There is however, a concern that if the nationals of requested State are not extradited, the end of justice might be defeated and the validity of the principle of territorial jurisdiction would be jeopardised. The necessary evidence to prosecute may not be easily available. Such contingencies are therefore sought to be tackled by demanding the extradition of nationals on the basis of reciprocity.[37] On the contrary the reciprocity could be a basis for prosecuting nationals in their own national systems especially when the offence for which extradition is sought happens to be one of double criminality i.e. (crime under both the jurisdictions). It nevertheless should be mentioned that the major trend in the world is to prosecute the nationals by the requested State itself rather than extraditing them.

While the civil law and socialist legal systems are clear, the trend within the Commonwealth is unclear and the question is regarded as a matter of discretion of the parties to an extradition arrangement.[38] This divergence may be due to historical reasons. Before the emergence of independent States within the Commonwelth, extradition was a matter merely of transferring the fugitive from one part of the empire to another part for reasons of expediency of administering a vast empire since the issue of nationality did not arise in most cases. Commonwealth nations, however, today have independent nationality laws, constitutional safeguards for individuals during a trial etc. In fact some countries such as Nigeria are precluded by their constitution from extraditing nationals but accept obligations, when so refusing, to consider initiating prosecution locallly Article 4(3) is provided to facilitate the rights enjoyed by the fugitive as well as his family members to enable a convicted person to serve his term within his country in familiar surrounding. The transfer of the fugitive to serve

37. For e.g. Indian statement on this point at the 28th Session of the AALCC, *Verbatim Records* pp. 377.

38. Clause 2 of Annex 2 of the Commonwealth Scheme Relating to Rendition of Fugitive Offenders States as follows :

(1) The return of a fugitive offender who is a national or permanent resident of the part of the Commonwealth in which he is found –

(a) may be precluded by law, or

(b) may be refused by the competent executive authority.

Provided that return will not be so refused if the fugitive is also a national of that part of the Commonwealth to which his return is requested.

(2) For the purposes of this paragraph - a fugitive shall be treated as a national of a part of the Commonwealth if that part consists of, or includes

(a) A commonwealth country of which he is a citizen, or

(b) A country or territory his connection with which determines his national status, in either case at the date of the request.

the sentence in his own State serves the purpose of meeting the demands and concerns of both the requesting and requested states.

The draft articles, therefore, while providing discretion in the matter of extraditing the national of a contracting party seeks to make it obligatory to prosecute the fugitive locally in case there is no extradition of the national. This would therefore provide a viable compromise between the civil law approach and the practice of the Commonwealth countries.

Article 5

Grounds for Non Extradition Other than Political Offence Exception

Extradition may be denied in the following circumstances:

1. Extradition shall not be granted for purely military offences.
2. When the prosecution or punishment is barred by the Statute of limitations according to the laws of the requesting State or the requested State (Prior to the presentation of the request for extradition).
3. When the person sought (is to be tried) before an extraordinary or *ad hoc* tribunal of the requesting state.
4. When there is reason to believe that extradition is sought in fact for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions.
5. If the offence for which extradition is sought is of a trivial nature.
6. If the allegation against the fugitive is not made in good faith or in the interests of justice.
7. Any other sufficient humanitarian consideration that warrant the denial of extradition such as acute ill health, physical frailty etc. (In this case the requesting State could postpone the request until such time as required for the fitness of the fugitive.)

Commentary

The grounds on which extradition could be denied as stated in the draft article have been in usage under various legal systems with

regard to extradition. The multilateral and regional extradition arrangements traditionally contain a fairly acceptable list of such grounds for denial of extradition. The draft article has been given the present shape after incorporating the familiar grounds from existing regional extradition arrangements. Thus, the draft article might appear to be a longer one than other schemes. However, in view of the emerging universal consensus on the method of prescribing extradition offence, efforts should be made to unify the trends regarding other areas of extradition such as the present one.

The grounds for denial of extradition as propounded by the present article might be familiar within the Asian-African region and accordingly warrant no explanation. However clause (3) which speaks of the possible trial before an *Ad hoc* tribunal of the requesting State is completely a new one that was not deliberated within the Committee while adopting the 1961 principles. Modern extradition arrangements such as Inter-American Extradition Treaty[39] preclude categorically extradition, on the ground.

In view of the increasing universal concern for the human rights of individuals and particularly the relevance of human rights to the criminal procedure and justice, there is a visible trend within Europe to preclude extradition if the procedural law in the requesting State is not in conformity with the European Convention on Human Rights.[40] Like the Inter-American Convention, number of European States do not extradite a fugitive if he is to be tried before an extraordinary or *ad hoc* tribunal.[41] This is perhaps due to the fear that such extraordinary/*Ad hoc* prosecution mechanisms are generally created with such powers the exercise of which may not correspond with the basic principles of natural justice or the fundamental norms of criminal jurisprudence. Further, more often than not, such tribunals are also created with an element or subjectivism sometimes *ultra vires* of requesting States own constitution.

39. Clause (3) Article 4 of Inter-American Convention on Extradition, which states "When the person sought has been tried or sentenced or is to be tried before an Extraordinary or *Ad hoc* tribunal of the requesting State". See International Legal Materials, Vol XX, No. 3, May 1981 at p. 724.
40. For example, Swiss and Austria legislation on the subject have made such provisions. See the paper prepared for the Commonwealth Secretariat by Dr. Torsten E. Stein, in *1982 Review of Commonwealth Extradition Arrangements Report of a Meeting of Government Representatives Commonwealth Secretariat 1982 at p. 102.*
41. *Ibid.*

Article 6

Speciality Rule

(a) The requesting State shall not try or punish the fugitive extradited except for the offence for which he was extradited.

(b) In the event of requesting State trying or punishing the fugitive for other offences that are likely to be directly related, it shall do so only with the consent of the requested State.

Commentary

The speciality rule, like the double criminality rule, is a well respected tenet of extradition process among States of all legal systems.[42] The rule seeks the compliance by the requesting State to try or punish the fugitive only for the offence for which the fugitive was extradited. The requesting State is prohibited from using the opportunity of an extradition grant to prosecute for other offences which may or may not have been extraditable. For any other offence allegedly committed by the fugitive the requesting State is obligated to make an altogether new request.

All the major extradition arrangements such as Commonwealth Scheme; Inter-American Convention on Extradition, 1981; European Convention on Extradition, 1957; Commonwealth Scheme on Rendition of Fugitive Offenders, provide specially for the speciality rule. Most of the bilateral treaties and municipal legislations also reflect the same.

However slight modifications are taking place with regard to the speciality rule, without questioning the fundamental validity of the rule. For instance, within Europe there seems to be a trend that the requesting State may without prior consent of the requested State, prosecute for an offence even if the description of the offence charged is altered in the course of the proceedings, provided that the offence is based on the same facts and constitutes itself a returnable offence. There are extradition treaties that require prior consent only if, for the offence in its altered description, a higher maximum punishment is fixed than for the offence for which extradition was granted.[43]

42. See Sheares, *Extradition in International Law (1971);* Iam Brownlie, *Principles of Public International Law*, Third Edition (1979), p. 315.
43. As for instance the extradition treaties between Germany and the United States, and between Germany and Yugoslavia. See Torstein E. Stein, *op. cit.* p. 101.

The Committee's 1961 principles have put adequate emphasis on the speciality rule in article 9. The present draft article, however, while retaining essentially the same content is divided into separate clauses (I) addresses positively the need to up hold the speciality rule and clause (2) provides, a procedure in case the requesting State wishes to try or punish the fugitive for directly related offence other than the one for which the extradition was sought. In other words, clause (2) still prohibits a State's clandestine effort to try the fugutive for other offences.

Article 7

Double Jeopardy (Non bis in idem)

Extradition shall be refused if the offence in respect of which extradition is sought is under investigation in the requested State or the person sought to be extradited has already been tried and discharged or punished or is still under trial in the requested State for the offence for which extradition is sought.

Commentary

The principles of *non-bis in idem* is primarily applicable in the domestic penal law which prohibits the courts from trying a person twice for the same offence. In this sense it has been recognised as part of the human rights.[44] While all the extradition treaties inevitably provide for this basic rule, some variations in its application have been noticed. Such variations normally relate, on the one hand, to the question whether the double jeopardy rule is to be applied only with regard to decisions of the other contracting State, or also with regard to those of third States and on the other hand, whether all or only certain judicial decisions are to be taken into consideration when deciding upon a request for extradition.[45]

The legal arrangements and the practice of most of the member States of the Committee contain provisions against double jeopardy for the same act. See for instance, the criminal procedure code of Iraq, Iraqi-Egyptian Treaty of 1941, the law of a United Arab Republic (as understood in 1961) Egypt-Iraq Agreement of 1931, Laws of Japan

44. See the Seventh Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms.
45. See *Extradition for Drug Related Offences op. cit.* p. 53.

and Indonesia. The extradition agreement concluded between the countries of the League of Arab States contains the principles *non-bis in idem*.[46] Moreover, the 1961 rule on this principle was unanimously adopted by the members of the Committee. In view of its universality as well as acceptability within the Committee the same article has been retained.

Article 8

Capital punishment

If the offence for which extradition is requested is punishable by death under the law of the requesting State and the law of the requested State does not provide such penalty, the requested State has the discretion to refuse extradition, unless the requesting State gives such guarantee which the requested State considers sufficient that the death penalty will not be carried out.

Commentary

The question of capital punishment has generated a good deal of controversy since Second World War with regard to its nature as a punishment.

Although legislation in many countries prescribe death penalty for capital offences, there is a trend at the global level seeking to abolish capital punishment. A number of other States, however have enlarged the category of capital offences. As far as the extradition arrangements are concerned the trend is clearly towards refusal to grant extradition where the fugitive is likely to be awarded death penalty if the requested State does not itself provide for death penalty. Extradition is granted under such circumstances only after the guarantee of the requesting State that in case death penalty awarded it will not be carried out. This trend has been explicitly provided for under some modern extradition treaties. For instance, both the European Extradition Tready[47] and the Inter-American Convention

46. See the *Report of AALCC 4th Session 1961* p. 33.
47. Article 11 (Capital Punishment) states that...."If the offence for which extradition is requested is punishable by death under the Law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requesting party or is not normally carried out extradition may be refused unless the requested party gives such assurance as the requested party considers sufficient that the death penalty will not be carried out."

on Extradition [48] uphold the right of the requested State to refuse extradition in case the requesting State does not assure the commutation of death sentence. The Commonwealth Scheme, has however, left the present question as a matter of discretion to the parties to decide whether to grant extradition or not in cases where the fugitive is likely to suffer death penalty. It has followed, in principle, the European Convention on Extradition.[49]

However, within the Commonwealth where several member States keep capital punishment in their statute books, still there is a trend toward following the European Convention.[50] States that still provide for death sentence in their criminal law could, while dealing with the extradition of a fugitive who is likely to face death sentence in the requesting State, keep in mind the relevant provisions of Article 6 of the International Covenant on Civil and Political Rights which states *inter alia* :

> "Any one sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."
>
> "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

The Committee's 1961 principles have not addressed this question. It is opportune to consider the issue in light of the experiences of existing major regional extradition arrangements.

Article 9

Pre-requisites of a Request

The requisition for extraditions shall be made through Diplomatic channel or any other appropriate channel in writing and accompanied by :

48. See Article 9 (Penalties Excluded) states : "The States Parties shall not grant extradition where the offence in question is punishable in the requesting State by the death penalty by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.".
49. See Annex 2, paragraph 1 of the Commonwealth Scheme.
50. For example Article 6 of the Indo-Canadian Extradition Treaty echoes the views of the European Convention on this question.

(a) information concerning the identity, description, nationality and location of the person sought;

(b) a statement of the offences for which extradition is sought, the time and place of commission, their legal descriptions, probable punishment and a reference to the relevant legal provisions with utmost accuracy;

(c) the original or authenticated copy of the conviction and sentence or detention order passed by competent judicial authority and immediately enforceable or of the warrant of arrest or other having the same effect and issued in accordance with the procedure laid down in the law of the requesting State;

(d) a copy of the statute of limitation governing prosecution and punishment.

Commentary

Traditionally, extradition request which is an act between Governments of Sovereign States is made through the diplomatic channel. However, in view of its time consuming nature the practice relating to the request has witnessed a recent trend in which communication could be made directly between the concerned ministries of both the requesting and requested States. For example article 12 of the European Convention on Extradition provides:

> "The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more parties."

Regional extradition treaties such as the Inter-American Extradition Convention have provided even for a situation wherein there may not be any diplomatic relations between States. Thus the relevant provision states :

> "The request for extradition shall be made by the diplomatic agent, or if none is present by its consular officer, or, when appropriate, by the diplomatic agent of a third State to which is entrusted, with the consent of the government of the requested State, the representation and protection of the interests of the requesting State. The request may also be made directly from government to government in accordance with such procedure as the governments concerned may agree upon.[51]

51. Article 10, which speaks of "Transmission of Request" See: International Legal Materials, Vol. 20, pp. 725.

Thus, it is discernible that the traditional diplomatic channel of communications is complemented by new methods. The guidelines of Committee's 1961 principles while providing that "the requisition shall . . . . be submitted normally through diplomatic channel" did not envisage other possible modes of communication between the requesting and the requested States. Therefore the present article provides the words, "or any other appropriate channel" with a view to provide the broadest possible channels of communications.

The other requisites for an extradition request have been similar in almost all the major extradition arrangements, though there may happen to be some trivial differences. Basic requirements, however, are two. If extradition is sought for prosecution the basic document is a warrant of arrest signed by the competent judicial authority of the requesting State. If the fugitive is sought for imprisonment as a consequence of an indictment, a certified copy of the final judgement must be submitted. As far as the texts of the relevant legal provisions are concerned, the minimum requirement is to submit the text of substantial penal law that was breached. Keeping in mind that the modern extradition arrangements preclude extradition if the offender could not be prosecuted for the lapse of limitation period, which aspect also finds place in the present draft articles, there is a need for the requesting State to produce a copy of the statute of limitation governing the criminal prosecution and punishment.

Supplementary Information or Evidence

If the evidence or information submitted by the requesting State in support of a request is found to be insufficient, the requested State may ask the requesting State to provide supplementary information or evidence as it may consider necessary to finalise a decision on the request. The requested State may also set a time limit for the receipt of such supplementary information evidence, and if the requesting State fails to comply with the subsequent requirement within the prescribed time the requested State may set free the fugitive.

Commentary

It is not always possible that the particulars accompanying the extradition request be correct or adequate at the first instance itself. Therefore there is a need to provide for a mechanism to enable the requested State to demand supplemetary information from the

requesting State on all aspects of the request with a sole purpose of ascertaining the facts that are necessary to extradite a fugtitive. All the modern extradition arrangements provide for seeking supplementary information.[52] However, in the event of extradition being refused the requested State has to, without fail, give reasons for the same.

Article 10

Evidential Requirement

(a) Extradition shall not be granted unless the competent authorities of the requested State are satisfied that the material furnished before them establishes (sufficient evidence) (prima facie case) that the fugitive has committed an offence in the requesting State.

(b) When the person sought is already convicted for an offence in the requesting State the requesting State shall establish that he was convicted by competent judicial authorities in respect of an extraditable offence within the jurisdiction of the requesting State and that he has not served his sentence in accordance with the laws of requesting State.

Commentary

Besides general rules, which are more or less a common feature of all extradition treaties, owing to particular situation of the countries involved, there are sometimes specific additional requirements that needed to be fulfilled. One such requirement is the pre-requisite of establishing a *prime facie* case by the requesting State against the fugitive offender.

As regards this requirement, in cases where extradition is requested for the purpose of prosecution rather than for execution of punishment following, conviction, the approaches in the common law and civil law systems are divergent. The question arises in the former case whether or not an extradition request must be supported by further evidence if it is based solely on a warrant of arrest.

In most common-law countries, the establishment of a *prima facie* case is traditionally a paramount requirement if the extradition of an

52. Article 12 of Inter-American Convention; Article 13 of European Convention on Extradition; Article 19 of Indo-Canadian Extradition Treaty 1987 speaks although of 'additional evidence' effectively it is supplementary information.

accused person is sought for the purposes of prosecution. According to typical extradition treaties entered into by common law countries, *prima facie* evidence is "such evidence as, according to the law of the requested party, would justify his (i.e. accused person) committal for trial if the offences had been committed in the territory of the requested party.[53]

Most common law countries apply particularly a strict approach in this respect. The basic idea is to ensure equality of tretment for all persons who stand before the court accused of an offence wherever this was committed.[54]

The typical approach of civil law countries on the other hand may be characterised as a common understanding that extradition is a preliminary auxillary system of bringing an offender to the justice.[55] According to this view, it is upto the court of the requesting State to take and evaluate evidence. The requested State is not called upon to investigate the subject and its authorities may content themselves with the fact that valid judicial warrant of arrest exists, based on an extraditable offence and that the contractually stipulated State has grounds for doubting the reasons given for an extradition request.[56]

The differences in the rule of evidence between common law and civil law countries have made the extradition proceedings very difficult. It seems that a high percentage of extradition requests submitted by civil law countries to common law countries fail for these formal reasons.[57] Some countries have decided that no further extradition request should be made where a *prima facie* needs to be established.[58] In fact Spain, a civil law country, has already terminated its extradition treaty with the United Kingdom, due to this reason.[59]

Even though within the common law system wherein the requirement of *prima facie* case has been zealously guarded, there are radical views questioning the validity of this rule. A case in point

53. See Article VII paragraph 3 of the Extradition Treaty between the United Kingdom of Great Britain and Northern Ireland and the United States of America of June 1972, *United Nations Treaty Series* Vol. 49, No. 15811.
54. *Review of the Law and Practice of Extradition in United Kingdom: Report of an Inter-Department Working Party, in 1982 Review of Commonwealth Extradition Arrangements: Report of a Meeting of Government Representatives.* op. cit. pp. 231-262.
55. *Extradition for Drug Related Offences,* op. cit p. 43.
56. *Ibid.*
57. *Ibid*, p. 42.
58. *Ibid*, p. 43.
59. *Ibid.*

is the position taken by Australia within the Commonwealth. There are, however, trends within England also which argues for the abolition of the requirement.[60] Two most important common law countries India and Canada have not adhered to the *prima facie* requirement so stringently in a recent agreement.[61] Though such trends are discernible in bilateral and municipal settings when it comes to the Commonwealth as such, the *prima facie* requirement has been largely retained.

On the other hand, the civil law countries who follow the inquisitorial method in criminal prosecution do not require the establishment of a *prima facie* case before granting extradition request. Reference may be made to Article 12 of the European Convention on Extradition which makes no reference to the *prima facie* case. However, Article 13 enables the requested State to seek any supplementary information which is thought to be necessary in order to reach a decision. Although there is no express provision for contracting States to provide a *prima facie* case, some States have nevertheless, on acceding to the Convention, made reservation on this point. Israel for instance insists upon *prima facie* case in all cases, whereas Norway and Denmark reserve the right to ask for such evidence in any particular case. Federal Republic of Germany is also in the process of a radical change in this regard. Following recent Court decisions, Article 10(2) of the new German Statute requires documents establishing a *prima facie* case if in the circumstances of the case there is reasonable doubt whether the requested person has in fact committed the offence.

60. See "*Green Paper on Extradition*" *in Commonwealth Law Bulletin*, Vol. 11, No.2, April 1985, pp. 433-499.
61. Article 9 of (India-Canada Extradition Treaty) States:
"*Article 9: Extradition Evidence*
1. The evidence submitted in support of a request for extradition shall be admitted in Extradition proceedings in the requested State if it purports to be under the stamp or seal of a department, ministry or minister of the requesting State, without proof of the official character of the stamp or seal.
2. The evidence referred to in paragraph 1 may include originals in copies of statements, depositions or other evidence purporting to have been taken on oath or affirmation whether taken for the purpose of supporting the request for extradition or for some other purposes.
3. The evidence described in paragraph 2 shall be admissible in extradition proceedings in the requested State, whether sworn or affirmed to in the requesting State, or in some third State.
"It is clear from the text of this article that there is no obligation on the part of the requesting State to establish a *prima facie* case and on the other hand any evidence adduced by the requesting State shall be "extradition evidence". There is no qualification whatsoever to this "extradition evidence".

Thus, the rule relating to *prima facie* requirement within the common law and civil law system is changing and distinct developments are taking place in both systems. Perhaps this is another area in which there could be efforts to harmonise the evidential requirements. One possible compromise is to make the requirement of *prima facie* case discretionary.

The Committee's 1961 principles, however, provided specifically for the establishment of *prima facie* case in Article 16 and 17. The practice in the member countries (as of 1961) is that a fugitive offender would be discharged if a *prima facie* case is not made out against him. There was a unanimity within the Committee then on this point. The draft article seeks to retain the requirement of *prima facie* case. However, if any change is contemplated to reduce the rigours of this requirement, it should seek to strike a balance between the requirement of an absolute *prima facie* case and presentation of a simple warrant of arrest. This is essential since the requested State should be in a position to satisfy itself before extraditing a fugitive. That is intent of inclusion of the words "sufficient evidence" in parenthesis in the drafts articles.

Article 11

Surrender

1. The competent authorities of the requested State shall take the necessary steps to enable the requesting State to take away the accused.
2. The requesting State shall be informed of the place and date of surrender and of the length of time for which the fugitive will be detained for the purposes of surrender.
3. The requested State may release the fugitive in question, if the requesting State fails to take custody of the fugitive within the prescribed time from the day of notification to the requesting State.
4. If circumstances beyond their control prevent either of the States from surendering or taking over the fugitive within the time, the States shall agree on a new date for surrender.

Article 12

Reply by the Requested State

The requested state shall inform the requesting state through diplomatic channel or other appropriate channel, in writing of its decision on the request for extradition. If the request for extradition is rejected, the reasons shall be stated.

Commentary

Once a request has been submitted to the requested state, the requested state has to act on it. The decision to grant or refuse extradition shall be made in writing and shall be transmitted through the same channel through which the requesting State made the request. In the event of extradition being refused the requested State has to give reasons for its decision.

Article 13

Concurrent Requests

1. If there are concurrent requests for extradition in respect of the same person the requested State shall have the discretion to decide upon the priority of requests.
2. The requested State while doing so, shall take into account all the circumstances and especially the relative gravity of the offences, place of commission, order of requests, penalty to be imposed and the nationality of the person claimed.

Commentary

It is possible that several States could make concurrent requests for the extradition of the same fugitive who has committed extraditable offences in the territories of all the requesting States. The major trend relating to this point is that the requested State shall have the discretion to decide as to which of the requesting States the fugitive shall be surrendered. However, the requested State is expected to take into account certain factors in exercising its discretion. Such factors according to the major extradition arrangements currently in force include the relative gravity of the offences, places of commission, order of requests and the nationality of the person. The Requested