that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."[127]

It should be noted, however, that latter the Virginian authorities informed the United Kingdom that the Attorney would not provide any further assurances; rather, he intended to seek the death penalty in Soering's case because he believed that the evidence supported such action.

On June 16, 1987 it was held by the Bow Street Magistrate's Court that Soering could be extradited to the United States. On June 29, 1987 Soering approached the Divisional Court and applied for a writ of habeas corpus as well as for leave to apply for judicial review of the lower court's decision. In his leave to apply for judicial review, Soering claimed that the assurances given by the United States were not satisfactory. However, on December 11, 1987 both these applications were rejected. Moreover, on June 30, 1988 Soering's petition for leave to appeal against the decision of the Divisional Court was also rejected by the House of Lords. On July 14, 1988 Soering petitioned the Secretary of State in which he requested him to exercise his discretion not to order the surrender to the United States. However, this

[127] Ibid, para 20.

request was also rejected, and on August 3, 1988 the Secretary of State signed a warrant ordering Soering's surrender to the United States.

Meanwhile, on July 8, 1988 Soering approached the European Commission of Human Rights. In this application he claimed, inter alia, that in spite of assurances given to the United Kingdom about the non imposition of the death penalty, there was a serious likelihood that he would be sentenced to death if extradited to the United States where he would have to face the death row phenomenon. Soering claimed that this amounted to inhuman and degrading treatment and punishment which would be a violation of Article 3 of the 1950 European Convention on Human Rights. Soering requested the Commission to ask the United Kingdom not to extradite him till the Commission decided his application.

On August 11, 1988 the Commission asked the United Kingdom not to extradite Soering till the final disposal of the application. That is why in spite of the warrant of 3 August, Soering was still in the United Kingdom.

The European Commission of Human Rights gave its opinion on January 19, 1989. According to this opinion the United Kingdom would commit no breach of Article 3 if Soering was extradited to the United States. However, the Commission found that there had been a breach of Article 13 of the Convention.

Then, on January 25, 1989 the case was brought before the European Court of Human Rights by the Commission. The Court was asked inter alia whether or not the facts of the case constituted a breach by the United Kingdom of its obligations under Article 3 of the Convention.

As Soering claimed that the death row phenomenon constituted a breach of Article 3, the Court found that the issue of Article 3 would arise only if Soering ran a real risk of the death penalty and hence of exposure to death row phenomenon.

In order to determine the risk of the death penalty the Court discussed the circumstances in which the alleged murders were committed, analyzed the relevant laws in Virginia and considered the assurances given to the United Kingdom. The Court finally concluded that Soering ran a real risk of the death penalty and hence of exposure to death row phenomenon. The Court said:

> "...it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the death row phenomenon. The Court's conclusion is therefore that the likelihood of the feared

> exposure of the applicant to the "death row phenomenon" has been shown to be such as to bring Article 3 into play."[128]

The Court then analyzed Soering's age and mental condition at the time when he committed the alleged murders, the length of time between the imposition and execution of the death penalty, the conditions which Soering was likely to face while on death row and most importantly the possibility of his extradition to the Federal Republic of Germany regarding which he had submitted that he would not oppose it.

Regarding the age and mental condition of Soering at the time when he committed the alleged murders the Court found that:

> "At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he was suffering from [such] an abnormality of mind ... as substantially impaired his mental responsibility for his acts."[129]

As regards to the length of time the Court found that it is on average six to eight years. It should be noted, however, that this length of time is usually the result of availing the advantage of all avenues of appeal which are offered to a convict by Virginia law. Taking into account of all the relevant considerations, the Court held that:

> "However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death."[130]

With regard to the conditions on death row the Court found that Soering was expected to be detained in Mecklenburg Correctional Center awaiting his execution where he feared that he would become a victim of violence and sexual abuse because of his age, colour and nationality. The Court held that these conditions along with other factors discussed here would constitute inhuman and degrading treatment and punishment. Therefore, if the United Kingdom extradited Soering to the United States, it would amount to a breach of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the United Kingdom.

Finally, the Court observed that Soering should be extradited to the Federal Republic of Germany so that he could not escape the legal consequences of his wrongful actions.

One can compare the United Nations Human Rights Committee's finding on the death row phenomenon in Kindler vs. Canada to that of the European Court of Human Rights' in Soering vs. the United Kingdom to conclude that the death row phenomenon does not per se

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[128] Ibid. para 98 & 99.

[129] Ibid. para 108.

[130] Ibid. para 106.

constitute cruel, inhuman or degrading treatment or punishment. Regard must be had to the particular facts of a case and if it is found that it amounts to cruel, inhuman or degrading treatment or punishment, extradition shall be barred.

Having discussed the method of execution of the death penalty and the death row phenomenon, it is considered expedient to discuss two more cases decided by the European Court of Human Rights which involved issues of inhuman or degrading treatment or punishment. The titles of these cases are Tyrer vs. the United Kingdom,[131] and Ireland vs. the United Kingdom.[132] In the former case, the European Court of Human Rights declared the judicial corporal punishment as degrading within the meaning of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms .The brief facts of this case are follows:

Anthony M. Tyrer was a citizen of the United Kingdom who resided in Castle town, Isle of Man. On March 7, 1972 at the age of 15 years he was convicted by a local juvenile court of unlawful assault resulting in actual bodily harm to a senior pupil at his school, and was sentenced to three strokes of birch under section 56(1) of the Petty Sessions and Summary Jurisdiction Act, 1927 and section 10(b) of the Summary Jurisdiction Act, 1960.

Section 56(1) states as:

> "Any person who shall -
> (a) unlawfully assault or beat any other person;
> (b) make use of provoking language or behaviour tending to a breach of the peace, shall be liable on summary conviction to a fine not exceeding thirty pounds or to be imprisoned for a term not exceeding six months and, in addition to, or instead of, either such punishment, if the offender is a male child or male young person, to be whipped."

The expression young person referred to an individual of or over the age of 14 and under 17, so Tyrer fell in this category. He appealed against his sentence to Staff of Government Division of the High Court of Justice of the Isle of Man. On April 28, 1972, the appellate court dismissed the appeal holding that unprovoked assault resulting in actual bodily harm was a very serious offence and there was no reason s for interfering with the sentence. After this dismissal Tyrer was medically examined and the report declared that he was fit to receive the punishment. Then on the same day in the presence of a doctor and his father, Tyrer was made to take down his trousers and underpants and bend over a table in a police station. He was held by two policemen while a third administered the punishment. The birching raised

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[131] 26 Eur. Ct. H. R. (ser. A) (1978) http://www.strasbourgconsortium.org/document.php?DocumentID=2151last (accessed Dec. 9, 2010).

[132] 25 Eur. Ct. H. R. (ser. A) (1978) http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695383&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (accessed Dec. 9, 2010).

Tyrer's skin, and he was sore for about ten days after that.

On September 21, 1972 Tyrer lodged an application with the European Commission of Human Rights claiming inter alia that his judicial corporal punishment constituted a breach of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He alleged that he had been subjected to torture or inhuman or degrading treatment or punishment or any combination thereof.

On December 14, 1976 the Commission gave the opinion that the judicial corporal punishment inflicted on Tyrer did not constitute torture or inhuman treatment or punishment. It, however, did constitute degrading treatment or punishment. Moreover, the Commission referred this case to the European Court of Human Rights to obtain a decision from the Court whether or not the facts of the case amounted to a violation of Article 3 of the Convention by the United Kingdom. The Court agreed with the Commission's opinion that the judicial corporal punishment constituted degrading treatment or punishment. The Court holding so discussed the arguments given by the Attorney General for the Isle of Man and the facts of the case. The Attorney General told the Court that the punishment was carried out in private and without publication of any name, so it could not be considered as degrading. The Court, on the other hand, held that publicity might be a relevant factor in assessing whether a punishment was degrading but the absence of publicity did not mean that a punishment could not be degrading. The victim might be humiliated in his own eyes even if not in the eyes of other persons. The Court further held that:

> "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalized violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects."[133]

Although the above discussed case did not include the issue of extradition, it can be concluded that if a fugitive faces a real risk of judicial corporal punishment in the requesting State, he/she has a right to get the extradition request turned down in the absence of satisfactory assurances not to inflict such punishment on the extraditee from the requesting State, as this type of punishment constitutes degrading treatment or punishment.

In Ireland vs. the United Kingdom the European Court of Human Rights analyzed the

[133] Supra note 127, para 33.

compatibility of interrogation methods particularly the five techniques used against the members of Irish Republican Army with Article 3 of the 1950 European Convention on Human Rights. These techniques sometimes referred as *"disorientation"* or *"sensory depriviation"* techniques consisted of:

> "(a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
> (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
> (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
> (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
> (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations."[134]

The Court said that for these techniques to be qualified as inhuman and degrading treatment or punishment, the suffering must attain a certain level of pain and feeling of fear and anguish in the victims. According to the judgment of the Court, these techniques amounted to inhuman and degrading treatment or punishment because:

> "The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[135]

In the light of the above discussed case, it can be concluded that if the fugitive faces a real risk of intimidatory interrogation techniques in the requesting State, the extradition request can be refused until the requesting State furnishes satisfactory assurances that such techniques would not be used against the fugitive. Nevertheless, it should be noted that there would be hardly any State admitting that it uses such interrogation techniques; therefore, assurances are least likely to be given in such a situation.

3.4 Fair Trial

One of the most important rights of an accused person is the right to a fair trial. This fundamental right is protected by various international and national instruments. From amongst such international instruments the most notable are Article 14 of the International Covenant on Civil and Political Rights, 1966 (ICCPR), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR), Article 3(f)

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[134] Supra note 128, para 96.

[135] Ibid. para 167.

& 3(g) of the Model Treaty on Extradition, 1990 and Article 23(1) (c) of the Draft Convention on Extradition, 1935. While with regard to national instruments in this respect, it is stated that the constitutions of all civilized States contain provisions which protect this right. The Constitution of the Islamic Republic of Pakistan, 1973 contains several such articles, for example, Article 10-A, Article 12 and Article 13. It should be noted, however, that Article 10-A specifically provides the right of fair trial and due process to every person for the determination of his/her civil rights and obligations as well as in any criminal proceedings against him/her. It states as:

> "For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

It should further be noted that the above stated Article has only been included in the Constitution in April 2010 after the eighteenth amendment. Before that though other Articles protected the right to a fair trial, a number of cases in the judicial history of Pakistan made this right doubtful. The trial and execution of Zulfiqar Ali Bhutto, the former Prime Minister of Pakistan, is considered one such case. Mr. Hamid Khan, a senior advocate and the former President of the Supreme Court Bar Association, in his book, *The Constitutional and Political History of Pakistan,* points out the events which made the Bhutto case unfair. These are discussed below.

i: Bhutto was nominated in the FIR of the murder of Nawab Muhammad Ahmed in November, 1974, an offence ordinarily triable by a court of session. However, the case was transferred to the High Court and that too without a notice to the accused.

ii: Mr. Justice K.M.A. Samdani had granted a bail to Bhutto which was cancelled by a full Bench of five judges headed by Justice Maulvi Mushtaq Hussain. The Bench did not include Justice Samdani who had earlier granted the bail. It was against the established practice of the Court that the cancellation application is fixed before the judge who had granted the bail or at least before a Bench of which he/she is a member. On the other hand, Justice Mushtaq was known to be biased against Bhutto for he had been superseded by a junior judge as the Chief Justice of the High Court.

iii: After a few hearings which held publically, the Court proceedings were held in camera.

iv: Two applications on behalf of the accused, one for the transfer of the case and the other requesting open hearing, were dismissed by the Court in chambers. Thereafter, Bhutto withdrew his power of attorney and boycotted the proceedings of the trial. However, he recorded his statement that he had no confidence in the fairness of the trial and why the case had been fabricated against him.

It is surprising that the Court, in spite of all this, awarded the death punishment to Bhutto and that too without reproducing his statement in the judgment. An appeal was lodged against the judgment of the High Court but without success. Without going into the details of the appeal proceedings, it is submitted that the above referred points in no way match the fairness required in the administration of criminal justice.

At this point it is considered expedient to point out the relation between extradition and the right to a fair trial. The European Court of Human Rights in Soering vs. the United Kingdom impliedly said that if a fugitive fears a risk of flagrant denial of this right in the requesting State, the extradition can be refused. The Court said:

> "The right to a fair trial in criminal proceedings ... 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."[136]

Besides, Article 14 of the International Covenant on Civil and Political Rights which is a lengthy Article and has 7 paragraphs provides for the right to a fair trial. Paragraph 1 says inter alia that all persons are equal before courts, and every accused has a right to be tried fairly by an independent and impartial court. It states as:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Paragraph 2 of this Article talks about the presumption of innocence which is the basic right of every accused. However, this presumption is rebuttable but the evidence which rebuts this presumption should be beyond reasonable doubt. It states as:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

It should be noted that paragraph 2 of Article 6 of ECHR is exactly similar to that of Article 14 of ICCPR. Therefore, the European Court of Human Rights in Barbera, Messegue & Jabardo vs. Spain,[137] explains the principle of the presumption of innocence in the following words:

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[136] Supra note 27, para 113.

[137] 146 Eur. Ct. H. R. (ser. A) (1988) http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=66089888&skin=hudoc-en (accessed Dec. 9, 2010).

> "Paragraph 2 embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. ...The presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty."[138]

The European Court of Human Rights in the same case also explains paragraph 3 of Article 6 of ECHR, which talks about the minimum guarantees, in the following words:

> "Paragraph 1 of Article 6 taken together with paragraph 3, also requires the Contracting States to take positive steps, in particular to inform the accused promptly of the nature and cause of the accusation against him, to allow him adequate time and facilities for the preparation of his defence, to secure him the right to defend himself in person or with legal assistance, and to enable him to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The latter right not only entails equal treatment of the prosecution and the defence in this matter but also means that the hearing of witnesses must in general be adversarial."[139]

In Kostovski vs. The Netherlands,[140] the European Court of Human Rights gave its finding on the proceedings of a case in which the conviction was based on the statements of anonymous witnesses. The Court held that the convict had not had a fair trial, and it amounted to a violation of Article 6 of ECHR.

Slobodan Kostovski was convicted of a bank robbery on the basis of statements given to a police officer and two magistrates by persons who wanted to remain anonymous because they feared reprisals. The police officer and the magistrates drew the accounts of these statements and produced these accounts as evidence against Kostovski in the trial court. The counsel for the accused could ask questions only from the police officer and the magistrates since the authors of the statements remained anonymous and did not appear in the court so they could not be cross examined.

The European Court of Human Rights held that:

> "...an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings...if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility."[141]

The Court further held that the right to a fair trial cannot be sacrificed to expediency.

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[138] Ibid. para 77 &91.
[139] Ibid. para 78.
[140] 166 Eur. Ct. H. R. (ser. A) (1989) http://cmiskp.echr.coe.int/tkp197/view.asp?item=13&portal=hbkm&action=html&highlight=&sessionid=66090645&skin=hudoc-en (accessed Dec. 9, 2010).
[141] Ibid. para 41, 42.

It said:

> "Although the growth in organised crime doubtless demands the introduction of appropriate measures ... the right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency."[142]

In the light of the above discussion, it can be concluded, therefore, that the extradition of a fugitive who has not had a fair trial in the requesting State should be refused until satisfactory assurances are given that he/she will be given a fresh fair trial. While in case of a fugitive who seriously fears a violation of his/her right of fair trial in the requesting State, the extradition can be made conditional upon satisfactory assurances to the requested State and monitoring of the trial by its officials.

[142] Ibid. para 44.

CHAPTER IV

4. Extradition Law of Pakistan and Other Related Issues

This chapter is the most important part of the thesis. In this chapter the Extradition Act of Pakistan, 1972 is discussed in detail along with the interpretation of various provisions contained in the Act by the superior courts. This is discussed in comparison to the extradition laws of other States such as Australia, New Zealand, Canada, the United Kingdom and others. Illegal extradition by deporting and kidnapping fugitive offenders is also discussed in this chapter. However, this chapter begins with the procedural aspects of extradition with special focus on the prima facie case requirement in the extradition procedure.

4.1 Procedure of Extradition

It should be noted from the very outset that the procedure of extradition varies sharply from State to State. It is so mainly because of different traditions with respect to extradition in common law and civil law jurisdictions, for example, common law States require from the requesting State to make out a prima facie case against the fugitive while the civil law States hardly require such standard of evidence. Moreover, as stated earlier,[143] the municipal extradition law of the requested State proceeds to determine the fate of an extradition request which, of course, varies from one State to another, thus resulting in different extradition procedures.[144]

Nevertheless, a formal extradition request, usually transmitted through diplomatic channels, for the apprehension and surrender of the fugitive is a common part of extradition procedure almost everywhere in the world. Such a request, in the first place, must identify the person whose extradition is sought. Besides the proper identification, it should contain an arrest warrant either in original or an attested copy thereof. Finally, it should specify the reasons for the extradition request, that is a description of allegations leveled against the concerned person and the text of relevant laws in case of an accused while in case of a person already convicted the judgment of an independent and competent court.

It should be noted, however, that apart from these documents, the requested State is entitled to seek any further information which it deems necessary. In this regard the common law countries usually require from the requesting State to make out a prima facie case against the

[143] See 1.3 above, 12.
[144] Supra note 4, 56.

fugitive by submitting sufficient evidence in support of the extradition request. The civil law countries, on the other hand, occasionally require any evidence from the requesting State let alone making out a prima facie case.

In most States, both the executive and the judiciary are involved in determining the fate of an extradition request. In the initial administrative stage, the concerned authority of the requested State determines whether the request is admissible, that is, the form of the request and the documents it contains are proper to proceed with it. If the request is determined proceed able, it is put before a judicial officer who determines if there is any legal bar to surrender the fugitive offender. In case there exists a legal bar the request is turned down. However, if no such bar exists and the fugitive offender can be lawfully surrendered, the judicial officer sends a report to this effect to the executive who has to make a final order. If the request is accepted, the fugitive offender is surrendered to the requesting State otherwise he/she is discharged if in custody.

The following section reviews the requirement of making out a prima facie case against the fugitive offender as a general principle of extradition.

4.1.1 Prima facie Case Requirement

A prima facie case for the purpose of extradition has been defined in various instruments. Among these instruments the most notable is the Draft Convention on Extradition, 1935.[145] Reservation Number Five in Schedule A of this Convention defines, inter alia, prima facie case as:

> "A requested State may require that the requesting State make out a prima facie case of guilt on the part of the person claimed such as would be sufficient, in case the person claimed were accused of having committed the alleged act or acts within the territory of the requested State, to justify a magistrate of that State in ordering that he be held for trial." [146]

The gist of this definition is that the evidence against the accused justifies his/her detention for facing a criminal trial. Similarly, in an English case, R. vs. Governor of Brixton Prison, ex-party Schtraks,[147] the court described a prima facie case in the following words:

> "A prima facie case is proven if the extradition magistrate is satisfied that, if the evidence stood alone at trial, a reasonable jury, properly directed, could accept it and find a verdict of guilty."[148]

A prima facie case as a general principle of extradition has become an issue of some debate especially after the European Convention on Extradition, 1957 which does not require a prima facie case to be made out by the requesting State. Similarly, the Extradition Act of

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[145] Supra note 3.
[146] Ibid., Res. No. 5 A
[147] [1994] AC 556 (HL)
[148] Ibid.

Australia, 1989 talks about a "no evidence" rule. According to section 19 sub-section 3 of this Act, the requesting State is not required to submit any evidence in support of an extradition request. On the other hand, almost all common law States require the requesting State to make out a prima facie case against the fugitive in support of the extradition request. So is the case in the Extradition Act of Pakistan, 1972. According to section 10 of this Act, if after magisterial enquiry a prima facie case is not made out against the fugitive, he/she shall be discharged. However, if such a case is made out, the magistrate shall commit him/her to prison subject to any provision relating to bail. It states as:

> "If after the enquiry .... the Magistrate is of opinion-
> (a) that a prima facie case has not been made out in support of the requisition for surrender of the fugitive offender, he shall discharge the fugitive offender and make a report to that effect to the Federal Government;
> (b) that a prima facie case has been made out in support of such requisition, he shall-
> (i) report the result of his enquiry to the Federal Government ;
> (ii) forward, together with such report, any written statement which the fugitive offender may desire to submit for the consideration of the Federal Government ; and
> (iii) subject to any provision relating to bail, commit the fugitive offender, to prison to await the orders of the Federal Government."

It should be noted that although a prima facie case is required to be made out under the 1972 Act, it is not defined in the Act. Nonetheless, Justice Gul Zarin Kiani of the Lahore High Court in Muhammad Asim Malik vs. Anwar Jalil,[149] described the meaning of a prima facie case in the following words:

> "...Keywords in the section are "a prima facie case in support of the requisition". The phrase "prima facie case" is not a term of art and, in law, signifies adequate to establish a fact or raise a presumption of fact unless rebutted. Prima facie case, means a substantial question raised bona fide which at first sight needs investigation and decision..."[150]

As far as the Australian Extradition Act, 1989 which talks about the no evidence rule is concerned, it is submitted that a prima facie case is still required to be made out in Australian Extradition relations with countries governed by the Commonwealth scheme as well as extradition treaties inherited from the United Kingdom. Similarly, Denmark has made a reservation to Article 12 of the European Convention on Extradition, 1957 according to which Denmark, under special circumstances, may require the requesting State to submit sufficient evidence in support of the extradition request so as to establish a presumption of guilt with respect to the fugitive. Moreover, some civil law countries such as Germany, Norway, Slovenia and others do require the requesting State to submit evidence supporting the extradition request. Therefore, it cannot be said that only common law countries require a prima facie case to be made out.

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[149] PLD 1989 Lah. 279.
[150] Ibid, 293.

In fact, the evidence submitted with the extradition request helps the requested State to assess the genuineness of the request. Consequently, it protects the rights of the fugitive. Although there is no general State practice with respect to making out a prima facie case, it is concluded that if a person living in a State is to be detained and transferred to another State to face a criminal trial, at least sufficient evidence which inculpates him/her should be submitted along with the extradition request.

4.2 Extradition Act, 1972

Having discussed this much, it is considered expedient to discuss and analyze the provisions of the Extradition Act of Pakistan, 1972 along with the decisions and interpretation of these provisions by the superior courts of Pakistan in comparison to the provisions of extradition laws of other jurisdictions. However, an issue of the first importance is to ascertain the validity of the Extradition Act of Pakistan, 1972 as it has been assailed being ultra vires of the Constitution.

4.2.1 The Constitution and the 1972 Act

In Nasrullah Khan Henjra vs. the Government of Pakistan,[151] it was asserted, inter alia, on behalf of the petitioner that the Extradition Act, 1972 should be declared void as far as it allowed the forced removal of the citizens of Pakistan to a foreign State while they had an absolute right to remain in Pakistan. It was argued that Article 15 of the Constitution of the Islamic Republic of Pakistan, 1973 protects the following fundamental rights of every citizen:

i: the right to remain in Pakistan;

ii: subject to any reasonable restriction imposed by law in the public interest, the right to enter and move freely throughout Pakistan;

iii: subject to any reasonable restriction imposed by law in the public interest, the right to reside and settle in any part of Pakistan.

Article 15 states as:

> "Every citizen shall have the right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof."

It should be noted that a plain reading of the above stated Article reveals that the right to remain in Pakistan is absolute and cannot be restricted in any form while the other rights provided in this Article are subject to restrictions. A reference was also made to Article 11 of the earlier Constitution of Pakistan, 1956 and Article 5 of the earlier Constitution of Pakistan,

[151] PLD 1994 SC 23.

1962. Both these Articles protect the fundamental rights of every citizen to move freely throughout Pakistan and to reside and settle in any part thereof. However, these rights are subject to reasonable restrictions imposed by law in the public interest. Article 11 of the 1956 Constitution states as:

> "Subject to any reasonable restriction imposed by law in the public interest, every citizen shall have the right:
> (a) to move freely throughout Pakistan and to reside and settle in any part thereof..."

It should be noted that the above stated Article does not provide for the absolute right to remain in Pakistan. Likewise, Article 5 of the 1962 Constitution does not provide such a right. It states as:

> "(1) No law should impose any restriction--
> (a) on the freedom of a citizen to move throughout Pakistan or to reside or settle in any part of Pakistan...
> (2) This principle may be departed from where it is necessary so to do in the public interest."

Moreover, it was stated in the above mentioned case that the civil law countries did not extradite their nationals. Therefore, it was argued on the basis of the above referred Articles and the practice of civil law countries with regard to their nationals that the makers of the Constitution of the Islamic Republic of Pakistan, 1973 willfully followed the practice of civil law countries as far as they would not allow the surrender of their citizens to a foreign State. This intention of the Constitution makers was expressed in the form of Article 15 which, inter alia, provides and protects the fundamental and absolute right of every citizen to remain in Pakistan. Consequently, the Extradition Act, 1972 as far as it allows the extradition of nationals stands void in terms of Article 8(1) of the 1973 Constitution. This Article provides that any law which is inconsistent with the fundamental rights provided by the Constitution shall be void to the extent of such inconsistency. Article 8(1) states as:

> "Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void."

The Supreme Court, on the other hand, rejected the above stated arguments and held that there was no inconsistency between the Act and the right to remain in Pakistan. The Court relied mainly on the Objectives Resolution which has been made substantive part of the Constitution by Article 2-A and on item number 3 in Part I of the Federal Legislative list contained in the Fourth Schedule of the Constitution to reach its decision. The Court noted that the goal which the people of Pakistan want to achieve and which has been reiterated in all the Constitutions of Pakistan is to attain their rightful and honored place amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity. This goal cannot be achieved if Pakistan becomes a safe haven

for those of its citizens who commit serious crimes abroad and then take refuge in Pakistan to avoid the consequences of their actions given the fact that only a few Pakistani penal laws have extra-territorial applicability. Moreover, item number 3 in Part I of the Federal Legislatively list expressly empowers the legislature to enact laws, inter alia, on the subject of extradition including the surrender of criminals and accused persons to Governments outside Pakistan. Since the provisions of the Constitution are to be construed in harmony with one another, it cannot be declared that the Extradition Act, 1972 is inconsistent with the right to remain in Pakistan. The Court also ruled out the argument that the Federal Legislative list empowered the Parliament to legislate on extraditing foreigners only. The Court said that the foreigners could be expelled from Pakistan at any time and there was no justification to draw a distinction between nationals and foreigners.

Similarly, the Lahore High Court in Zulqarnain Khan vs. the Government of Pakistan,[152] laid the principle that where a prima facie case was made out against a fugitive offender, he/she even a citizen of Pakistan would lose the right to remain in Pakistan for the time being. The Court held:

> "...Since there is a prima facie case against him (the fugitive offender) under the anti-narcotics law of U.S.A. he loses his right to live in his own country for the time being..."[153]

Another ground on which the legality of the Extradition Act, 1972 has been assailed was raised and settled in Nargis Shaheen vs. Federation of Pakistan.[154] In this case it was argued, inter alia, on behalf of the petitioner that the Extradition Act, 1972 was ultra vires of the Constitution of the Islamic Republic of Pakistan, 1973 as far as it conferred upon the Government power to surrender muslims to a non-muslim State which is repugnant to the injunctions of Islam in terms of Article 227(1) which states as:

> "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions..."

The Court rejected the above contention of the petitioner and held that the Extradition Act, 1972 could not be declared repugnant to the injunctions of Islam. The Court relied, inter alia, on the provisions of the Treaty of Hudeybiyeh in support of its decision. This Treaty was concluded between the Muslims of Medina and the Quresh of Mecca in the sixth year of Hijrah. According to one of the Articles of this Treaty the Muslims had under taken to surrender the persons who fled form Mecca to Medina without the permission of their

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[152] 1990 MLD 1611 Lah.
[153] Ibid, para 12.
[154] PLD 1993 Lah. 732.

guardians. It was under this Article that the Muslims had to surrender Abu Jandal R.A. (a companion of the Holy Prophet S.A.W) to the non-muslims of Mecca.

The above discussed cases and the rulings of the superior courts of Pakistan thereon settle once for all that the Extradition Act, 1972 is valid legislation and intra vires of the Constitution. It is, now, time to discuss and analyze the provisions of this Act. It should be noted that this discussion and analysis of the Pakistani extradition law will focus mainly on human rights provisions and procedural safeguards contained therein. Nevertheless, other provisions of the 1972 Act, where considered necessary, are also discussed briefly.

4.2.2 Introduction of the 1972 Act

The Extradition Act of Pakistan, 1972 consists of a preamble and four chapters having twenty four sections. The schedule containing a list of extradition offences also forms part of the Act. The preamble talks about the consolidation and amendment of the law relating to the extradition of fugitive offenders. Before this Act, extradition was regulated in Pakistan by the Extradition Act, 1903. The Act of 1903 was, in fact, promulgated to provide for more convenient administration of the Extradition Acts of 1870 and 1873 and of the Fugitive Offenders Act, 1881 as well as to regulate the cases to which the Extradition Acts, 1870 and 1873 did not apply. However, after the promulgation of the 1972 Act on September 25, 1972 and its commencement on February 20, 1973 the Extradition Act of 1903 was repealed. Therefore, the only Act which regulates extradition matters in Pakistan is the Extradition Act, 1972.

4.2.3 CHAPTER I-- PRELIMINARY

This chapter consists of four sections. According to section 1(2) this Act extends to the whole of Pakistan. While according to section 1(4) this Act has two types of applications:

(a) to extradite the fugitive offenders from Pakistan to a State with which Pakistan has extradition relations;

(b) to seek extradition of fugitive offenders from a State with which Pakistan has extradition relations to Pakistan. Section 2 defines the important terms used in this Act. Section 3 talks about the "*Treaty State*". According to this section the Federal Government is under a duty to publish in the official Gazette the names of the States with which Pakistan has extradition relations. However, the Supreme Court of Pakistan in Muhammad Azim Malik vs. the Government of Pakistan,[155] held that if Pakistan has a binding extradition treaty with another

[155] PLD 1989 SC 519.

State, the mere non-publication of it in the Gazette does not bar the operation of that treaty. The Court interpreted section 3 in the following words:

> "Publication of treaty in the official Gazette—Copy of treaty was on record with all the necessary particulars about ratification and was formally incorporated in the United States Code Annotated- Requirement of law, held, was sufficiently met and even if treaty was not published in the gazette of Pakistan, existence and efficacy of the treaty as such, would not in any manner get impaired."[156]

It is worth mentioning, here, the States with which Pakistan has concluded Extradition Treaties. These are:

Monaco	Netherlands
Denmark	Austria
Yugoslavia	Iraq
Eqouador	Portugal
Luxemburg	Colombia
Liberia	Cuba
San Marino	Italy
Argentina	Belgium
France	Greece
Switzerland	United States of America
Iran	Kingdom of Saudi Arabia
Maldives	Arab Republic of Egypt

Finally, section 4 of Chapter I talks about the application of the Act to non-treaty States. This has already been discussed above.[157]

4.2.4 CHAPTER II-- SURRENDER OF FUGITIVE OFFENDERS

It is the most important part of the Extradition Act of Pakistan, 1972. It consists of ten sections starting from section 5 to section 14. It should be noted that this part of the Act contains provisions regarding the first type of application of this Act that is to extradite the fugitive offenders from Pakistan to a State with which Pakistan has extradition relations.

4.2.4.1 Section 5--Liability of fugitive offenders to be surrendered

According to section 5(1) every fugitive offender is liable to be apprehended and surrendered to the requesting State following the procedure provided in the Act. It states as:

> "Subject to the provisions of subsection (2), every fugitive offender shall be liable to be apprehended and surrendered in the manner provided in this Act, whether the offence in respect of which his surrender is sought was committed before or after the commencement of

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[156] Ibid.
[157] See 2.1.2 above, 15.

this Act and whether or not a Court in Pakistan has jurisdiction to try that offence..."

Section 5(2), however, provides seven grounds on which extradition request will be turned down. The first ground provided in it to refuse an extradition request is the political offence exemption which has already been discussed above.[158] The second ground is provided in clause (b) which says that the extradition request will be turned down in respect of an offence which is not punishable with death or with imprisonment for life or which is punishable for a term less than twelve months. This clause, in fact, impliedly talks about refusing an extradition request in case of trivial nature of the offence. However, the first part of this clause talking about the death penalty should not go unnoticed. As noted above,[159] there is a serious tendency towards the abolition of the death penalty under international law and many countries refuse extradition if the fugitive offender on surrender has to be executed in the requesting State.

Section 22(3)(c) of the Australian Extradition Act, 1988, for example, provides for the refusal of extradition request in the absence of satisfactory assurances from the requesting State that the fugitive offender on surrender will not be tried for the offence punishable with death or if that person is tried for such an offence, death penalty will not be imposed or if it has already been imposed, it will not be carried out. It states as:

> "... (3)..., the eligible person is only to be surrendered in relation to a qualifying extradition offence if:
> ...(c) where the offence is punishable by a penalty of death—by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:
> (i) the person will not be tried for the offence;
> (ii) if the person is tried for the offence, the death penalty will not be imposed on the person;
> (iii) if the death penalty is imposed on the person, it will not be carried out;..."

Similarly, section 44 of the Canadian Extradition Act, 1999 which talks about reasons for refusal (of an extradition request) is important in this regard. Sub-section 2 of this section provides that the Minister (of Justice) is empowered to turn down an extradition request if the offence for which extradition is sought is punishable with death. It states as:

> "... (2) The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition partner."

Likewise, section 8 of the German Law on International Assistance in Criminal Matters, 1982 and section 37(3) of the Swiss Law on International Judicial Assistance in Criminal Matters, 1981 are relevant in this regard.

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[158] See 2.3.1 above, 23.
[159] See 3.1 above, 31.

Moreover, it should be noted, as already mentioned,[160] the Extradition Treaty between Portugal and Pakistan provides a bar to extradition in case of an offence punishable with death. Therefore, as far as, the extradition relations of Pakistan with Portugal are concerned, on the one hand no fugitive offender can be surrendered from Pakistan to Portugal and vice versa if he/she is to be executed on surrender. While, on the other hand, the first part of section 5(2)(b) of the 1972 Act provides that a person will only be surrendered if, inter alia, the offence for which his/her surrender is sought is punishable with death. So there is a contradiction between the 1972 Act and the Treaty which has to be resolved. However, there is not any reported case where this contradiction has been addressed by the superior courts of Pakistan.

The next two grounds for turning down an extradition request are lapse of time and speciality. These are provided in clauses (c) and (d) of section 5(2) respectively; both of these have already been discussed above.[161] However, Mr. Justice Abdul Majeed Tiwana of the Lahore High Court in Zulqarnain Khan vs. the Government of Pakistan,[162] interpreted section 5(2)(c) of the 1972 Act which is considered useful to discuss here.

The United States requested Pakistan to extradite Zulqarnain Khan alias Zulfiqar Ali Khan to face a trial under section 21 of the United States Code 963 for having allegedly conspired to smuggle heroin into the United States in 1984. The Government of Pakistan in response to this request ordered an enquiry to ascertain whether a prima facie case was made out against the accused or not. The enquiry officer submitted his report on 14/02/1990 whereby he concluded that the accused was liable to be surrendered as a prima facie case was made out against him. However, before he could actually be extradited, he challenged the enquiry report in the Lahore High Court by invoking its writ jurisdiction. The accused's contention was, inter alia, that the extradition offence was allegedly committed in 1984 and according to the law of the United States an accused could not be prosecuted after the lapse of five years. Therefore, his prosecution was barred by the law of limitation, and he could not be extradited. The Court, however, ruled out this contention because the accused had already been indicted on 28/06/1984, within three months of the occurrence of the offence. Lapse of time, therefore, in this case could not be a ground for refusing the extradition.

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[160] Ibid.
[161] See (Speciality) 2.2.3 above, 22 and (Lapse of Time) 2.3.3 above, 28.
[162] Supra note 151.

This interpretation of the lapse of time reveals that the time is not to be considered when the actual trial starts; rather it is to be calculated when the State indicts the accused for prosecution.

The next ground for refusing an extradition request is provided in section 5(2)(e). It talks about non-bis-in-idem, and it has already been discussed above.[163] The next ground is that if an extradition request is made for the surrender of a person who is facing a trial or serving a sentence in Pakistan for an offence other than the offence for which the request has been made, the extradition will be refused. It should be noted, however, that once that person gets free either by acquittal or serving his/her sentence, surrender can be made to the requesting State.

It is interesting to note that this is the only ground which has been successfully availed so far by any fugitive offender to get an injunction to stay the extradition proceedings against him/her. In the last discussed case the Lahore High Court partly accepted the writ petition of the accused on this ground. The Court declared Zulqarnain Khan an accused within the meaning of section 5(2)(f) of the 1972 Act. In fact, the Supreme Court had granted leave to appeal against the fugitive offender's acquittal by the court of Sessions and the High Court in a murder case and bail able warrants of his arrest had been issued. Since the leave had been granted and the fugitive offender had to defend himself in the appeal, he could not be extradited until his discharge on the dismissal of the appeal or if he got convicted, until he underwent his sentence. The Court explained:

> "... The Supreme Court, vide its order, dated 28-11-1983, was pleased to grant leave to appeal against the petitioner on a petition to that effect moved by the complainant against his acquittal in a murder case and bail able warrants of his arrest were directed to be issued against him. In execution of these coercive processes his appearance before the Court stands secured and, to my mind, he is an accused for all intents and purposes, and a person accused of an offence within the meaning of section 5(2)(f). His extradition to U.S.A. therefore, cannot be effected until his discharge on the dismissal of the appeal of his opponent by the Supreme Court, or if he is convicted in that appeal, until he undergoes his sentence. His writ petition is accepted only to this extent."[164]

Regarding the last discussed ground, it is submitted that this cannot be termed as a ground for refusing extradition stricto senso. In fact, it serves the same objective which States have desired to achieve by way of extradition that is to make sure that the criminals do not go unpunished. Therefore, it is suggested that courts should interpret an extradition instrument

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[163] See 2.3.2 above, 27.

[164] Supra note 151, para 13.

even in the absence of such a provision as 5(2)(f) in a way that the criminals are punished for every offence they committed.

The last ground in this respect is provided in section 5(2)(g) which talks about discrimination. This provision provides four bases of discrimination. These are race, religion, nationality or political opinions. Discrimination as a ground for refusing extradition has already been discussed above.[165]

However, it is considered expedient to discuss here the analogous provisions from the extradition laws of other States. The Extradition Act of the United Kingdom, 2003, for example, contains two such provisions in the form of section 13 and section 81. Section 13 is present in Part 1 of this Act which governs extradition to category 1 territories while section 81 is present in Part 2 of the Act which governs extradition to category 2 territories. However, both the sections talk about extraneous considerations. According to section 13(a) of the 2003 Act extradition of a person is barred if the purpose of extradition is to prosecute or punish him/her on account of his /her race, religion, nationality, gender, sexual orientation or political opinions. It states as:

> "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..."

Moreover, paragraph (b) of this section bars the extradition of a person if he/she might be prejudiced at his/her trial or punished, detained or restricted in his/her personal liberty by any of the reasons mentioned in paragraph (a). It should be noted that this section adds gender and sexual orientation to the bases of discrimination mentioned in section 5(2)(g) of the 1972 Act of Pakistan.

Besides the above discussed section 13 of the UK Extradition Act, another important provision in this regard is the section 7 of the Extradition Act of New Zealand, 1999 which talks about mandatory restrictions on surrender of the fugitive offenders. According to paragraph (b) of this section, the surrender of a fugitive offender is restricted if, inter alia, his/her surrender is sought to prosecute or punish him/her on account of his/her race, ethnic origin, religion, nationality, sex or other status or political opinions or for an offence of a political character. Similarly, paragraph (c) of this section protects the personal liberty of the fugitive offender and restricts his/her surrender if, on surrender, he/she may be prejudiced on account of any of the reasons mentioned in the preceding paragraph.

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[165] See above 3.2, 35.

It states as:

> "A mandatory restriction on surrender exists if—
> ...(b) the surrender of the person, although purportedly in respect of an extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions, or for an offence of a political character; or
> (c) on surrender, the person may be prejudiced at his or her trial or punished, detained, or restricted in his or her personal liberty by reason of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions; or ..."

This provision, thus, adds ethnic origin and other status to the bases mentioned in section 13 of the UK Act. However, it should be noted that "other status" seems to be wide enough to include in it any type of discrimination.

Finally, it is worth mentioning the Extradition Act of Canada, 1999 in this regard. It provides in section 44(1)(b) that the Minister (of Justice) shall refuse to surrender a fugitive offender if the Minister is satisfied that the extradition request has been made for the purpose of prosecuting or punishing the fugitive offender by reason of his/her race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the fugitive offender may be prejudiced for any of those reasons. This provision, thus, provides five additional bases of discrimination than those contained in section 13 of the UK Act, 2003.

Having discussed the seven grounds for refusing the surrender of a fugitive offender provided in section 5(2) of the Extradition Act of Pakistan, 1972, it would not be out of place to discuss some other additional grounds available for turning down an extradition request present in the extradition laws of other States.

Section 46(1)(b) of the Canadian Extradition Act,1999, for example, provides that the Minister shall refuse to surrender a fugitive offender if satisfied that the offence in respect of which extradition has been claimed is a military offence and not an offence under the ordinary criminal law. It states as:

> "(1) The Minister shall refuse to make a surrender order if the Minister is satisfied that...
> (b) the conduct in respect of which extradition is sought is a military offence that is not also an offence under criminal law; or ..."

Similar provisions are contained in section 7(d) of the Australian Extradition Act, 1988 and in section 7(d) of the Extradition Act of New Zealand, 1999. Section 7(d) of the latter states as:

> "A mandatory restriction on surrender exists if—
> ...(d) the conduct for which the surrender is sought would have constituted an offence under military law only and not an offence under the ordinary criminal law of the extradition country; or..."

Military offence as a ground for refusing extradition has already been discussed above along with fiscal and religious offences.[166]

Another ground for refusing to surrender a fugitive offender is where he/she has been tried in absentia and convicted without having any right to a retrial or getting the conviction reviewed. According to section 10(1) of the Australian Act, 1988 if a person whose extradition is sought has been convicted of an offence in absentia in the requesting State, that person for the purpose of extradition shall be deemed not to have been convicted but to have been accused of that offence. Likewise section 47(b) of the Canadian Act, 1999 gives the Minister discretion to refuse the surrender in such a case. However, the most important provisions in this regard are contained in the Extradition Act of the United Kingdom, 2003 in the form of section 20 in Part 1 and section 85 in Part 2.

According to section 20 of the Extradition Act of the United Kingdom, 2003 if the judge decides that the concerned person has been convicted in absentia and he/she did not absent himself/herself from the trial deliberately and he/she would not be entitled to a retrial or (on appeal) to a review amounting to a retrial on surrender, the judge must discharge that person. It states as:

> "(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence...
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial...
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial...
> (7) If the judge decides that question in the negative he must order the person's discharge..."

However, paragraph (8) of this section provides that if it is alleged that the concerned person would be entitled to a retrial on surrender, the judge must consider the following rights of the fugitive in that proceedings:

i: the right of defence either in person or through legal assistance of the fugitive's own choosing and if he/she did not have sufficient means to pay for the legal assistance, he/she should be so provided free when the interests of justice so required;

ii: the right to examine the witnesses produced against him/her and obtain the attendance of witnesses on his/her behalf under the same conditions as witnesses against him/her. It states as:

> "... (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—

[166] See 2.3.4 above, 28.

(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
(b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

The law contained in section 85 of the above Act is similar to that of in section 20; therefore, it does not require to be discussed separately. It should be noted that the above discussed ground is closely related to the right of a fair trial. However, the Lahore High Court in Nargis Shaheen vs. Federation of Pakistan,[167] linked the right of a fair trial with the right not to be discriminated. The Court ruled out the contention that the accused would be treated discriminately if extradited to the United States and he would not be given a fair trial. The Court said:

"...We have no reason to believe that the accused will not get a fair trial...We do not agree with the learned counsel for the petitioner that accused shall meet a discriminatory treatment while facing investigation or the trial in U.S.A. The grievance is not only premature but is also ridiculous and imaginary..."[168]

The last ground for refusing an extradition request desired to be discussed here is where the fugitive on surrender faces a real risk of torture, cruel, inhuman or degrading treatment or punishment. It has already been discussed in good detail above.[169] Nevertheless, it would be useful to discuss here section 21 and section 87 of the Extradition Act of the United Kingdom, 2003. Both these sections talk about the protection of human rights of the fugitive in the requesting State on surrender.

According to section 21 of the Act if none of the bars mentioned in section 11of the Act apply or the judge decides the questions mentioned in section 20 of the Act in affirmative, he/she must decide whether the fugitive's extradition would be in accordance with the provisions of the Human Rights Act, 1998. This Act provides, inter alia, a complete ban on torture, inhuman or degrading treatment or punishment. If the judge decides this question in negative, he/she must discharge the fugitive offender. Section 21 states as:

"(1) If 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.
(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge..."

4.2.4.2 Section 6--Requisition for surrender of fugitive offender

According to section 6 of the Extradition Act of Pakistan, 1972 the authority to receive an extradition request for the surrender of fugitive offenders is the Federal Government. Such a

[167] Supra note 153.
[168] Ibid. para 27.
[169] See 3.3 above, 36.

request is to be made to the Federal Government by a diplomatic representative of the requesting State in Pakistan or by the Government of the requesting State through the diplomatic representative of Pakistan in that State. It should further be noted that an extradition request can also be made in such other manner as may have been settled between the Federal Government and the Government of the requesting State.

4.2.4.3 Section 7--Order of Magisterial enquiry

This section talks about the order of the Federal Government to a Magistrate of the First class to enquire into the extradition offence in respect of which surrender of the fugitive has been claimed. It states as:

> "Where a requisition is made under section 6, the Federal Government may, if it thinks fit, issue an order to enquire into the case to any Magistrate of the first class who would have had jurisdiction to enquire into the extradition offence to which the requisition relates if it had been an offence committed within the local limits of his jurisdiction."

The most important issue desired to be discussed regarding the above stated section is whether it is mandatory for the Federal Government to order a magisterial enquiry or it is just a discretion of the Government. A plain reading of this section may suggest that the Federal Government has a discretion to order the enquiry because of the words *"...the Federal Government may, if it thinks fit, issue an order..."* used in the section. This interpretation was also stressed by the Advocate General of the Punjab in Jose Gonzalo De Garcia De Balseras vs. State.[170] The Advocate General argued:

> "...That under section 3 of the Extradition Act making of an order of inquiry into the nature of crime was purely discretionary with the Central Government which was under no obligation to do so..."[171]

It should be noted that the reference to section 3 of the Extradition Act is, in fact, a reference to section 3(1) of the Extradition Act of Pakistan, 1903. Section 3(1) of the said Act states, *"Where a requisition is made to the Central Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State, who is in or who is suspected of being in Pakistan, the Central Government may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case."*

The Advocate General because of the words *"...the Central Government may, if it thinks fit, issue an order..."* used in section 3(1) of the 1903 Act argued that to order an enquiry was not mandatory but discretionary. However, the Court in that case did not decide whether it

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[170] Supra note 1.

[171] Ibid. para 7(3).

was mandatory or discretionary. Nevertheless, it is suggested that these words refer to the formalities of an extradition request, that is, if the request does not fulfill such formalities it will not be preceded further. Moreover, it would be an over simplification to always interpret the word "may" as discretionary. In a large number of cases the superior courts of Pakistan have held that the words "may" and "shall" are interchangeable. The Lahore High Court, for example, in Muhammad Siddiq Khan vs. District Magistrate, held that:

> "...although the word "may" is generally used in permissive sense but it is well settled that word "may" is interchangeable with "shall" and if the context so requires it can also be interpreted as being mandatory..."[172]

Besides the above referred case, the Supreme Court of Azad Jammu & Kashmir in Muhammad Shafiq vs. Chief Secretary and others,[173] discussed in detail the interpretation of the words "may" and "shall'. The Court in this case discussed the circumstances in which the word "may" had been interpreted as mandatory by legal experts. The Court explained that if the word "may" has been used to effectuate a legal right or it authorizes the doing of a thing for the sake of justice and/or public good, it is to be interpreted as mandatory. Moreover, "may" should also be interpreted as mandatory when it gives a power for the benefit of specific persons and the condition upon which the power is to be used is also mentioned. Finally, while interpreting "may" the consequences that would follow by construing it one way or the other must also be taken into consideration. The Court said:

> "...The word 'may' has been, in the following circumstances, treated as a binding obligation on the authority invested with the permissive power:
> (1) When the power is given for the benefit of persons who are specifically pointed out and the condition upon which it is to be exercised has also been provided for.
> (2) If it is to effectuate a legal right.
> (3) If it authorises the doing of a thing for the sake of justice.
> (4) If it authorises the doing of a thing for public good.
> (5) In the light of the consequences that would follow by construing it one way or the other..."[174]

It is submitted that the use of "may" in section 7 of the Extradition Act of Pakistan, 1972 fully satisfies the condition(s) stated above. It is to be construed as mandatory because it is to effectuate a legal right not to be detained and restricted in personal liberty without due process of law. It authorizes the order of enquiry for the sake of justice and public good because after the enquiry only those fugitives will be surrendered against whom a prima facie case is made out. Similarly, the power to order an enquiry is for the benefit of persons whose surrender has been claimed by the requesting State and the condition upon which the enquiry

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[172] PLD 1992 Lah. 140.
[173] PLD 1973 Azad J&K 27.
[174] Ibid. 33.

is to be ordered is that a valid extradition request which fulfills all the formalities has been received for their surrender. Finally, if the word "may" as used in section 7 of the Act is interpreted as discretionary and the Federal Government surrenders a fugitive offender without ordering an enquiry, the extradition so taking place may well be in respect of an offence of a political character which is barred by law.

Another reason to interpret "may" as used in section 7 as mandatory is that a fugitive offender against whom no prima facie case is made out is to be discharged. Obviously, to ascertain whether a prima facie case against a fugitive offender is made out or not an enquiry must be ordered. Yet another reason for this interpretation is that under the 1972 Act, a fugitive offender is not liable to be surrendered with respect to an offence of a political character or if the extradition request is with respect to an offence which cannot be termed as an extradition offence within the meaning of section 2(a) of this Act. This can only be determined after an enquiry takes place. Finally, it is submitted that if the Federal Government does not order an enquiry under section 7, no extradition can take place as it would be impossible to act upon sections 8, 10, 11 and 12 of the Act and no procedure to surrender a fugitive offender is provided other than these sections. It should be noted, however, that the superior courts of Pakistan have not so far interpreted the word "may" as used in section 7 of the Act and a binding interpretation of this word is still to be determined.

Finally, a reference, in comparison, can be made to the Extradition Act of the United Kingdom, 2003 which makes the involvement of the judiciary compulsory in the extradition proceedings. According to section 4 of this Act if a person is arrested under a Part 1 warrant, he/she must be brought before the appropriate judge as soon as practicable. It further provides that if such a person is not brought before the appropriate judge and he/she applies to the judge for his/her discharge, the judge must discharge him/her. Section 4 states as:

> "... (3) The person must be brought as soon as practicable before the appropriate judge.
> ... (5) If subsection (3) is not complied with and the person applies to the judge to be discharged, the judge must order his discharge..."

Similarly, according to section 70 of the 2003 Act if a valid extradition request is made to the Secretary of State for the surrender of a person to a Category 2 territory, he/she must issue a certificate that the request has been made in the approved way and must send the relevant documents to the appropriate judge who may issue a warrant for the arrest of the concerned person under section 71 of this Act. Section 70 states as:

> "(1) The Secretary of State must issue a certificate under this section if he receives a valid request for the extradition to a category 2 territory of a person who is in the United Kingdom.
> ... (9) If a certificate is issued under this section the Secretary of State must send these documents to the appropriate judge—

(a) the request;
(b) the certificate;
(c) a copy of any relevant Order in Council."

Section 72 of this Act provides, inter alia, that when the concerned person is arrested, he/she must be brought before the appropriate judge. It further provides that if this provision is not complied with and the concerned person applies for discharge, the judge must discharge him/her. Section 72 states as:

> "(1) This section applies if a person is arrested under a warrant issued under section 71.
> ... (3) The person must be brought as soon as practicable before the appropriate judge.
> ... (6) If subsection (3) is not complied with and the person applies to the judge to be discharged, the judge must order his discharge..."

4.2.4.4 Section 8--Magisterial enquiry

It talks about magisterial enquiry. According to subsection (1) of this section the magistrate shall issue a summon or a warrant to get the presence of the fugitive offender in his/her court when he/she receives an order of enquiry under the last section. According to subsection (2) when the fugitive offender appears on service of the summon or is brought before the magistrate on execution of the warrant, the magistrate shall enquire into the case. It is important to note that the purpose of the enquiry is to ascertain whether a prima facie case against the fugitive offender is made out or not and whether his/her surrender to the requesting State is barred by law or not. Section 8 gives the magistrate jurisdiction and powers of a court of a session for the purpose of the enquiry. Similarly, the magistrate is required to enquire into the case in the same manner as if the case were one triable by a court of session and he/she is empowered to take evidence in support of the extradition request as well as on behalf of the fugitive offender. Such evidence includes the evidence to prove, on behalf of the fugitive offender, that the offence in respect of which the request has been made is an offence of a political character or is not an extradition offence. Section 8(2) states as:

> "...(2) When the fugitive offender appears or is brought before him, the Magistrate shall enquire into the case in the same manner, and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a Court of Session and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive offender, including any evidence to show that the offence of which the fugitive offender is accused or alleged to have been convicted is an offence of a political character or is not an extradition offence."

The superior courts of Pakistan have interpreted the above stated section in a number of cases especially the words *"... the Magistrate shall enquire into the case in the same manner... as if the case were one triable by a Court of Session..."* However, it would be wise to discuss one such case which interprets this section comprehensively. The Lahore High Court in Mst. Akhtar Malik vs. Federation of Pakistan and five others,[175] rejected the argument on behalf of

[175] 1994 P CR L J 229 Lah.

the petitioner that section 8(2) requires framing of charge, recording of evidence, giving an opportunity of cross-examination to the accused, handing over to the accused copies of material to be used against him/her, recording his/her statement under section 342 of the Code of Criminal Procedure, 1898 (Cr.P.C), confronting the accused with all material evidence to be used against him/her and to give the accused full opportunity to produce defence including to get his/her statement recorded under section 340(2) Cr.P.C. On the other hand, the Court held that the words used in section 8(2) by no stretch of argument can make the enquiry magistrate a court of session or the enquiry equal to a trial. The enquiry magistrate is not bound to hold the enquiry exactly in accordance with the mode of trial by a court of session. It is enough if the proceedings are held in any judicious mode. The Court said:

> "...The forums which are not stricto senso courts can hold their proceedings in accordance with any judicious mode and the accused before such forums have no vested right to claim a particular mode for holding of the inquiry..."[176]

Regarding the incriminating material to be used against the accused, the Court held that the material was on the record and though the prosecution did not formally tender it in evidence, the fact remains that the accused had the knowledge as to what material was to be used against him and had full opportunity to prove that the allegations leveled in that material were false.

It is important to note that section 8(2), inter alia, talks about the evidence which may be produced on behalf of the fugitive offender to prove that a prima facie case is not made out against him/her or the offence is of a political character or the offence cannot be termed as an extradition offence. It, however, does not talk about the production of evidence to prove that the fugitive offender cannot be surrendered because one or more grounds for refusing an extradition request contained in section 5(2) of the 1972 Act apply. In this regard a reference can be made to section 24 of the Extradition Act of New Zealand, 1999 which talks about the determination of eligibility for surrender. According to paragraph 3(a) of this section a fugitive offender is not eligible for surrender if he/she satisfies the court in which he/she is brought that a mandatory restriction on his/her surrender applies under section 7 of this Act. Section 24(3)(a) states as:

> "... (3) The person is not eligible for surrender if the person satisfies the court—
> (a) that a mandatory restriction on the surrender of the person applies under section 7..."

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[176] Ibid. para 18.

It should be noted that unlike section 8(2) of the Extradition Act of Pakistan, 1972 section 24(3)(a) of the Extradition Act of New Zealand, 1999 provides for non eligibility for surrender on any mandatory restriction provided in the relevant section.

4.2.4.5 Section 9--Receipt in evidence of exhibits, depositions, etc.

The next provision of the 1972 Act is in the form of section 9. This section validates the use of certain authenticated documents as evidence in any proceedings against the fugitive offender under the 1972 Extradition Act. It is a special provision contained in a special law and, thus, prevails over the general evidence law contained in Qanun-e-Shahadat Order, 1984. It should be noted, however, that hearsay evidence is not admissible even under this special provision. The superior courts of Pakistan have interpreted this provision in various cases. One such case is Muhammad Azim Malik vs. Government of Pakistan and others.[177] In this case the Supreme Court of Pakistan held that section 9 of the Extradition Act of Pakistan, 1972 makes admissible all statements recorded on oath by authorized persons containing the official certificates of facts even if the deponents thereof are not available for cross-examination. In another case, Nasrullah Khan Henjra vs. Government of Pakistan and others,[178] the Supreme Court held that the enquiry report based on hearsay evidence prepared by the magistrate was of no legal effect. In this case the requesting State supported the extradition request by the affidavit of one of its Assistant Attorneys who had met and examined the witnesses against the accused. The magistrate in the enquiry proceedings relied on the said affidavit to conclude that a prima facie case was made out against the fugitive offender. However, the Supreme Court declared this conclusion null and void being based on hearsay evidence. The Court explained:

> "...It appears from the evidence placed before the learned Magistrate that there were two persons, described as C-1 and C-2, who had direct dealings with him (the accused) for the purpose of smuggling heroin into the United States. The requisitioning Government did not produce the depositions or statements made by these witnesses. On the other hand, it relied upon the affidavit of one of its Assistant Attorneys who had met and examined them. Quite obviously what the Assistant Attorney deposed with regard to the statements made by C-1 and C-2 would have been rejected in Pakistan as hearsay evidence. The learned Magistrate could not have therefore based his findings with regard to the existence of a prima facie case against Nasrullah Khan Henjra on this affidavit..."[179]

4.2.4.6 Section 10--Magistrate to report after enquiry

This section relates to the conclusion of the magisterial enquiry. Obviously, the enquiry report will either conclude that a prima facie case has been made out against the fugitive

[177] Supra note 154.
[178] Supra note 150.
[179] Ibid, para 11.

offender or such a case has not been made out. In the former case, the magistrate is required to submit a report to the Federal Government to this effect along with the written statement, if any, submitted by the fugitive offender for the consideration of the Federal Government. The fugitive offender will be committed to the prison to wait the orders of the Federal Government. However, the committal is subject to any provision relating to bail.

On the other hand, if no prima facie case is made out, the magistrate is required to discharge the fugitive offender and submit a report to this effect to the Federal Government and it seems to be the end of the extradition proceedings. However, the Sind High Court in Federation of Pakistan vs. Muhammad Haris Hassan and others,[180] held that the Federal Government can challenge such a conclusion by the enquiry magistrate. In fact, the Federal Government approached the Sind High Court in writ jurisdiction to challenge the enquiry report submitted by the magistrate to the effect that no prima facie case had been made out against the fugitive offender. The Court turned the writ petition into a criminal revision and held that a revision petition under section 439 Cr.P.C is maintainable in High Court against the enquiry report. The reasons given by the Court for this decision are very interesting. The Court said that under section 13 of the 1972 Act the Federal Government has full discretion to discharge a fugitive offender even if the requisite conditions for extradition are satisfied, conversely where the Federal Government is of opinion that it is expedient to surrender the fugitive offender and the opinion of the enquiry magistrate to discharge the fugitive appears to be perverse then only course open to the Federal Government is to challenge the opinion recorded by the enquiry magistrate.

On the other hand, the Lahore High Court in Muhammad Asim Malik vs. Anwar Jalil and four others,[181] held that no appeal or revision against the magisterial enquiry has been provided to any court or tribunal in the Extradition Act, 1972. The Court said:

> "...Section 10 of the Extradition Act, 1972 has two limbs. Its first limb is that, in case the Magistrate to whom the inquiry was entrusted finds that no prima facie case was made out in support of the requisition, it is open to him to discharge the offender and make a report to that effect to the Federal Government, and that is the end of it... From the report and the findings in it, no appeal or revision has been provided to any Court or Tribunal..."[182]

The contradiction revealed in the above discussed two cases still remains unsettled but the fact is that the Extradition Act of Pakistan, 1972 does not contain any provision which provides a right of appeal against the magisterial enquiry.

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[180] PLD 2004 Karachi 119.

[181] Supra note 148.

[182] Ibid, 295.

4.2.4.7 Section 11--Removal and delivery of the fugitive offender

The next section of the Extradition Act, 1972 talks about the removal and delivery of the fugitive offender. This section applies if the Federal Government receives a report from the enquiry magistrate to the effect that a prima facie case has been made out against the fugitive offender. Under this section the Federal Government is required to consider the enquiry report and the written statement of the fugitive offender, if any. If after objective consideration the Federal Government is of opinion that the fugitive offender must be surrendered, it may issue a warrant for his/her surrender. The warrant will allow the custody and removal of the fugitive offender and his/her delivery to a person and at a place mentioned in the warrant. However, this section also contains a proviso that the fugitive offender will not be delievered before the expiry of fifteen days from the date of his/her custody under the warrant. Section 11 states as:

> "If upon receipt of the report and statement under clause (b) of section 10, the Federal Government is of opinion that the fugitive offender ought to be surrendered, it may issue a warrant for the custody and removal of the fugitive offender and for his delivery at a place and to a person to be named in the warrant:
> Provided that the fugitive offender shall not be so delivered until after the expiration of fifteen days from the date he has been taken in custody under such warrant."

The above stated section has been interpreted by the Supreme Court in Muhammad Azim Malik vs. Government of Pakistan and others.[183] According to this interpretation the Federal Government has to take an overall view of the entire proceedings and form its own opinion with regard to the expediency of extraditing the fugitive offender. It should be noted that the fugitive offender at this stage does not have a right to be heard either personally or through a representative by the Federal Government. Moreover, the Court explained that the opinion expressed by the Federal Government under section 11 need not be a reasoned order like the report of the enquiry magistrate or adjudication at the trial. However, it should be noted that in an earlier petition whereby the warrant issued under section 11 was challenged by the same petitioner it was argued, inter alia, on behalf of the petitioner that the opinion formed by the Government to surrender the fugitive offender was not objective because the Federal Government did not consider the written statement submitted by the fugitive offender as an opportunity of hearing was not provided.[184] This argument was supported by the wording of the warrant which made a reference to the magisterial enquiry but not to the written statement.

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[183]Supra note 154.

[184]PLD 1989 SC 469.

It read as:

> "...And whereas the Government of Pakistan is of the opinion, after a proper Magistrate Enquiry, that the said Malik Muhammad Saleem ought to be surrendered..."[185]

In that petition the Court declared the warrant null and void. However, the Court did not give its opinion on the above argument of the petitioner rather the warrant was declared of no legal effect because it mentioned an offence other than the offence for which surrender had been claimed and the magistrate had submitted his report.

It is submitted that the written statement must be objectively considered by the Federal Government and a reference to it must be expressly made in the warrant such as "...after a proper magisterial enquiry and considering the written statement submitted by the fugitive offender..."

It should be noted as referred above that there is no provision in the Extradition Act, 1972 providing a right of appeal against the magisterial enquiry or getting the order of the Federal Government under section 11 reviewed by a higher court. On the contrary, the extradition laws of many other States expressly provide this right. In this regard, a reference can be made to the extradition laws of Australia, Canada and the United Kingdom.

The relevant sections of the Extradition Act of Australia, 1988 are section 19 and section 21. Section 19 of this Act talks about determination of eligibility for surrender. According to section 19(9) if the magistrate determines that the person is eligible for surrender, the magistrate shall, inter alia, inform the person that he/she may seek a review of the magistrate's order within fifteen days after the day on which the order in the warrant is made. Section 19(9)(b) states as:

> "Where, in the proceedings, the magistrate determines that the person is eligible for surrender to the extradition country in relation to the extradition offence or one or more of the extradition offences, the magistrate shall:
> ... (b) inform the person that he or she may, within 15 days after the day on which the order in the warrant is made, seek a review of the order under subsection 21(1)..."

Similarly, section 21 talks about the review of the magistrate's order. According to subsection (1) of this section if the magistrate determines the person eligible for surrender the fugitive may within fifteen days after the day on which such determination is made apply for a review of this order to the Federal Court or to the Supreme Court of the state or territory. A similar right is available to the extradition country (requesting State) in case the magistrate determines the person not eligible for surrender. Moreover, according to subsection (3) of this section an appeal to the Full Court of the Federal Court lies against the decision of the

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[185] Ibid. para. 2.

Federal Court or the Supreme Court in the review petition. It is irrespective of the fact that the review petition was filed by either party. It should be noted that the appeal to the Full Court lies only within fifteen days after the day on which the review petition is decided. Section 21(3) states as:

> "...(3) The person or the extradition country, whether or not the person or country was the applicant for review under subsection (1), may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court..."

Yet another appeal to the High Court lies against the decision of the Full Court if special leave is sought from the High Court within fifteen days after the day on which the Full Court gave its decision on an appeal under subsection (3). It is provided in section 21(5) which states as:

> "... (5) The High Court shall not grant special leave to appeal against the order of the Full Court made on the appeal referred to in subsection (3) if the application for special leave is made more than 15 days after the day on which the order of the Full Court is made..."

The Australian Act contains another similar provision in the form of section 35. It should be noted, however, that section 35 applies only where the requesting State is New Zealand while section 21 applies in case of other requesting States.

Similarly, the Extradition Act of Canada, 1999 contains a provision in the form of section 38(2) which, inter alia, requires the judge to inform the fugitive offender in case of an order of committal that he/she has a right of appeal against the committal order. It states as:

> "... (2) When the judge orders the committal of a person, the judge shall inform the person that they will not be surrendered until after the expiry of 30 days and that the person has a right to appeal the order and to apply for judicial interim release."

An appeal against an order of committal, discharge or stay of proceedings lies under section 49 of the Act to the Court of appeal of the province in which the order was made. It should be noted, however, that if a ground of appeal does not involve a question of law alone the appeal does not lie without first obtaining the leave to appeal. Another important provision contained in the Canadian Extradition Act, 1999 is section 56. According to this section the Supreme Court may defer the hearing of an application for leave to appeal or the hearing of an appeal from a decision of the Court of appeal on an appeal under section 49 or on any other appeal in respect of a matter arising under this Act. The limit of deferral is until the Minister makes a decision under section 40 with respect to the surrender of the person. Finally, it is considered expedient to make a reference to section 57 of the Canadian Act. This section talks about the exclusive original jurisdiction of the Court of appeal of the province in which the person was committed to hear and decide applications for judicial review of the decision of Minister under section 40.

It states as:

> "(1) Despite the Federal Courts Act, the court of appeal of the province in which the committal of the person was ordered has exclusive original jurisdiction to hear and determine applications for judicial review under this Act, made in respect of the decision of the Minister under section 40..."

As far as the Extradition Act of the United Kingdom, 2003 is concerned it contains various provisions which provide a right of appeal. A reference in this regard can be made to section 26 which provides such a right to the person in whose respect the appropriate judge has ordered extradition to a Category 1 territory. Such a person can challenge the order of the appropriate judge in the High Court by way of an appeal on a question of law or fact. Section 26 states as:

> "(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.
> ... (3) An appeal under this section may be brought on a question of law or fact..."

A similar provision is contained in the form of section 28 which gives a right of appeal to the authority which issued Part 1 warrant in case the appropriate judge orders the person's discharge at the extradition hearing. Under section 32 of this Act an appeal to the House of Lords lies against the decision of the High Court if a leave to appeal is granted by the High Court or the House of Lords. Section 32(4) provides the grounds on which leave to appeal can be granted. According to this provision a leave to appeal will only be granted if the High Court certifies that there is a point of law of general public importance involved in the decision or it appears that a point is involved which ought to be considered by the House of Lords. If the High Court refuses leave to appeal, the House of Lords can be approached to obtain such a leave within 14 days starting with the day on which the High Court refused leave to appeal. Section 32 states as:

> "(1) An appeal lies to the House of Lords from a decision of the High Court on an appeal under section 26 or 28.
> ... (3) An appeal under this section lies only with the leave of the High Court or the House of Lords.
> (4) Leave to appeal under this section must not be granted unless—
> (a) the High Court has certified that there is a point of law of general public importance involved in the decision, and
> (b) it appears to the court granting leave that the point is one which ought to be considered by the House of Lords.
> ... (6) An application to the House of Lords for leave to appeal under this section must be made before the end of the permitted period, which is 14 days starting with the day on which the High Court refuses leave to appeal..."

Similarly, Part 2 of the Extradition Act of the United Kingdom, 2003 which regulates extradition to Category 2 territories contains provisions which provide a right of appeal to the High Court and, with leave to appeal, to the House of Lords. According to section 92 of the

Act if the appropriate judge sends a case to the Secretary of State for his/her decision if the person is to be extradited, the judge must, inter alia, inform that person that he/she has a right of appeal to the High Court. It should be noted, however, that if an appeal is preferred to the High Court, the Court will not hear the appeal until the Secretary of State has given his/her decision. Under section 114 an appeal to the House of Lords lies against the decision of the High Court under similar conditions as discussed above with regard to section 32.

4.2.4.8 Section 12--Discharge of person apprehended if not surrendered within two months

Section 12 of the Extradition Act of Pakistan, 1972 provides for the discharge of persons apprehended if not surrendered to the requesting State within a certain specified time mentioned in this section. This section can be invoked by a fugitive offender or on his/her behalf if the following conditions are fulfilled:

i: the fugitive offender has been taken into custody to await his/her surrender to the requesting State:

ii: the fugitive offender has not been conveyed out of Pakistan within two months after such committal;

iii: the fugitive offender has informed the Federal Government by a reasonable notice that he/she intends to approach the High Court for his/her discharge.

If the above conditions are satisfied the High Court on an application under section 491 Cr.P.C by or on behalf of the fugitive offender may order his/her discharge. However, the High Court will not make such an order if the Federal Government succeeds to show to the High court sufficient reasons for the delay and that the fugitive offender should not be so discharged. Section 12 states as:

> "If a fugitive offender who, in pursuance of this Act, has been taken into custody to await his surrender is not conveyed out of Pakistan within two months after such committal, the High Court, upon application made to it by or on behalf of the fugitive offender and upon proof that reasonable notice of the intention to make such application has been given to the Federal Government, may order such prisoner to be discharged unless sufficient cause is shown to the contrary."

The above stated section has been interpreted by the Supreme Court of Pakistan in Muhammad Azim Malik vs. Government of Pakistan.[186] In this case, the court said that the expression *"after such committal"* refers to a particular committal earlier referred to in section 10(b)(iii) of the Act. This explanation by the Court, therefore, implies that the Federal Government is not only required to issue a warrant under section 11 of the Act but also to

[186]Supra note 154.

convey the fugitive offender out of Pakistan within two months from the date of committal. It is interesting to note, however, that the Lahore High Court in Mst. Akhtar Malik vs. Federation of Pakistan and five others,[187] discussed the effect of a warrant issued under section 11 of the Act by the Federal Government beyond the limit of two months. The Court held that section 12 of the Act is not mandatory in nature and, therefore, even if extradition order is not passed within two months from the date of committal, it will not make any difference, and the order will remain lawful.[188] The Court relied for this interpretation on the principle enshrined in Article 254 of the Constitution of the Islamic Republic of Pakistan, 1973 which reads as:

> "When any act or thing is required by the Constitution to be done within a particular period and it is not done within that period, the doing of the act or thing shall not be invalid or otherwise ineffective by reason only that it was not done within that period."

It is submitted that the personal liberty of an individual should not be curtailed by abuse of process. The right not to be detained and restricted in personal liberty without due process of law is a very valuable right and the courts are expected to protect this right. The law contained in section 12, for the sake of argument, may not be mandatory but the reason given by the Court seems to be absurd as it neglects the whole law of limitation. Article 254 provides for any act or thing required to be done by the Constitution only and not by any other law. It is a very useful and intelligently drafted article. Article 224 paragraph 1, for example, provides that a general election to the National Assembly or Provincial Assembly shall be held within a period of sixty days immediately following the day on which the term of the Assembly is due to expire. In the absence of Article 254, if the general election is held after sixty days as mentioned in Article 224, the whole election could have been declared void. However, Article 254 expressly provides that the general election would be valid even if it was held beyond the time specified in Article 224.
On the other hand, if a person gets convicted and is sent to jail for a certain period, it would be hardly justified on the part of the Government to keep that person in jail after he/she completes his/her term of sentence. The Government by invoking Article 254 cannot keep that person in jail arbitrarily.

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[187] Supra note 174.
[188] Ibid, para 17.

Finally, for the sake of comparison a reference to sections 35, 36, 99, 117 and 118 of the Extradition Act of the United Kingdom, 2003 is made here. Section 35 of this Act provides that if the appropriate judge has ordered the extradition of a person to a Category 1 territory against which no appeal is lodged, the person must be extradited before the end of the required period which is ten days starting with the day on which the judge made the order. However, the judge and the authority which issued the Part 1 warrant can agree to a later date in which case the required period is ten days starting with the later date. The most important provision contained in this section is in the form of subsection (5). It provides that if the person is not extradited before the end of the required period and he/she applies for his/her discharge, the judge must discharge him/her unless reasonable cause is shown for the delay.

Similarly, section 36 provides that if the appropriate judge has ordered the extradition of a person and this decision is upheld in the appeal proceedings, the person must be extradited before the end of the required period. It further provides that if the person is not extradited before the end of the said period and he/she applies for his/her discharge, the judge must order the discharge unless reasonable cause is shown for the delay. Section 35 states as:

> "(1) This section applies if -
> (a) the appropriate judge orders a person's extradition to a category 1 territory under this Part, and
> (b) no notice of an appeal under section 26 is given before the end of the period permitted under that section...
> (3) The person must be extradited to the category 1 territory before the end of the required period.
> (4) The required period is—
> (a) 10 days starting with the day on which the judge makes the order, or
> (b) if the judge and the authority which issued the Part 1 warrant agree a later date, 10 days starting with the later date.
> (5) If subsection (3) is not complied with and the person applies to the appropriate judge to be discharged the judge must order his discharge, unless reasonable cause is shown for the delay..."

Sections 117 and 118 are analogous to those discussed above. Therefore, they need not be discussed separately. However, it should be noted that the required period for the extradition of a person to a Category 2 territory is twenty eight days starting with the day on which the Secretary of State makes the order of the extradition if no appeal is lodged against the order. Moreover, there is no provision in these sections under which the Secretary of State can agree with the authority who issued a Part 2 warrant for delaying the extradition.

Finally, section 99 of the Act provides that if the appropriate judge sends a case to the Secretary of State for his/her decision whether the person is to be extradited, the Secretary must within two months starting with the appropriate day make an order for the extradition of

the person or his/her discharge. This section further provides that if the Secretary does not make such an order within the required period and the person applies to the High Court for discharge, the Court must order his/her discharge. However, the Secretary of State before the end of the required period can apply to the High Court for an extension of the required period upon which the Court can extend the required period. Section 99 states:

> "(1) This section applies if –
> (a) the appropriate judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited;
> (b) within the required period the Secretary of State does not make an order for the person's extradition or discharge.
> (2) If the person applies to the High Court to be discharged, the court must order his discharge.
> (3) The required period is the period of 2 months starting with the appropriate day.
> (4) If before the required period ends the Secretary of State applies to the High Court for it to be extended the High Court may make an order accordingly; and this subsection may apply more than once."

It should be noted that according to subsection (2) of the above stated section, it is mandatory for the High Court to discharge the person and this provision does not provide for refusing the discharge if sufficient reasons are shown for the delay.

4.2.4.9 Section 13--Powers of the Federal Government to discharge fugitive offender

This section of the Extradition Act of Pakistan, 1972 concerns the powers of the Federal Government to discharge a fugitive offender. According to this provision the Federal Government has full discretion to stay or cancel the extradition proceedings against a fugitive offender at any time if it appears to the Federal Government that the request has not been made in good faith or the surrender would not be in the interest of justice or the case is of a trivial nature or it would be unjust or inexpedient to surrender the concerned person. If the Federal Government for any of the above stated reasons decides to stay or cancel the extradition proceedings, it may direct to cancel any summons or warrants issued under the Act and discharge the fugitive offender if he/she is in custody. Section 13 states as:

> "If it appears to the Federal Government that by reason of the trivial nature of the case or by reason of the application for the surrender of a fugitive offender not being made in good faith or in the interest of justice or for any other reason it would be unjust or inexpedient to surrender the fugitive offender, it may, by order, at any time stay the proceedings under this Act against him and direct any summons or warrant issued under this Act, to be cancelled and the fugitive offender, if he is in custody or under detention, to be discharged."

The Lahore High Court in Muhammad Asim Malik vs. Anwar Jalil,[189] explained the above stated section. According to this explanation the Federal Government is under no obligation to surrender a fugitive offender to a Treaty State even where the requisite conditions for

[189] Supra note 148.

extradition are satisfied. The Federal Government has full discretion in the matter as provided in section 13 of the Act.

4.2.4.10 Section 14--Simultaneous requisitions

The last section of Chapter II is section 14 which provides that if the Federal Government receives an extradition request for the surrender of a fugitive offender from more than one Treaty State, the Government has discretion to proceed with any request it thinks fit considering the circumstances of the case.

4.2.5 CHAPTER III—SURRENDER TO PAKISTAN OF PERSONS ACCUSED OF EXTRADITION OFFENCES

This Chapter consists of three sections and it contains provisions regarding the second type of application of the 1972 Extradition Act, that is to claim extradition of fugitive offenders to Pakistan from a State with which Pakistan has extradition relations.

The first section of this chapter talks about the requisition for surrender of persons to Pakistan. This provision is analogous to section 6 of this Act which has already been discussed above so it need not be discussed separately.[190] Similarly, section 16 provides for the principle of speciality which has also been discussed above.[191] Therefore, the only section desired to be discussed here is section 17 which provides for the return of persons who have been surrendered to Pakistan.

4.2.5.1 Section 17--Return of the persons surrendered to Pakistan

According to this section if a person is surrendered to Pakistan in response to an extradition request, the Federal Government may at its own cost arrange for his/her return to the State which surrendered him/her if he/she so requests in either of the following cases:

i: the proceedings against that person are not initiated within six months starting from the day on which he/she arrived in Pakistan;

ii: the person is acquitted or discharged on his/her trial for the extradition offence.

4.2.6 CHAPTER IV--MISCELLANEOUS

This Chapter consists of seven sections. However, the only section desired to be discussed here is section 19 which talks about release of persons arrested on bail.

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[190] See 4.2.4.2 above, 71.

[191] See 2.2.3 above, 22.

4.2.6.1 Section 19--Release of persons arrested on bail

According to this section the fugitive offender shall be deemed to be accused or convicted of the extradition offence in Pakistan and the provisions of the Code of Criminal Procedure, 1898 relating to bail shall be applicable in his/her case. Moreover, this section provides that the magistrate before whom the fugitive offender is brought after arrest shall have the powers and jurisdiction of a Court of Session. Section 19 states as:

> "The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to bail shall apply to a fugitive offender arrested or detained under this Act in the same manner as they would apply if he were accused of committing in Pakistan the offence of which he is accused or has been convicted; and in relation to such bail the Magistrate before whom he is brought shall have, as far as may be, the same powers and jurisdiction as a Court of Session under that Code."

One could find only one reported case in which a bail matter under the above stated section has been discussed and decided. The Sind High Court in Sami Nasir Hussain vs. the State,[192] refused to grant a bail to the fugitive offender where the magisterial enquiry was still pending and a prima facie case had not been made out against the fugitive when he applied for the bail. The Court gave very surprising reasons for rejecting the bail application as far as it held that the fugitive offender was wanted for a trial in the United States of America and there was no guarantee that if bail was granted to him, he would go and appear before the trial court in the U.S.A.

The brief facts of this case are that an extradition request had been received by the Government of Pakistan from the U.S.A. for the surrender of the fugitive offender, Sami Nasir Hussain, with respect to an offence under section 1343, Article 18 of the U.S. Code. The allegations against the fugitive offender were that he defrauded a U.S. bank to the extent of 1.6 million dollars. This offence was punishable with five years imprisonment and fine.

In pursuance of the extradition request the fugitive offender got arrested and was produced before an enquiry magistrate under section 7 of the Extradition Act, 1972. The fugitive offender during the enquiry proceedings applied for a bail to the enquiry officer as the extradition offence was not punishable with death or imprisonment for life and it did not fall in the prohibitory class. The magistrate, however, refused the bail application. This decision of the magistrate was challenged in the Court of Sessions which upheld the magistrate's decision. Thereafter, the fugitive offender approached the Sind High Court but without success. The High Court held that:

> "...This is not a case where he (the fugitive offender) has to appear before the Court in Pakistan but if bail is granted he has to appear before the Court in the U.S.A ... ordinarily the

[192] 1984 PCRLJ 1553 Karachi.

bail has been granted by the Superior Courts even where huge amount is involved in some case but this is an exception where not only huge amount is involved but the applicant is a national of America and if it is found proper by the authorities he has to be transported. There is no guarantee that he will go and appear in the Court of U.S.A, therefore, this is a case of exception where discretion to grant bail cannot be exercised in favour of the applicant..."[193]

It should be noted that the Court in the above discussed case could not differentiate between the arrest for enquiry and the arrest for surrender and removal of the fugitive offender from Pakistan. In the former case, the fugitive offender is brought before an enquiry magistrate so that he/she could ascertain whether a prima facie case is made out in support of the request. While in the latter case, the purpose of the arrest is to surrender the fugitive offender to the requesting State as a prima facie case is made out and the Federal Government under section 11 of the Act considers it expedient to hand over the custody of the fugitive offender to the requesting State. It is in this case that the fugitive offender is brought before the trial court in the requesting State. It is suggested that the courts should take a lenient view in the former case while in the latter case a bail can still be granted upon relatively strict conditions.

Finally, for the sake of comparison it would not be out of place to make a reference to section 72(4)(a) of the Extradition Act of the United Kingdom, 2003. According to this section even a constable can grant a bail to the fugitive offender who is arrested to be brought before a judge for extradition hearing. It states as:

"(1) This section applies if a person is arrested under a warrant issued under section 71...
(3) The person must be brought as soon as practicable before the appropriate judge.
(4) But subsection (3) does not apply if--
(a) the person is granted bail by a constable following his arrest..."

4.3 Disguised Extradition

The last thing desired to be discussed in this chapter is if there is any other legal method available other than extradition to bring the fugitive offenders into the State which has jurisdiction over them.

Before the above stated question is answered, it is important to note that the High Court in Mir Aimal Kansi vs. The State,[194] observed that mere illegal manner of arrest and production of an accused before a competent court would not affect the validity of the trial. This principle has been applied frequently in the United States of America. In Ker vs. Illinois,[195] for example, the accused was kidnapped from Peru and brought to the United States to face a criminal trial. The court held that jurisdiction of the court could not be challenged on the basis of illegal manner of arrest and production of the accused before the court. Similarly, in

[193] Ibid, para 7.
[194] 1998 PCRLJ 1097 Lah.
[195] 119 U.S. 436 (1886).

Frisbie vs. Collins,[196] this principle was reaffirmed. Even Mir Aimal Kansi was kidnapped from Pakistan and brought to America to face a trial. He got convicted there and sentenced to death. The manner by which he was brought to the jurisdiction of the court was considered irrelevant. It is on the basis of this principle that proper extradition procedure is abandoned and the fugitive offenders are kidnapped to be brought before a court which has jurisdiction over them.

Another common practice in this regard is to deport an individual to a particular State where he/she is arrested to be brought before a court. In an English case, R vs. Horse ferry Road Magistrates' Court, ex p Bennett,[197] for example, the defendant, Bennett, was a New Zealand citizen who had allegedly committed criminal offences in connection with the purchase of a helicopter in England. In order to avoid prosecution, the defendant had fled to South Africa. The English authorities instead of making extradition arrangements for Bennett's surrender asked the South African police to arrest the defendant and deport him to New Zealand via Heathrow so that he could be arrested by English police at Heathrow. The defendant got arrested at Heathrow according to the plan. He was brought before a stipendiary magistrate who committed him for trial. The defendant applied to the Divisional Court for a review of the magistrate's decision. The Court held that it had no jurisdiction to inquire into the circumstances by which the defendant had been brought into the Court. However, Bennett was successful in convincing the House of Lords, in appeal, that the proceedings against him should be stayed on ground that he had been illegally brought before the magistrate. The House of Lords held that a court had a duty to protect the moral integrity of criminal process. It had been established in administrative law that the judiciary had the power to review the executive action likewise in the field of criminal law if it came to the knowledge of the court that there had been a serious abuse of executive power, the court would express its disapproval by refusing to act upon it. Lord Griffiths, one of the Law Lords, said:

> "...The judiciary must accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law..."[198]

Similarly, in New Zealand the Court of Appeal in R vs. Hartley,[199] disapproved the illegal method of extradition and declared that it could threaten the whole concept of freedom in society.

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[196] 342 U.S. 519 (1952).
[197] [1993] 3 WLR 90.
[198] Ibid, 104.
[199] [1978] 2 NLR 199.

On the basis of the above discussed cases, it is submitted that the rule of law, freedom in society and the integrity of criminal proceedings are not second to prosecution of culprits. It is, therefore, concluded that extradition is the only legal method by which fugitive offenders should be brought to justice. Moreover, it is a basic right of every individual to be dealt in accordance with the law. Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, for example, provides protection of law to every citizen of Pakistan wherever he/she may be and to every other person who is in Pakistan. According to this Article, inter alia, no action detrimental to life and liberty of a person can be taken but in accordance with the law. This Article states as:

> "(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.
> (2) In particular--
> (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law..."

Besides the above stated Article, Article 9 of the 1973 Constitution provides that no person shall be deprived of life or liberty save in accordance with law.

On the basis of this discussion, it is submitted that those who kidnap any fugitive offender from Pakistan commit an offence under section 360 of the Pakistan Penal Code, 1860. Such persons must be brought to justice. In this context, a reference can be made to an article, Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping, by Mr. Jeffrey J. Carlisle. In this article, the author points out that where the government officials bring a fugitive offender before a court by kidnapping him/her from another State, they not only violate the international law but also the municipal law of that State. In such a case if the extradition of these government officials is claimed, the courts must treat them as ordinary persons and they cannot benefit from sovereign immunity.[200]

To conclude this chapter it can be said that the procedure of extradition varies sharply from one jurisdiction to another. This in result leaves the fugitive offenders with different rights and procedural safeguards in different States. Therefore, in order to determine the rights and procedural safeguards available to fugitive offenders it is necessary to study and analyze the extradition law of a particular State.

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[200]Jeffrey J. Carlisle, "Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping," California Law Review, Vol. 81, No. 6(Dec., 1993), 1541-1586. www.jstor.org/stable/3480957 (accessed Apr. 10,2011).

A study of this chapter shows that the extradition law of Pakistan lags far behind in protecting the basic rights of fugitive offenders and providing them procedural safeguards. Section 5 of the Extradition Act, 1972, for example, does not contain sufficient provisions which may protect the fugitive offenders from torture, cruel, inhuman or degrading treatment or punishment in the requesting State. Similarly, it does not guarantee a fair trial for the fugitive in the requesting State on surrender.

Moreover, the involvement of judiciary in extradition proceedings is essential in most States of the world. This Act, however, does not contain a clear and express provision in this regard though section 7 talks about the involvement of judiciary. Likewise, section 8 does not provide for the production of evidence to prove that the fugitive offender cannot be surrendered because one or more grounds for refusing the extradition apply. Above all, this Act does not provide any right of appeal against any order made under this Act. This leaves the fugitive offenders with least procedural safeguards.

CHAPTER V

5. CONCLUSION

States have every right to punish the criminals rather it is a duty of every responsible State to ensure that criminal justice is administered in such a way that crime is eliminated or at least minimized in the society. In this regard, extradition has played a very important role in situations where the persons accused or convicted of serious criminal offences escape from the jurisdiction of the State where they can be brought to justice. Since one of the objectives desired to be achieved by the proper administration of criminal justice is the protection of human rights, States have realized that the rights of the fugitive offenders must also be respected and they should be provided sufficient procedural safeguards in the determination of their surrender or discharge.

In case of an extradition request for the surrender of a fugitive offender, the municipal extradition law of the requested State determines the rights of the fugitive offender and procedural safeguards available to him/her in the determination of the request. It is, therefore, the municipal extradition law which plays a key role in the proper administration of criminal justice on one hand, and the protection of basic human rights of a fugitive offender and providing him/her procedural safeguards on the other. However, a study of the preceding chapters especially chapter number 4 reveals that the Extradition Act of Pakistan, 1972 lags far behind in providing sufficient procedural safeguards to the fugitive offenders and protecting their basic human rights. The Government of Pakistan, therefore, owes a duty to international community to incorporate sufficient provisions in the Extradition Act, 1972 which better protect the human rights of fugitive offenders and provide them procedural safeguards.

Moreover, the people of Pakistan desire to prosper and attain their rightful and honored place amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity- a goal they have set for themselves in the Constitution.

It is submitted that the above stated goal can hardly be achieved without respecting and promoting human rights. Similarly, the laws which restrict the liberty and freedom of movement of a person such as the Extradition Act, 1972 must contain enough procedural safeguards and human rights provisions that this fundamental right of a person cannot be abused. The Government of Pakistan is, therefore, under a Constitutional duty as well to incorporate

satisfactory human rights provisions and procedural safeguards in the Extradition Act, 1972. It is so because the States which better protect and promote human rights are considered more civilized and enjoy an honored place amongst the nations of the world.

The following section suggests some recommendations to improve the Extradition Act, 1972 so that this Act may also provide for sufficient procedural safeguards and human rights.

5.1 Recommendations to Improve the Extradition Act, 1972

5.1.1 Section 5

The first recommendation is proposed about section 5 of the Act. As discussed above,[201] this section consists of two sub-sections; sub-section 1 talks about liability of fugitive offenders to be apprehended and surrendered while sub-section 2 provides seven grounds for refusing extradition. It is submitted that the grounds for refusing extradition generally protect the basic rights of a fugitive offender. The legislature should express its clear intention to protect these rights. It is, therefore, proposed that the grounds for refusing extradition should be provided in a separate section with a separate title such as, for example:

5-A Grounds for Refusing Extradition

Extradition shall not be granted in any of the following circumstances:

(a) ...

Moreover, the second ground for refusing extradition provided in section 5(2)(b), inter alia, provides that a fugitive offender shall not be surrendered if the offence in respect of which his/her surrender is claimed is not punishable with death.[202] It is suggested that this provision should be amended to exclude the death penalty from it. Rather, the surrender should be made conditional upon satisfactory assurances from the requesting State that the fugitive offender, if surrendered, will not be executed.

Furthermore, the seventh ground provided in section 5(2)(g) talks about discrimination and mentions four bases of discrimination which are race, religion, nationality or political opinions.[203] It is suggested that the bases of discrimination should not be limited to only those provided in this provision. Rather, this provision should be amended to include other bases of

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[201] See 4.2.4.1 above, 64.

[202] Ibid.

[203] Ibid.

discrimination such as those mentioned in section 44(1)(b) of the Extradition Act of Canada, 1999 or alternatively a general phrase such as "other status" as used in section 7(c) of the Extradition Act of New Zealand, 1999 which would include any form of discrimination should be included in the 1972 Act.[204]

Moreover, it should be noted that section 5(2)(g) of the 1972 Act only talks about the refusal of surrender where the fugitive might be prejudiced at his/her trial or punished, detained or restricted in his/her personal liberty on account of any of the reasons mentioned in this provision. It, however, does not consider the possibility of claiming the surrender of a fugitive offender purportedly in respect of an extradition offence but actually for the purpose of prosecuting or punishing him/her by reason of his/her race, religion, nationality or other bases of discrimination. Therefore, to refuse surrender in such a case an additional ground (h) for refusing extradition should be provided in the Act.

Finally, it is suggested that at least three additional grounds for refusing extradition should be provided in the 1972 Act as discussed above.[205] These are:

(i) if the offence in respect of which surrender has been sought is an offence under the military law only but not an offence under the ordinary criminal law of the requesting State;

(j) if he/she has been or would be subjected to torture or cruel, inhuman or degrading treatment or punishment in the requesting State;

(k) if he/she has been convicted in the requesting State in absentia without having sufficient notice of the trial or opportunity to arrange for a defense and has not or will not have the opportunity to have a retrial or (on appeal) to a review amounting to a retrial or if he/she has not or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights, article 14.

5.1.2 Section 7

The second proposed recommendation is about section 7 of the 1972 Act. As discussed above,[206] this section talks about the order of the Federal Government to a Magistrate of the First class to enquire into the extradition offence in respect of which surrender of the fugitive has been claimed. Although it has been submitted that an enquiry under this section is mandatory, an

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[204] Ibid.
[205] Ibid.
[206] See 4.2.4.3 above, 72.

amendment in this section is proposed so that there remains no doubt about the mandatory nature of this provision. In this context, the following proposed provision may be introduced in the Act.

"7(1) Where a requisition is made under section 6, the Federal Government may, if it thinks fit, issue a certificate that the requisition is admissible.

(2) If the Federal Government issues a certificate under sub-section (1), it shall order to enquire into the case to any Magistrate of the first class who would have had jurisdiction to enquire into the extradition offence to which the requisition relates if it had been an offence committed within the local limits of his jurisdiction."

5.1.3 Section 8

As noted earlier,[207] section 8(2) of the 1972 Act, inter alia, talks about the evidence which may be produced on behalf of the fugitive offender to show that the offence in respect of which extradition is requested is an offence of a political character or it cannot be termed as an extradition offence. It, however, does not talk about the production of evidence to prove that the fugitive offender cannot be surrendered because one or more grounds for refusing an extradition request contained in the 1972 Act apply. It is, therefore, suggested that section 8(2) may be amended to protect the rights of fugitive offenders by the following proposed provision.

"...(2) When the fugitive offender appears or is brought before him, the Magistrate shall enquire into the case in the same manner, and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a Court of Session and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive offender, including any evidence to show that the offence of which the fugitive offender is accused or alleged to have been convicted is not an extradition offence or any of the grounds for refusing extradition contained in this Act applies or there is some other legal bar to extradition."

5.1.4 Section 12

As stated earlier,[208] this section provides for the discharge of persons apprehended if not surrendered to the requesting State within two months from the date of committal. The High Court, in such a case, can order the discharge provided that the other conditions set out in this section are satisfied and the Federal Government does not show a sufficient cause to the

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[207] See 4.2.4.4 above, 75.
[208] See 4.2.4.8 above, 83.

contrary.[209] It should be recalled that the Lahore High Court had held that section 12 is not mandatory in nature.[210] However, the analogous provisions in the extradition laws of other States, as already discussed, are mandatory in nature.[211] Moreover, the freedom of movement and the right to personal liberty of an individual must be protected. Therefore, an amendment, in this section, is proposed which provides for mandatory discharge. Section 12 of the 1972 Act may be amended to introduce the following proposed provision.

"If a fugitive offender who, in pursuance of this Act, has been taken into custody to await his surrender is not conveyed out of Pakistan within two months after such committal, the High Court, upon application made to it by or on behalf of the fugitive offender and upon proof that reasonable notice of the intention to make such application has been given to the Federal Government, shall order such prisoner to be discharged.

Provided that the High Court shall not order the prisoner to be discharged if the Federal Government shows sufficient cause for the delay."

5.1.5 Appeals

It should be noted, as discussed above,[212] that the Extradition Act, 1972 unlike the extradition laws of other States does not provide any right of appeal against any decision made under the Act. This drawback of the Act leaves it with least procedural safeguards. It is submitted that a fugitive offender may seriously be prejudiced by the consequences of a decision under the Act especially when there is no right to appeal. As the extradition laws of other States provide an express right of appeal and the procedural safeguards demand such a right, it is suggested that the Act should expressly provide the right to appeal on issues of law as well as fact. The addition of the following proposed provisions in the Act is considered sufficient to make it comparable with the other extradition laws.

(I) Appeal to High Court

14-A "(1) An appeal lies to the High Court against the report of the Magistrate under section 10 of the Act within fifteen days starting from the day on which such report is prepared.

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[209] Ibid.
[210] See supra note 187.
[211] See 4.2.4.8 above, 83.
[212] See 4.2.4.7 above, 79.

(2) If an appeal under sub-section (1) is lodged, the extradition proceedings shall be stayed until the Court decides the appeal."

14-B "An appeal lies to the High Court against the order of the Federal Government under section 11 of the Act within fifteen days starting from the day on which such order is made.

Provided that an appeal under sub-section (1) does not lie if an appeal under section 14-A has already been decided."

14-C "An appeal lies to the High Court against the order of the Magistrate under section 19 of the Act within fifteen days starting from the day on which such order is made."

(II) Appeal to Supreme Court

14-D "An appeal lies to the Supreme Court against the judgment of the High Court in an appeal under section 14-A or 14-B within fifteen days starting from the day on which such judgment is made.

Provided that no appeal lies to the Supreme Court without first obtaining leave to appeal from the Supreme Court."

14-E "An appeal lies to the Supreme Court against the order of the High Court under section 12 of the Act within fifteen days starting from the day on which such order is made.

Provided that no appeal lies to the Supreme Court without first obtaining leave to appeal from the Supreme Court."

It should be noted that the first appeal lies to the High Court because the enquiry magistrate has the power and jurisdiction of a court of session under the 1972 Act.

5.1.6 Due Process of Law

As mentioned above,[213] it is the basic right of every individual to be dealt with according to law. Therefore, illegal extradition should be discouraged. It is suggested that an expression of resentment about disguised extradition should be provided in the 1972 Act. The following provision is proposed for such an expression.

"(1) Notwithstanding anything contained in any other law for the time being in force, the High Court on its own motion or upon an application given to it by any person shall order to register a criminal case against the persons who are involved in illegal extradition of a person to or from Pakistan.

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[213] See 4.3 above, 89.

(2) Any court which otherwise has jurisdiction to try or punish a fugitive offender may decline to exercise its jurisdiction, to express its disapproval, where the fugitive offender has been brought before it by illegal extradition."

It should be noted that the extradition laws of other States which have been discussed above are meant only for a comparison with the Extradition Act, 1972 otherwise those laws are not flawless either. For instance, the Canadian Extradition Act, 1999, the Australian Act, 1988 and the Extradition Act of New Zealand, 1999 do not contain express provisions which provide for refusing the surrender of fugitive offenders to a State where they might be subjected to torture, cruel, inhuman or degrading treatment or punishment. Similarly, the Canadian Act and the New Zealand Act though provide a right of appeal to a fugitive offender against the decision of his/her surrender to the requesting State, only a question of law can be raised in the appeal. It is unlike the Extradition Act of the UK, 2003 which provides the right of appeal on both a question of law as well as a question of fact. On the contrary, the 2003 Act provides only six bases of discrimination for refusing extradition as compared to the Canadian Act which provides at least eleven such bases.[214]

Nevertheless, it is submitted that if the above proposed recommendations are given due consideration and the Extradition Act, 1972 is improved accordingly, it will be a step forward towards achieving an honored place amongst the nations of the world. Moreover, it will be in accordance with the practice of other States which are concerned about the protection of human rights of fugitive offenders and availability of procedural safeguards to them.

[214] See 4.2.4.1 above, 64.

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