

Extradition requests and available defences:

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Leading a practice of law spanning from general corporate matters, to alternative dispute resolution, cross border proceedings, corporate investigation to risk management, members of the Special Projects Team master lawyering skills (both hard and soft) that leaves very little to be desired of a practicing attorney.

One of the intriguing indeed enigmatic areas of practice the Special Projects Department prides itself with advising on is: “Extradition”. Extradition, with its transnational process, implications and interdisciplinary concerns is emblematic of the complexities of service of justice in this day and age. As a strand of criminal justice, Extradition is mainly differentiated from other strands of criminal justice by the matter that involves more than one jurisdiction. Lawyers faced with extradition cases are often confronted with the task of reconciling two or more jurisdictions of different countries to resolve extradition issues. The complexity of resolving extradition matters stems from an intricate juggling exercise between legal and diplomatic subtleties.

Extradition can be defined as a series of exchange documents via diplomatic channels between authorities seeking the surrender of an alleged offender or fugitive to the state in whose territory the alleged offence was committed.

Legal basis of an extradition request

Extradition is a mixed process; it is neither purely legal, nor political. It is usually initiated by judicial institutions and communicated through political channels, but is also subject to political exercise of legal concept of sovereignty. Based on long-standing legal traditions, the States have always been strongly opposed to extraditing their own nationals, to the extent that it is sanctified by their national respective constitutions.

Extradition requests of a legal basis are reliant on the presence of international conventions, whether they are international, regional, or bilateral treaties or a specific agreement between the two jurisdictions to extradite a specific subject. Such conventions are extremely important, in particular due to the consequences of globalization and the ease at which individuals can travel nowadays. It is worth noting that the United Arab Emirates signed international conventions such as the UN Convention Against Corruption on the 10th of August 2005 (ratified on the 22nd of February 2006), but also regional and bilateral treaties of extraditions.

Under international law principles, there is no obligation for one country to surrender a “wanted” individual to another country. On that basis, and in light of the importance of cooperation in fighting international crimes, it has been necessary to build up agreements / international conventions. It is relevant to mention however that when treaties are in place, extradition does not necessarily take place.

An alternative ground for extradition: “international courtesy”

As indicated above, in the absence of a treaty, initially there is no legal obligation on the jurisdiction receiving the extradition request to oblige. It is however noted that in some incidents the country applying for extradition invokes the concept of “international courtesy” promising to extend the same treatment to the country receiving the application should the latter elect to cooperate.

Needless to say international courtesy is the historical origin of extradition as the process we know today.

Recently – in June 2011 – a British national has been extradited from Thailand to the UAE to face criminal charges of embezzling substantial amounts from an Emirati Government-owned company. The British national was turned over to the UAE authorities after the Thai Criminal Court agreed to extradite him to the UAE, even though there is no formal treaty between the UAE and Thailand.

UAE Law:

In the course of our daily practice, we are usually invited to advise and opine on the issue of Extradition and how it is carried out in the UAE. It is worth mentioning that the UAE legal system does not treat extradition as a public action but rather as a judicial order subject to review by superior Courts and is generally governed by:

- Article 38 of the UAE Constitution: “Extradition of citizens and of political refugees is prohibited.”
- Article 121 of the UAE Penal Code, Federal Law No. 3 of 1987.
- Article 132(1) of the UAE Penal Code, Federal Law No. 3 of 1987.
- Article 304(1) of the Criminal Procedures Code, Federal No. 35.
- Articles 23 to 29 of the Residency Law, Federal Law No. 17 of 1972.
- Articles 79 to 92 of the Executive Regulations of Residency Law, Federal Law No. 6 of 1973.

Process of extradition: In all extradition proceedings, the process of extradition takes place through diplomatic channels:

- The requesting party (the Attorney General) sends the request to the Ministry of Justice (of the requesting party).
- Following this, the Ministry of Justice sends the request to the Ministry of Foreign Affairs (of the requesting party), who then transfers it to the Embassy of the requesting party in the capital of the country receiving the request.
- Then, the Embassy communicates the request to the Ministry of Foreign Affairs of the requested party, who then transfers this request to the Ministry of Justice (of the requesting party).

Enforcement of the extradition request:

The enforcement of the extradition will occur as per the below listed points:

1. Arrest of the wanted subject: when a requesting party seeks to extradite a fugitive, in many cases, the fugitive in question flees the country to another in hopes of evading his prosecution and punishment. One option for the requesting party to ‘retrieve’ the wanted individual can be facilitated by alerting Interpol, whose primary objective would be to facilitate international police cooperation by using tools to prevent or regulate movements of suspected or indicted individuals. One of such tools used by Interpol includes the use of colored notices of which there are 7 types, each one indicating different types of requests. For instances, if there is a request for an individual’s extradition, the requesting party may alert Interpol, who would in turn, issue a Red Notice alert to prevent that individual from travelling. It is worth noting that both the Interpol Red Wanted Persons Notice and the European Arrest Warrant have the same purpose i.e. to alert police that the individual for whom the European Arrest Warrant or the Red Wanted Person Notice has been issued is wanted for a specific crime, by a specific country and most importantly that a judge from that specific country has signed an arrest warrant (Interpol would arrest the individual in the country he is in and surrender him to the local Prosecutor first). This process would help requesting parties to recuperate fugitives, particularly when a fugitive is a holder of dual nationality, and leaves the requesting country to another by way of his second nationality.

2. Interview of the wanted subject by the Prosecutor;

3. Either immediate deportation (e.g. in incidents of Terrorism, Drug and/or Human Trafficking, Money Laundry, Transnational Organized Crime) or the Prosecutor will incarcerate the wanted individual pending receipt of the copy of the case file from the requesting jurisdiction and a final decision on extradition following that.

4. In some jurisdictions (e.g. U.K) the Prosecutor upon receiving a copy of the case file from the requesting jurisdiction will examine the case and provided that it satisfies the English Prima Facie test of evidence he/she will initiate an extradition Public Action against the wanted individual before a specialized extradition Court which will decide on the extradition issue.

Available defences:

The available defences include the defences of dual criminality, political crimes, human rights concerns, conflicts of jurisdictions but also diplomatic protection.

Dual criminality: an individual will only be extradited if his or her actions constitute an offence in both, the requesting and the requested states.

- Political crime: is defined under international law as the incrimination of peaceful opposition and criticizing the politics of the political regime requesting the extradition.
- If there are discrepancies in the views of two jurisdictions on human rights and unusual or cruel punishment, and there is a risk of such a violation in the requesting jurisdiction, this would frustrate the extradition request, even if there are treaties governing the process between the two jurisdictions.
- Conflicts of jurisdictions: The defence of conflicts of jurisdictions will be applicable when two jurisdictions believe they are competent to make a certain decision on a particular case. If there is a conflict of jurisdictions, extradition cannot occur.
- Diplomatic Protection: there are sometimes complications to the extradition process, in particular when the individual in question holds dual nationality. Due to effective nationality, there are a lot of difficulties to effective diplomatic protection of individuals. In the *Nottebohm* case, the International Court of Justice regarded nationality as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state”. Deriving from the *Nottebohm* case, it was held that diplomatic protection from a state to an individual can only provide security if there is “a sufficient bond of attachment” between an individual and the state from which he seeks diplomatic protection. Furthermore, even if the individual gains diplomatic protection, he may still risk prosecution in the country where he is residing. In today’s circumstances, one could state that it would be difficult to demonstrate effective nationality following the *Nottebohm*’s case considerations. However, those principles are still useful in particular in cases of dual or multiple nationalities.
- Diplomatic protection is the oldest of all available defenses and a historical origin of famous incidents for intervention in the domestic affairs of another state as well as the outbreak of hostilities between two countries. For example: the British and French army invaded Egypt and then took over North Africa on the grounds of Diplomatic Protection of European nationals living in Arab Territories. Nowadays, Diplomatic Protection takes the form of political and legal support rather than military guardianship which is now called Humanitarian Intervention.

Conclusion:

Extradition is an intermingled matter. Although this process is simplified by the presence of conventions between two or more jurisdictions, the main task of reconciling two or more jurisdictions takes a lot more than finding a binding treaty. Extradition is a fast developing field of

law, and this can be illustrated in an increasing amount of countries taking steps to simplify the resolution of extradition matters by the merging of regulations to form binding treaties. This is demonstrated for example by the recent treaty on extradition signed between the UAE and Australia in 2007 and between the UAE and Pakistan in 2010 but also by proposal made by countries such as Kuwait, which in September 2011, proposed at the 15th meeting of the Justice Undersecretaries of the Gulf Cooperation Council States endorsing the agreement for extradition of criminals among the Members States of the Council.

Extradition's fast development needs to be maintained in parallel to the increasing challenges of globalization in the modern world.