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Extradition Process and the Legal Grounds for its Refusal

الأسس القانونية لرفض إجراء التسليم

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Abstract:

The paper addresses the topic of extradition of offenders as an efficient international tool used in the framework of cooperation between States to fight transnational crime and crimes of international concern. However, this mechanism is governed by international law, and made effective in virtue of national legislations, bilateral and multilateral treaties ensuring the common interest of the world community and preserving the fundamental rights of the alleged offender.

In the same context, the author explores the most important grounds for denying extradition requests wherever there is a risk that the basic human rights of the defendants may be breached or where extradition collide with the requested State vital national interests or where extradition requests fall in contradiction with international rules and customs. The paper examines the extradition process and on what grounds the request of extradition can be refused and the legitimacy of the refusal.

Keywords: extradition, requesting State, Requested State, alleged offenders, grounds for refusal.

الملخص:

يعالج المقال موضوع تسليم الجناة كأداة دولية فعالة يتم اللجوء إليها في إطار التعاون بين الدول لمحاربة الجريمة المنظمة والجرائم الدولية محل اهتمام المجتمع الدولي. لكن يستوجب أن تكون هذه الآلية محكومة بموجب القانون الدولي، ويتم تفعيلها بموجب التشريعات الوطنية والمعاهدات الثنائية والمتعددة الأطراف لكفالة المصلحة المشتركة للمجتمع الدولي، دون المساس بالحقوق الجوهرية للجاني المشتبه به.

في ذات السياق، يتناول المؤلف أهم أسس رفض طلبات التسليم حيثما كان هنالك اشتباه بانتهاك الحقوق الأساسية للمدعى عليهم أو في حالة المساس بالمصالح الوطنية الأساسية للدولة المطلوب منها التسليم، أو عندما تكون طلبات التسليم تنطوي على خرق للقواعد الدولية والعرفية. يتناول المقال بالدراسة إجراء التسليم و الأسس المستند عليها لرفض التسليم ومشروعية هذه الأسس.

الكلمات المفتاحية: التسليم، الدولة الطالبة ، الدولة المطلوبة، المشتبه بهم، أسس الرفض.

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Introduction

Following the escalation of transnational organized crime such as drug trafficking, terrorism, illicit migration, cyber-criminality…etc and as interactive technology becomes within the grasp of nearly every individual, and as mobility is constantly increasing, the States have decided to come together as a block to combat organized crime and crimes of international concern such as genocide, crimes against humanity and crimes of war. One of the mechanisms adopted to give effect to the determination to address these grave violations is international legal frameworks on extradition and relevant domestic legislations with the objective of bringing to justice suspected offenders who find refuge abroad in search of safe havens.

In this context, extradition is defined according to the United Nations Office on Drugs and Crime in its "Model Law on Extradition" as: "the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence". Doctrinal definitions agree to define extradition as a legal procedure by which a State requests the surrender of a person accused or convicted of a crime for trial or enforce the verdict against him [(1)]. The request is initiated due to a crime committed within the territory of the requesting State.

It is worth noting that in virtue of the principle of sovereignty, a State is not bound to surrender a person unless there is an extradition treaty or under the reciprocity principle, and as long as the process meets criteria enshrined in its legislation. In this framework, the paper explores the foundational grounds of extradition (part1) and seeks to examine the grounds for refusing extradition.

1. Foundational Grounds of Extradition

As a rule, a State is not bound to surrender a fugitive to another country unless it is subjected to do so in virtue of binding rules.

Extradition as a legal process and a judicial cooperation tool between States rests on some grounds recognized by international law. These grounds are deemed to be binding tools for the requesting and requested states. The sources of extradition can be divided into fundamental and non-fundamental sources. International treaties and municipal legislation are recognized as fundamental sources of extradition, whereas, customary law and the principle of reciprocity are identified as non-fundamental sources.

1.1.The Legal Basis for Extradition (Fundamental Sources of Extradition)

The fundamental sources of extradition are international treaties and national legislation. In this portion of the paper, we try to explore these two legal grounds in turn, which the requesting and the requested States refer to when addressing extradition issues.

1.1.1. International Treaties for Extradition

As regards international treaties, States have ratified and acceded to multilateral and bilateral treaties, which means that they have deliberately accepted to be legally bound by the provisions laid down in the treaties addressing extradition issues.

Multilateral treaties refer to both universal and regional instruments enshrining extradition as one of the efficient mechanisms adopted to fight impunity. This conventional

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[1] - د. علي جميل حرب، نظام تسليم و استرداد المطلوبين (تسليم المجرمين في القانونين: الدولي و الوطني) ، منشورات الحلبي الحقوقية، لبنان، بيروت، 2015، ص 25.

framework aims to set up cooperation tools between States for the purposes of addressing transnational organized crimes. The author tries to explore some of them as a basis for extradition.

The United Nations Model Treaty on Extradition is the best reference. It is a model treaty on extradition enhancing effective international cooperation; it was adopted for inspiring States to come together in the framework of specific arrangements in view of extraditing offenders to hold them accountable for their acts and in the perspective of fighting crimes affecting social order and security.

The General Assembly of the United Nations invites Member States to establish treaty relations with other States on extradition and revise existing treaty relations, taking into account whenever doing so, the Model Treaty on Extradition. It also urges Member States, within the framework of their national legal systems, to enact effective extradition legislation and invites them to consider taking steps to conclude extradition treaties and comply with their provisions.[2]

In the same context, it urges the States to revise bilateral and multilateral law enforcement cooperation arrangements as an integral part of the effort to effectively combat constantly changing methods of individuals and groups engaging in organized transnational crime. In addition, the General Assembly encourages them to use the Model Treaty on Extradition as a basis in developing treaty relations at the bilateral, regional and multilateral levels as appropriate for the purpose of combating new and complex forms of crime.

United Nations Convention against Transnational Organized Crime is meant to fight transnational organized crime which is a criminal entity that comprises a variety of heinous activities carried out for profit by organized criminal groups. It uses violence and corruption in its activities. Deeply concerned by the odious prejudices caused by the organized crime and the growing links with terrorist organizations, and in view of addressing these challenges which threaten the peace, security and well-being of the world, the United Nations General Assembly adopted United Nations Convention against Transnational Organized Crime which was the first international treaty to receive universal adherence. By joining the Convention, the State Parties committed themselves to enhancing international cooperation, prevent and combat such grave crimes at the national, regional, and international levels.

One of the efficient tools to deny safe havens for the offenders is Article 16 which provides for extradition of the perpetrators of the offences covered by the convention[3], such us money laundering, corruption, migrant smuggling, illicit trafficking in persons and other serious crimes. Pursuant to the adherence to this Convention, the State Parties have a binding obligation to take it as the legal basis for cooperation in matters of extradition or they can seek, where appropriate, to conclude bilateral, regional or multilateral treaties on extradition with other State Parties for the purposes of addressing organized criminal activities.

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2 - United Nations General Assembly, resolution 45/116, subsequently amended by the General Assembly resolution 52/88, Preamble of the Model Treaty on Extradition.

3 - Article 16 paragraph (1) of the United Nations Convention against Transnational Organized Crime, Resolution adopted by the General Assembly in its fifty fifth session, 55/25, 15 November 2000. It States: This article shall apply to the offences covered by this convention or in cases where an offence referred to in article 3, paragraph 1(a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under domestic law of both the requesting State Party and the requested State Party.

In 2002, Algeria ratified the United Nations Convention on Transnational Organized Crime by virtue of the presidential decree 02/55 dated on the 05th of February 2002 to join the global efforts to fight dangerous criminal activities, and one of the mechanisms to avoid granting safe havens to offenders is extradition process as set out in the aforementioned Convention.

The UN Model Treaty on Extradition call upon States Parties to join in regional treaties as an efficient mechanism to fight and prevent grave offences. The Economic Community of West African States Convention on Extradition, the European Convention on Extradition and its additional protocols, and the Inter-American Convention are regional treaties on Extradition having dealt with extraditing suspected or convicted persons. As far as Arab States are concerned, they concluded an agreement for judicial cooperation on 6th April 1983. This Arab Convention devoted Part 6 to extradition of accused or convicted persons under some rules and conditions laid down in this part. It encompasses provisions about the right to deny extradition of nationals, obligation to extradite individuals charged with committing acts punishable by the laws of the requesting and requested States, crimes not subject to extradition, method of submitting extradition requests, detention of the person whose extradition is requested, release of the person to be extradited, deciding on extradition requests, it also comprised provisions about requests to extradite an individual under investigation or being tried and trying a person for a crime other than that for which he was extradited.

It is worth noting that the only extradition treaty between Arabs is the Arab Union States Treaty on Extradition of offenders concluded in 1953 in Cairo-Egypt, adopted by the founding States: Egypt-Lebanon-Jordan-Syria-Iraq-Yemen and Saudi Arabia. Later on the Treaty was ratified by all Arab States. The treaty needs to be revised and updated to go in line with recent developments in extradition provisions recognized by the international community.

Bilateral treaties on extradition are bipartite arrangements negotiated and ratified only by two consenting States are an important tool in mutual cooperation and assistance between States in the fight against serious and heinous crimes, and in criminal matters in general. The United Nations Convention against Transnational Crime encourages Member States to conclude bilateral treaties on extradition in order to implement Article (16) provisions related to extradition procedure. The limited number of States involved in bilateral treaties make the conventions more efficient and more effective and less obstacles stand in the way of their application.

The United Nations Model Treaty on Extradition recalled in its Preamble the States Parties of resolution 1 of the Seventh Congress, on organized crime, in which Member States were urged, inter alia, to increase their activity at the international level to combat organized crime, including, as appropriate, entering into bilateral treaties on extradition and mutual legal assistance.

In this context, Algeria has concluded bilateral conventions with many States with the aim of overcoming the borders' obstacles so as to bar criminals from having a safe location and enhance responses to transnational criminality. It has concluded treaties in penal and extradition matters with Tunisia, Morrocco, Libya, Mauritania, Bulgaria, France, Belgium, and many other States.

1.1.2. National Legislation as a Fundamental Source for Extradition

National legal systems promote the development of legislation and institutions related to extradition, to that effect, they quote principles and provisions on extradition from the United Nations Model Treaty on Extradition, multilateral and bilateral treaties which provide an important tool for the development of international cooperation.

The national provisions on extradition are incorporated in States' Criminal Law Procedure Codes. With regard to Algeria, the conditions, the procedure and effects of extradition are governed by articles 694 till 720 of the Algerian Code of Criminal Procedure, unless otherwise provided in international treaties. National extradition laws try to make a balance between domestic sovereign interests and the requirements of international cooperation and mutual assistance in addressing criminal activities that threaten peace, security and welfare worldwide.

It should be noted that the United Nations General Assembly encourages Member States, within the framework of their national legal systems, to enact effective extradition legislation, and calls upon the international community to give all possible assistance in achieving that goal.[4]

1.2. The Legal Basis for Extradition (Non-Fundamental Sources of Extradition)

As referred to above, the non-fundamental sources of extradition are customary international law and the principle of reciprocity. These two grounds are to a large extent effective in interstate relations as legal bases for both the requesting and the requested States.

1.2.1. Customary International Law

Customary international law consists of norms deduced from practices performed by States in a repeated and consistent way, and on a large scale over a considerable period of time. These norms are accepted as binding rules holding accountable States breaching them. The Statute of International Court of Justice refers to it as evidence of general practice accepted as law.

It is generally agreed that the existence of a rule of customary international law requires the presence of two elements: namely State practice and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law. In the assessment of State practice, two separate issues need to be addressed: namely the selection of practice that contributes to the creation of customary international law and the assessment of whether this practice establishes a rule of customary international law. Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. [5]

The material element of customary international law refers to preceding practices and occurrences repeatedly carried out by States during a reasonable period of time. Nowadays, the period of time criteria is less required because of the impressive revolution in technology communication. The moral element consists of the fact that subjects of international law believe that the repetitive practice becomes a binding rule that must be observed and respected.

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4 - Model Treaty on Extradition, Op.Cit, p.127.

5- Jean-Marie Henkaerts and Louise Doswald Beck, Customary International Law, Volume 1: Rules, ICRC, Cambridge University Press, United Kingdom, 2009, p. 39.

State practice with regard to requesting, surrendering and where appropriate, denying extradition, has established some rules as norms of customary international law as the conduct has occurred in a repetitive and consistent manner. It should be recalled that the major source governing international relations has been customary law, and this is applicable to relations between States regarding extraditable offences. Having this status, States resort to customary law in the absence of extradition treaties or domestic legislation to carry out extradition procedures. [(6)]

It is well-established for example that customary rules prohibit the surrender of foreign high-ranking officials as they enjoy immunity under international rule. In addition to that, precedents deny extradition of certain categories enjoying diplomatic immunity.

Some treaty rules originated from customary law, such as the denial of extradition of nationals of States of refuge and prohibition of handing persons enjoying the status of refugees, moreover, offences are not extraditable unless they are criminalized in both the requesting and requested States. And finally, political offences are not extraditable from customary law perspective.

1.2.2. The Principle of Reciprocity

In the absence of treaty-based provisions, the principle of reciprocity can be referred as basis to extradite requested persons. It provides that every act of favour, respect, benefit or penalty that a country bestows on the citizens or legal entities of another country, should be returned (reciprocated) in the same manner. It provides for the mutual expression of international support. As far as extradition is concerned, the principle of reciprocity implies that the territorial State must extradite the accused persons or convicts in exchange for any diplomatic kindness shown by the requesting State. Such diplomatic kindness may be any act, ranging from tariff relaxations or enforcement of foreign judgments to military or economic aid. This principle may also operate for the mutual extradition of accused persons or convicts of the respective countries. [(7)]

The decisive element propelling States to extradite is the reciprocity underpinning international relations: States need to extradite if they wish to obtain extradition from other States in the future. In his 'rationalist' construction of international institutions, Keohane classifies reciprocity as one of the "principal guarantors of compliance with commitments", and divides it into two essential dimensions, namely "threats of retaliation" and "promises of reciprocal cooperation". It is primarily the latter that is manifesting itself here. States assuredly have an interest in extraditing because they have an interest in obtaining extradition.[(8)]

6- محمد عبيد، المصادر القانونية لنظم تسليم المجرمين، دراسات سياسية، المعهد المصري للدراسات، تركيا، 2019.

7 - Jerusha Melanie, Extradition in International Law, published by Rachit Garg, India, June 13, 2022.

8 - Miguel Joao Costa, Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond, doctoral thesis, Maastricht University, 2019, p. 18.

2. Grounds for Refusal of Extradition Requests

In spite of the necessity to surrender suspects and convicted persons, either for prosecution or enforcement of sentences, extradition is deemed by international and customary law as a sovereign act as the State has legal authority over people on its territory. Consequently, States may decline to grant extradition on considerations related to the offence and the nature of penal sanctions or on grounds related to the person or on grounds related to human rights considerations and finally on factors related to jurisdiction, clause Discrimination and Refusal on Grounds of Immunity of the Person from Prosecution or Punishment Because of Lapse of Time and Amnesty.

2.1. Refusal of Extradition on Grounds connected to the Offence and Nature of Penal Sanctions

The requested State may refuse the extradition request on the basis of the nature of the offence and on grounds of the penalties stipulated for the offences which are not applicable in the State of refuge, or which are considered disproportionate and harsh enough.

2.1.1. Refusal of Extradition Related to the Offence

The State requested to extradite a person allegedly accused of committing an offence in the territory of the requesting State may decline to grant extradition grounded on some motives relating to the offence.

The double-criminality principle (dual criminality) is the first bar to extradition; it allows the requested State to deny an extradition request unless the offence in question is criminalized under the domestic legal system of the requested State as well as in the requesting State.

The dual criminality principle is stipulated in Article 697 of the Algerian Criminal Procedural Code setting out that extradition request is not granted if the offence is not punishable under Algerian law.

It should be recalled in this respect that it does not matter whether the extraditable offence is classified under the same category or in different categories, under penal laws of both requesting and requested States.

Developments occurred in Europe in this matter; a recent framework decision adopted by the Council of the European Union removes the principle entirely in certain types of crimes. The United Kingdom ruled the principle of dual criminality out by enacting the extradition act in 2003[9].

Besides the aforementioned bar, political offence may be invoked for Refusal of extradition requests. Nearly all domestic legislations provide that extradition may be denied if the offence for which extradition is requested is of a political nature. It is noteworthy that there is not a consensual definition related to political offences either from legal or doctrinal point of views. In particular circumstances, it is conceived as a political offence, in others, it is a terrorist offence; it depends on States' interests and visions.

However, some define the political offence as the acts aiming to overthrow the government in place in order to establish a new political system proposed as an alternative by

9 - Gavan Griffith and Claire Harris, Recent Developments in the Law of Extradition, Melbourne Journal of International Law, Vol 6, p. 9.

the opponents using unconstitutional methods or causing prejudice to the public social order or harming the independence and territorial integrity of a State.

The political offender in general uses forcible and coercive ways to change the political regime, he steps away from legal and legitimate paths for achieving his political aspirations, that is why, his deeds are deemed to be pernicious and prejudicial for the security and stability of the country, and thus, the political authorities seek his extradition for the purpose of prosecution. Wherever there is a divergence in view as to whether the behavior is a political offence or not, the requested State is entitled to determine whether it is political in nature or not. But the best option for the Contracting States is to agree on a unified definition with regard to political offences.

The approach in effect till now, is that the political offences are not extraditable, as the motivation is not cupidity or gaining material profits, but the motivation is to do reforms and achieve political goals based on ideological beliefs. In this context, Article 03 of the Model Treaty on extradition states that extradition shall not be granted if the offence for which extradition is requested is regarded by the requested State as an offence of a political nature.

Countries tend to agree on the exclusion of conducts such as acts of violence, serious offences involving an act of violence against the life, physical integrity or liberty of political leaders or persons having official quality or against their wives and children from the concept of political offence; that is to say; in the application of the provisions pursuant to extradition, the following crimes, even when they have a political purpose, shall not be considered crimes of a political nature: assault on kings and presidents of the contracting parties or their wives or their ascendants or their descendants and assault on crown princes and vice-presidents[10].

Military offence is set out in bilateral and multilateral treaties as a basis for refusal of extradition request. It is a violation of military duties, such as desertion from military service, disobedience of orders emitted by superiors. Extradition is denied for offences under military law of the requesting State as they are not criminalized under ordinary criminal law because they are not prohibited in criminal laws.

In my view, individuals alleged to have committed grave military offences must be extradited to the requesting State. Some military offences are harmful enough to put in danger the security and public order of the requesting State, such as communicating with the enemy and providing him with confidential information, serving within the armed forces of the enemy …etc.

2.1.2. Extradition Refusal on Grounds of the Penalties

As political offences are perceived as dangerous crimes since they geopardize the territorial integrity, stability and threaten the political authorities, many States tend to impose capital punishment to this category of offences. As Human Rights organizations have started to require the abolition of death penalty, in 1989, the U.N General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights acknowledging a worldwide effort to abolish capital punishment for all purposes and

10 - See Article (41) of Riyadh Arab Agreement for Judicial Cooperation adopted on 6th April 1983, and

obligating each State Party to “take all necessary measures to abolish the death penalty within its jurisdiction.” (11)

In furtherance of the policy to abolish capital punishment, in 1999 the General Assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights to abolish the death penalty; the Protocol obligates States that are parties to it not to apply the death penalty in their territory to any person subject to their jurisdiction.

States having abolished death penalty never surrender offenders incurring such punishment. However, Islamic countries must maintain this type of penalty as it is stipulated in the Holy Koran for some specific serious wrongdoings.

Denial of extradition shall be decided by the requested State in case the alleged offender has already served the sentence because a deeply rooted principle recognized and enshrined in international instruments, as well as in national legal systems, provides that a person shall not be punished twice for the same offence.

2.2.Rule of Speciality as a Basis for Refusal of Extradition

The rule of speciality is a standard in international law: it means that the individual is handed over to the requesting State to be prosecuted or tried for the specific crimes mentioned in the extradition request. This principle allows a nation to require the requesting State to limit prosecutions and trials to declared offences. The doctrine of speciality forces the requesting State to punish the surrendered individual just for offences for which the requested State allowed the extradition (12).

The Rule of Speciality is justified by the fact that some States may refer to extradition mechanism to achieve illegitimate purposes, such as, trying an individual for offences not included in the extradition request or for ethnic and political considerations.The Rule of Speciality is thus, a protection offered for the extradited person against cheating.

It is worthy to emphasize that even though it is not mentioned in the documents exchanged by the requesting and the requested States, the requesting States have to abide by this rule, since it has become a well-established customary rule.

2.3.Refusal on Grounds related to Human Rights Breaches

Extradition requests may be rejected when the requesting state is known to have a bad record in practicing torture against its own people as a method of punishment. Torture is prohibited under international human rights law and national legislations, it is considered as a dehumanizing sanction, amounting to crimes that shock public conscience. In this regard, the Convention against Torture, inhuman or Degrading Treatment adopted on 10 December 1948, stipulates in Article 3 that no State Party shall expel, return 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.

In the same connection, Articles 5 and 7 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which assert the fact that

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11 - Ved P. Nanda, Bases for Refusing International Extradition Requests: Capital Punishment and Torture, Fordham International Law Journal, Volume 23, Issue5, 1999, P. 1373.

12 - Renuwati Rajpurohit, Extradition in International Law: a Critical Study, a thesis submitted for the award of Doctor of Philosophy, Faculty of Law, Jai Narain Vias University, Jodhpur (Rajasthan), India, 2021, pp.43-44.

no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Given the above-mentioned penal sanctions that are seen as inhuman and heinous universally, torture, capital punishment and inhuman treatment are increasingly accepted as legal and acceptable grounds for refusal to surrender individuals having fled to seek safe havens.

2.4.Refusal of Extradition Related to the Requested Person

The person whose extradition is requested is one of the most important pillars in the extradition regime. He or she is the person who has perpetrated the criminal offence or who is accused by the requesting State to be the author of the offence. The requested person is a natural person and cannot be a moral person. As far as the latter is concerned, an applicable legal and customary regime is in force in most multilateral and bilateral treaties, as well as, in most domestic legislations. The requested States generally refuse to extradite their nationals, and decline as well, extradition requests on the basis of the official positions of the requested persons.

2.4.1. Refusal of Extradition on Grounds of the Nationality of the Individual

Denying extradition of a national is a widely enshrined rule in customary law, as well as in treaty law, it is equally codified in national legal systems. States refuse to hand over the person sought by the requesting because he or she has the nationality of the requested State, and it does this, pursuant to the personal jurisdiction principle. The refusal is also related to the sovereignty principle. But it is worthy to note that at the request of the requesting State, the requested State, may bring the suspect or the convicted person before its competent courts for prosecution. And even, without request, the requested State can prosecute the offender on the basis of active-nationality principle.

This is set out in the Model Treaty on Extradition adopted by the United Nations stating that extradition may be refused if the person whose extradition is requested is a national of the requested State, and stipulates that where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested.[13] The nationality of the person charged with, or convicted of having perpetrated the offence shall be determined as on the date on which the criminal offence for which extradition is requested was committed.

Similarly, passive-nationality jurisdiction is increasingly accepted, as it is embodied in a growing number of domestic legal systems. It refers to the fact that if an offence is perpetrated against one of the nationals of the requested State, and if the latter can secure in custody the offender, the State from which extradition is requested can prosecute the offender, even if the offence is committed outside the requested State territory.

Some multilateral and bilateral treaties highlight the need that the requested State shall bring the suspect before its competent judicial organs to hold him accountable for his acts, in view of barring those responsible for criminal offences from escaping punishment. The Riadh Arab Agreement for Judicial Cooperation signed in 1983 encompasses the same provision. It provides that "each of the Contracting Parties may refuse to extradite its nationals provided

13- See Article (4/a) of the Model Treaty on Extradition, adopted by the General Assembly resolution 45/116, subsequently amended by General Assembly resolution 52/88, 68th plenary meeting, 14th December 1990.

that it undertakes within the limits covered by its jurisdiction to charge such national who has committed crimes punishable by law in the territories of any other Contracting Party…”. (14) It is equally enshrined in many treaties binding Algeria with foreign States.

2.4.2. Refusal of Extradition on the Basis of the Official Status of Individuals

From ancient times, certain categories of individuals enjoy some immunities with regard to their functions in order to ensure the efficient performance of their missions. These immunities have increasingly become established rules, as evidence of general practice accepted as binding law.

International custom and inherited international traditions grant sitting presidents and high-ranking government officials immunity from being extradited to a State having requested them for prosecution. However, the International Criminal Court sets out in Article 27 that immunities which may be attached to the official status of a person shall not bar the ICC from exercising its jurisdiction. In spite of this provision some States stick to the custom and refuse extradition requests on this ground.

Refusal of extradition shall be notified to the requesting State where the request targets members of the diplomatic staff. This practice has been deeply rooted in States' behaviors from remote times. The immunities and privileges accorded to these persons are embodied and recognized by Vienna Convention on Diplomatic Relations 1961. In the same context, staff members of international organizations, and particularly United Nations Staff enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes as stipulated in Article 105 of the UN Charter, and that representatives of States Parties of the UN and officials of the Organization shall as well be granted these immunities in order for them to perform their functions independently.

As a consequence, officials of the United Nations shall not be handed over to a requesting State for prosecution as they are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity (15). Regional governmental organizations also enjoy immunity from extradition and legal process, such as the League of Arab States members and members of the European Union…etc.

2.5. Refusal of Extradition on Grounds of National Criminal Jurisdiction of the Requested State

Denial of extradition may occur where national criminal courts have jurisdiction to prosecute cases based on territorial or universal jurisdiction, as well as on grounds of the protective principle of criminal jurisdiction, which is regarded as a procedural constraint with reference to extradition. These norms are to a large extent accepted in national legislations and in international treaties governing the extradition process, and this is linked to “aut dedere, aut judicare” principle which is to say “prosecute or extradite”.(16)

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14 - See Article (39) of Riyadh Arab Agreement for Judicial Cooperation, signed by the Council of Arab Ministers on the April 6th 1983, ratified by Algeria on 11th February 2001.

15 - See Article 5 Section 18/a of the Convention on the Privileges and Immunities of the United Nations adopted on 13 February 1946.

16- بن زحاف فيصل، تسليم مرتكبي الجرائم الدولية، رسالة لنيل شهادة الدكتوراه في القانون الدولي و العلاقات السياسية الدولية، جامعة وهران، كلية الحقوق و العلوم السياسية، السنة الجامعية: 2011-2012، ص 328.

2.5.1. Territorial jurisdiction

It refers to the authority that a State has to prosecute offences occurring within its territory.

2.5.2. Universal jurisdiction

Any State has the right to prescribe rules to punish certain heinous crimes in the absence of ordinary connections linking the offence to that State, in order to prosecute criminal acts committed outside its territorial sovereignty, by anyone, anywhere in the world, on the motivation that these crimes are atrocious and deeply shock the conscience of humanity. Universal jurisdiction is strongly motivated by States' willingness to fight the most serious crimes of concern to the international community that threaten international order.

2.5.3. The protective principle of criminal jurisdiction

It entitles States to prosecute certain offences committed by non-citizen nationals outside their territories which harm their national fundamental interests, such as crimes relating to counterfeit currency, cybercrime, terrorism, money laundering, migrant smuggling, piracy …etc.

2.6.Refusal of Extradition on Grounds of Clause Discrimination

Discrimination against other people because of their race, ethnicity, religion is a doctrine of some particular political or social entities that consider that others are inferior. It usually involves the idea that a particular human entity is superior and thus, is entitled to exercise domination on groups with different identities and maintain them in a state of submission, which is totally unjustified socially and morally.

To shed light on the question, it is worth reminding that Article (1) of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. In the same context Article (2) provides that everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion…etc

Pursuant to the above cited criteria, when the requested State is convinced that the request for extradition is grounded on discriminatory motives, it is bound under international law provisions not to extradite. Non-extradition in this particular case is universally accepted as a fundamental principle of the law of extradition. The person in question shall enjoy a refugee status. The mobile behind non-extradition is the fear that the person whose extradition is requested may be victim of persecution.

The Convention for the protection of refugees of 1951 and its protocol of 1969 assert the right of individuals fleeing persecution not to be extradited as they fear threat to their life or freedom.

International treaties enshrine extradition refusal on ground of discrimination, such as the Model Treaty on Extradition urging States to decline extradition if they consider there are substantial grounds for believing that the requesting State seeks the surrender of the offender for the purpose of prosecuting or punishing him/her on account of race, religion, nationality, ethnicity, origin, political opinions, sex or status, or that the person's position may be prejudiced for any of those reasons. In this situation, criminal justice is not sought, which is considered legally a reprehensible behavior.

2.7.Extradition Refusal on Grounds of Immunity of the Person from Prosecution or Punishment Because of Lapse of Time and Amnesty

It is widely asserted in international instruments relating to extradition as well as in national legal systems, that the request for extradition may be denied if the person is immune from punishment because of lapse of time or amnesty.

The above-mentioned limitations are enshrined in most domestic and international treaties, the lapse of time principle grants rights to the requested person not to be prosecuted or punished because of neglect of pursuing prosecutorial measures or execution of the sentence. Therefore, after a certain period since the criminal offence was perpetrated, according to the prescriptive laws of the requesting State, the surrender can be refused by the requested State.

The alleged perpetrators are immune from extradition pursuant to the principle of expiration of public lawsuit if the prosecution has not been initiated and maintained, and the limitation period established in the penal law of the requesting State is run. However, the most serious breaches of international criminal law such as, the genocide, the crimes against humanity, the crime of aggression and war crimes are not subject to any statute of limitations, this provision is plainly mentioned in Article 29 of Rome Statute. As far as the Algerian Code of Penal Procedures is concerned, the expiry of public lawsuit is stipulated in Article 6. With respect to the limitation periods relating to contraventions, misdemeanors and felonies, they are referred to in Articles 613, 614 and 615 of the Algerian Code of Criminal Procedures.

Conclusion:

In the global fight against transnational crime and crimes of international concern, the States have undertaken to conclude treaties relating to extradition to prevent granting safe havens to offenders. Extradition refers to the handing over of defendants and convicted persons to the requesting State, in view of preserving social order and common values in contracting States.

As a legal tool, it shall be implemented in accordance with the provisions contained in national legal systems, bilateral and multilateral treaties governing extradition process. It should be noted in this respect that offences are extraditable, only if they are penally prohibited under the legal systems of both the requesting and requested States, and if the offence has been perpetrated within the territory of the appealing State. The latter ought to transmit to the requested State a transcript request, together with supporting documents.

In spite of the significant role of extradition in the battle against grave violations of law, the request may be declined if it doesn’t meet the requirements as set out in most treaties and enshrined in international instruments. When the double criminality principle is not met, and when the punishment imposed for a particular offence is death penalty or considered inhuman, cruel and degrading treatment, extradition request may be refused. Refusal of extradition can be decided on grounds of territorial jurisdiction where the offence is committed on the territory of the requested State as jurisdiction is essentially territorial. It can equally be denied if the alleged offender flees his home country because of persecution, and consequently, he acquires a refugee status.

Similarly, extradition may not be granted if the person sought is accused of having committed political or military offences, as these types of offences are not extraditable under national and international legal rules. It may also be declined if the individual requested for

extradition holds the nationality of the requested State. Other reasons may be invoked to refuse extradition, such as clause discrimination and immunity of the Person from Prosecution or Punishment Because of Lapse of Time and Amnesty and for considerations and risks linked to human rights abuses.

The author urges States to conclude more bilateral and multilateral treaties relating to extradition of offenders, as they cannot address singlehandedly transnational crime. But the extradition norms should be brought into consonance with core social and cultural values of the requested State, for the purposes of stability and public order, and prevention of intense security concerns. Islamic States shall not surrender Muslims for acts in congruence with their religious beliefs, as extradition depends to a large extent on the supreme interests of the requested State. As for dual criminality principle, requested State may extradite even though the offence is not criminalized in its legal system, where the alleged acts are intolerable to the social consciousness and seen as heinous and immoral, this behavior consolidates the requesting and requested States empathy.

The author suggests that serious disproportionality between the alleged acts and the penal sanction applicable in the requesting State is worth being a ground to refuse extradition. Wherever there are plausible reasons that dignity and worth of person would be infringed by the requesting State, this could be a legitimate and legal foundation for denial of extradition, as disregard and contempt for human rights are universally reprehensible.