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EXTRADIÇÃO E ASSISTÊNCIA JURÍDICA MÚTUA

(NO CONTEXTO DO PRINCIPAL, RESTRIÇÃO E APLICAÇÃO EM EXTRADIÇÃO E ASSISTÊNCIA MÚTUA)

Dissertação no âmbito do Mestrado em Ciências Jurídico-Criminais, orientada pelo Professor Doutor António Pedro Nunes Caeiro e apresentada à Faculdade de Direito da Universidade de Coimbra.

Junho de 2020

Faculdade de Direito
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Extradição e assistência jurídica mútua
(no contexto do principal, restrição e aplicação em extradição e assistência mútua)
Extradition and Mutual Legal Assistance
(The content is about the principles, restrictions and applications of extradition and mutual legal assistance)

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Summary and keywords

In this global world, we got many things to be compromise in order to maintain world's order, such as economy, environment etc. By maintaining the orders, we have some rules or laws to help in order to make a maximum benefit for all the States or countries. And there are many commitments are mainly constituted by different area and they will appear in different kinds of form such as protocol, treaty, agreement etc. By creating the law, there are some rules to follow in order to implement sufficiently. The methods that international States cooperate in criminal area are mainly on extradition and mutual legal assistance. But there are some principles restrictions to follow when implementing extradition and mutual legal assistance.

In this dissertation, it mainly discuss on the extradition and mutual legal assistance, the extradition includes the principles of extradition, types of extradition, restrictions of extradition. For the principles of extradition, it focus on how the principles implement in international law and how the nations implement in their law.

For the types of extradition, it describe different types of extradition by their function and how to define them. It also discuss how they implement for the nations.

For the restriction of extradition, it discuss how the restriction will affect the usage of extradition and how can the restricted implement in extradition.

For the mutual legal assistance, it discuss the concept, performance, principles, restrictions and how they implement in Mainland, Macau, Hong Kong and Taiwan. For the concept and the performance, it discuss about what is mutual legal assistance and how it perform in practice. For the restriction of mutual legal assistance, it discuss how the restriction will affect the usage of mutual legal assistance and how can the restricted implement in mutual legal assistance.

Since there are special conditions for the Mainland, Macau, Hong Kong and Taiwan, therefore, the mutual legal assistance will be the most useful method to use.

Neste mundo global, temos muitas coisas a ser transigidas para manter a ordem mundial, como economia, meio ambiente etc. Ao manter as ordens, temos algumas regras ou leis para ajudar a fazer o máximo benefício para todos os Estados ou países. E há muitos compromissos são constituídos principalmente por áreas diferentes e aparecerão em diferentes tipos de formas, como protocolo, tratado, acordo, etc. Os métodos que os Estados

internacionais cooperam na área penal são principalmente sobre extradição e assistência jurídica mútua, mas existem algumas restrições de princípios a serem seguidas ao implementar a extradição e assistência jurídica mútua.

Nesta dissertação, discute principalmente sobre a extradição e assistência jurídica mútua, a extradição inclui os princípios da extradição, tipos de extradição, restrições à extradição. Para os princípios da extradição, enfoca como os princípios se implementam no direito internacional e como o nações implementam em suas leis.

Para os tipos de extradição, descreve os diferentes tipos de extradição por sua função e como defini-los, além de discutir como eles implementam para as nações.

Para a restrição à extradição, discute como a restrição afetará o uso da extradição e como a restrição pode implementar na extradição.

Para o auxílio judiciário mútuo, discute o conceito, desempenho, princípios, restrições e como eles se aplicam no Continente, Macau, Hong Kong e Taiwan. Para o conceito e desempenho, discute-se sobre o que é auxílio judiciário mútuo e como ele atua no Para a restrição do auxílio judiciário mútuo, discute como a restrição afetará o uso do auxílio judiciário mútuo e como a restrição pode ser implementada no auxílio judiciário mútuo.

Uma vez que existem condições especiais para o Continente, Macau, Hong Kong e Taiwan, portanto, o auxílio judiciário mútuo será o meio mais útil a utilizar.

Keywords: Extradição, princípios, restrições, assistência mútua, conceitos

Extradition, principles, restrictions, mutual legal assistance, concepts

Introduction

In this global world, we got many things to be compromise in order to maintain world's order, such as economy, environment etc. By maintaining the orders, we have some rules or laws to help in order to make a maximum benefit for all the States or countries. And there are many commitments are mainly constituted by different area and they will appear in different kinds of form such as protocol, treaty, agreement etc. By creating the law, there are some rules to follow in order to implement sufficiently. The methods that international States cooperate in criminal area are mainly on extradition and mutual legal assistance. But there are some principles restrictions to follow when implementing extradition and mutual legal assistance.

Extradition is an act where one jurisdiction delivers a person accused or convicted of committing a crime in another jurisdiction, over to their law enforcement. It is a cooperative law enforcement process between the two jurisdictions and depends on the arrangements made between them. Besides the legal aspects of the process, extradition also involves the physical transfer of custody of the person being extradited to the legal authority of the requesting jurisdiction. Through the extradition process, one sovereign jurisdiction typically makes a formal request to another sovereign jurisdiction ("the requested state"). If the fugitive is found within the territory of the requested state, then the requested state may arrest the fugitive and subject him or her to its extradition process. The extradition procedures to which the fugitive will be subjected are dependent on the law and practice of the requested state.

A mutual legal assistance treaty is an agreement between two or more countries for the purpose of gathering and exchanging information in an effort to enforce public or criminal laws. A mutual legal assistance request is commonly used to formally interrogate a suspect in a criminal case, when the suspect resides in a foreign country.

In this dissertation, it mainly discuss on the extradition and mutual legal assistance, the extradition includes the principles of extradition, types of extradition, restrictions of extradition. For the principles of extradition, it focus on how the principles implement in international law and how the nations implement in their law. These principles may affect the legislation of the nation extradition law or even their domestic law. They have to follow the principle of the extradition when they legislate their law because it may affect the

application when they start the extradition activities with other nation. And most of the principles are used in the international law. Therefore, the nations had to pay attention or study the principles before they legislate the extradition law and the extradition scope of their domestic law in order to implement the extradition successfully and legislate the most advantages condition for their usage.

For the types of extradition, it describe different types of extradition by their function and how to define them. It also discuss how they implement for the nations. Since different types of the extradition had different constitute components, so the nations have to know how to implement the extradition a correct way and have to decide which type of the extradition is suitable for the substantial situation. In practice, the nations can use their present evidence or documents to decide which extradition should they choose which is the most advantage for them. Normally, they have to follow the principle of the extradition when they choose the types of extradition, it usually need to combine with the principles when they are in extradition. So, they have to choose the most advantages which is convenience for them.

For the restriction of extradition, it discuss how the restriction will affect the usage of extradition and how can the restricted implement in extradition. For nations, they have to pay more attention on the restriction because the restrict will be the obstacle for them to implement the extradition or apply the extradition request. Normally, the restriction involved in the human rights or the legal rights of the relevant person, these restrictions are well known in the international law. Therefore, the nations had to know the restrictions well in order to implement the extradition successfully. It is important because the restriction may cause the extradition in difficult situation or cannot transfer the relevant person immediately. If the situation is under restriction, it will affect nations criminal proceeding and the legal rights of relevant person. Therefore, the requesting party has to pay more attention when raising the extradition request and the requested party has to pay attention for the extradition request by checking the information or evidence that the requesting party provide.

For the mutual legal assistance, it discuss the concept, performance, principles, restrictions and how they implement in Mainland, Macau, Hong Kong and Taiwan. For the concept and the performance, it discuss about what is mutual legal assistance and how it perform in practice. For the principles, it focus on how the principles should be follow in mutual legal assistance and how the principles affect during mutual legal assistance. In the principles, the nations have to pay attention on their rights and obligations during mutual legal assistance.

It is because if the nations don't follow the rules of the principle, the nations may have to serve disadvantages. Therefore, the principles of the mutual legal assistance is important for the nations when they apply the mutual legal assistance request. And the nations had to pay attention when establishing the mutual legal assistance with other nations, they have to state clearly about what the principles they have to follow and which one can be the exception in mutual legal assistance. It is better for them to implement the mutual legal assistance in the most advantages usage.

For the restriction of mutual legal assistance, it discuss how the restriction will affect the usage of mutual legal assistance and how can the restricted implement in mutual legal assistance. For nations, they have to pay more attention on the restriction because the restrict will be the obstacle for them to implement the mutual legal assistance or apply the mutual legal assistance request. Normally, the restriction involved in human rights of the relevant person or legal rights of nations. Therefore, the nations had to know the restrictions well in order to implement the extradition successfully. It is important for the nations to know well about the restriction because the mutual legal assistance should not violate any rights of the relevant person or nation. It is because the function for the mutual legal assistance is help the requesting party to investigate or preserved evidence in order to implement the requesting party criminal proceeding in success. It will lost the function of mutual legal assistance if it violate the restriction. Therefore, the requesting party had to pay attention when they implement mutual legal assistance by making the commitment with the requested party.

Since there are special conditions for the Mainland, Macau, Hong Kong and Taiwan, therefore, the mutual legal assistance will be the most useful method to use. They use mutual legal assistance as the transfer for the relevant person because of their background and due to their legal systems are not the same. Therefore, the mutual legal assistance is the only way to transfer the relevant person to each other. For Mainland, it is nation, but Macau and Hong Kong are the regions and one part of China, although they are in the same country, but their legal systems are not the same because of their history background and cannot establish the extradition treaty because their legal system are not the same and cannot compromise with their legislative concept. For Taiwan, its status is special, for some nations, they considered it as the nation but some nations decided it is one part of China and due to be the region. Since this status happened because of history background and due to different legal system. They cannot compromise on how to transfer the fugitive with each other because of different

legal concept, and both of them are insist on their legal concept, it resulted in using mutual legal assistance.

For both extradition and mutual legal assistance, their functions are to help the relevant nation to implement the criminal proceeding smoothly, but they still have difference, for extradition, it always implement strictly because most of their principle are applicable on the international law, and the nations should follow the principles strictly, the conditions for the extradition also be serious because it usually involved in depriving the liberty of the fugitive. For the nations, it had to use time and judicial resources for arranging the extradition. It will increase the nation burden and the resources. For mutual legal assistance, it is softer than the extradition because it does not involved in depriving the liberty of the fugitive, and the function for them is to help the requesting party to implement the criminal proceeding smoothly. Since their functions are not different, so the requirement and the conditions are also difference. The nations have to choose the suitable form for them in order to take the advantage on helping the criminal proceeding operate smoothly.

Extradition

Section 1

Extradition obligations and principles

In this global world, we got many things to be compromise in order to maintain world's order, such as economy, environment etc. By maintaining the orders, we have some rules or laws to help in order to make a maximum benefit for all the States or countries. And there are many commitments are mainly constituted by different area and they will appear in different kinds of form such as protocol, treaty, agreement etc. By creating the law, there are some rules to follow in order to implement sufficiently. The methods that international States cooperate in criminal area are mainly on extradition and mutual legal assistance. But there are obligations and principles on extradition and characters on mutual legal assistance to comply with. And the obligations and principles on extradition are principle of reciprocity, double criminality principle, principle of Speciality, non-extradition of national, exception of political offence, non-extradition to capital punishment and ne bis in idem. In this section, we will discuss the principle of reciprocity, double criminality principle and principle of Speciality first, and the others will discuss in the later sections.

1. Principle of reciprocity

"Principle of reciprocity implements on the environment in which States support one another for short- or long-term advantage through the balancing of rights, duties and interests. It is basically a promise that the requesting State will provide the requested State the same type of assistance in the future, should the requested State ever be asked to do so[1]." "There are two views under principle of reciprocity. One is based on reciprocity and the other is based on existing extradition treaty[2]." For the view of based on reciprocity, the states will consider their benefit when start the cooperation, for incident, they will reference their relationship before and present in order to make the decision about how to operate their cooperation, and they usually will give the equivalent offers to each other in order to operate smoothly, based on this view, the states usually provide the convenience to each other such as simplify the legal procedures, for simplifying the legal procedures, they can take the precedent and the existing situations as their reference, for the case that the states had no precedent before, they

[1] Manual on Mutual Legal Assistance and Extradition, p.23
https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf

[2] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.3

can take the other states practice as their reference or discuss their future cooperation conditions based on the principle of reciprocity in order to balance the status of both states. For the view of based on existing extradition treaty, they have to comply with the regulations in their existing extradition treaty, it take advantage on this kind of treaty because it can reduce some necessary conflict between the states such as interpretation of the regulations, the cooperation measure or the conflict between states legal systems, but it also had disadvantage on it because it is difficult for the States to spread out the extradition cooperation because the States can only establish the bilateral extradition treaty with few States and resulted that the States have to used other methods to solve the extradition problem such as by illegal immigration and expulsion, by immigration prevention and prohibit their stay and even through discovering illegal immigrant or illegal overstay. And it will reduce the implement of the state's extradition law or agreement. In order to endure this kind of reciprocity, many States expect international convention to be the extension of extradition cooperation basic. Under this situation, the State which implement this kind of reciprocity had changed their standpoint by legislative procedure. And this change mainly implements on the following forms:

1. "Ensure the extension extradition cooperation is permitted under no bilateral agreement"[3]
   When under no bilateral agreement situation, the states also can implement the extradition by other measures. The states can follow their domestic extradition law, it takes advantage in the concrete situation because their extradition law is more updated than the bilateral agreement sometimes, some bilateral agreement may not suitable for the current situation because it may establish from recent years and cause not updated in the current situation. Furthermore, the states also can take the precedent as their reference, these precedents can be the consideration conditions for the states to start the cooperation. Also, one state's temporary measure can be the measure to implement extradition, the states can make the commitment for the concrete case based on the principle of reciprocity, it can be a certain case or the cases within certain scope of extradition.
2. "Consider the multilateral convention or individual case as the extradition cooperation agreement"[4]

[3] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.5
[4] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.6

Some States stipulate or interpret that the extradition treaty not only focus on the norm in the existing extradition treaty, but also include the other agreement related to the extradition or transfer the fugitive from one to another. Aside from the precedent and the bilateral agreement, the multilateral convention can be the extradition cooperation agreement because they also include the rule of extradition and extradition conditions. The interpretation of the multilateral convention can extend the criminal scope of extradition because it involved in many states and the norm can interpret widely and had high credibility. For individual case, the states can establish a specific agreement when the situation is without existing extradition treaty. The states can make the commitment for the specific case in concrete situation based on their nation benefits or legal system. And the specific case can be used as the reference for their future case or even the consideration conditions on their future agreement.

3. Exception

"Since United States has its special legal system, it had limited modification on its extradition law's application scope. It amended that the American who offense violate crime in foreign State. United States can extradite the suspect to its State even though there is no extradition treaty with that foreign State. But there are some restrictions on it, the accused crime shouldn't have political character and the foreign State should provide enough crime evident to United States Department of Justice[5]."

These kinds of change indicated that the view which based on existing extradition treaty is not suitable on reality. And many States had already used different measures to replenish or abandon this insufficient in order to maintain the world's order and be more sufficient.

2. Double criminality principle

Double criminality is a crime punished in either the State or region where a suspect is being held and the requesting state ask for the suspect to be handed over or transferred to stand trial. It is also known as dual criminality. This principle is important in the extradition procedure because it involved in the status of the state's legal system and the liberty of the extradited person. It is because the concept of double criminality principle is

[5]黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.6

to satisfy the norms in both states, when the conditions are not satisfy for either state's legal system, it cannot be work. When the criminal violate one state's law while the other state not, it cannot be the constitute component of double criminality principle because it is unfair to the state which didn't constitute as criminal or serious crime. It will waste their time and resources for them to start the international cooperation. Also for their legal system because the law for them is one of their nation sovereignty performance because the constitute of legal system is also the performance of the state's culture, moral concept, habit or history. If the state's law didn't consider the act of the criminal as the violated action, it reflects that the act is not serious to extradite the fugitive and use lots of resources to transfer the extradited person. For the criminal, it is important to them because it involved their liberty or even life. In international cooperation, extradition is mandatory measure that the requested state transfer the extradited person to the requesting state and may cause the deprive the liberty or life of the extradited person, therefore, it is necessary for both states to review the offense seriously and set the basic principle and standard. Furthermore, although it should pay more attention on reviewing, but the standard on the offense not only focus on the name of the offense but also the constitute components of the offense, in practical, it usually focus on the constitute components of the offense but not the name, the offense will be the same in both states if the constitute components are in the same category and it also reach the concept of double criminality principle.

"It is a fundamental requirement of international extradition that the crime for which extradition is sought be one provided for by the treaty between the requesting and the requested state. The second determination is whether the conduct is illegal in both nations[6]."

Recently, there are few developments on extradition, one is mutual recognition arrest warrant. When one state issued a warrant, the other states will recognize and execute the warrant. It implemented in European Union from 2004 and replace the traditional extradition proceedings. "This innovation system cancelled or changed some applicable of double criminality principle since "Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States has established[7]." According to the decision, it stipulate the scope of the European arrest

[6] Double Criminality Law and Legal Definition
https://definitions.uslegal.com/d/double-criminality/
[7] 曾文革, 欧盟法, 对外经济贸易大学出版社, 2015 年 7 月 p.54

warrant. This decision changed the traditional concept to innovative one. It changed to the surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent

elements or however it is described. And it also stipulated the exception in applying double criminality principle. It means when the sentencing Member State will sentence the criminal in more than three years or in detention, this principle will not be applicable. In execution aspect, it stipulated the grounds for mandatory non-execution of the European arrest warrant and grounds for optional non-execution of the European arrest warrant[8]. These articles indicate the surrender procedures need the cooperation of judicial authority between Member States in order to reduce or simplify the surrender procedure. The other development on extradition is mutual recognition evidence warrant. The European Evidence Warrant (EEW)[9] shall be a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in proceedings. The EEW indicated that "it should issue by a competent authority of a Member State and the authority can be judge, court, criminal investigator, prosecutor or judicial authority[10]." But there is exception on this decision, the decision cannot be used in all judicial procedure, it stipulated that some situation can be used the EEW[11]. In execution of EEW, the executing State no need to prove that the evidences will be the crime in both executing State and the issuing State except the EEW request the executing Member Nation to implement mandatory sanctions such as investigation or detention. It means when the situation is under no investigation nor detention, the double criminality principle will not be considered. If the EEW request to implement investigation or detention, and it involve the scope in some serious crimes such as participation in a criminal organization, terrorism, trafficking in human beings, etc. It shall not be subject to verification of double criminality. Also, it stipulates that in relation to offences in connection with taxes or duties, customs and exchange, recognition or

[8] COUNCIL FRAMEWORK DECISION of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States Article 1

[9] COUNCIL FRAMEWORK DECISION 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

[10] 曾文革, 欧盟法, 对外经济贸易大学出版社, 2015 年 7 月 p.54

[11] COUNCIL FRAMEWORK DECISION 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters Article 14

execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State. It means the executing State cannot reject to provide assist due to there is different categories of tax[12]. And if the EEW is under investigation or detention, and the crimes are not involved in the exception of EEW, it should prove that the both States are involved in crimes in both States. Furthermore, if the crime is not involved in exceptional situation, the executing authority can ask request State to prove the criminal conduct will be the crime in both States. Otherwise, the executing State can reject the EEW. In execution aspect, if the decision didn't violate the executing State's legislation or national security and the appliance of double criminality, the executing authority of executing State can follow the issuing State's procedure to get the evidence by issuing the decision between EU Member States. Also, the decision stipulated some rules on recognition, execution and time limit on execution. This can ensure quick, effective and consistent cooperation on obtaining objects, documents or data for use in proceedings in criminal matters throughout the European Union and reach the purpose of preservation evidence.

3. The principle of Speciality

"The principle of Speciality is the basic legal obligation in extradition cooperation which limit requesting state authority, it means the requesting state can only transfer the extradited person which specify in extradited list while the requested state also consider the crimes can be prosecute or implement penalty. Also, the requesting state cannot transfer the extradited person to the third state without permission and should obey the commitment with requested state strictly in prosecution or sentencing issues scope[13]."

"This principle aims to protect the rights of individual and protect the requested state from abuse of its judicial process. In fact, if the extradited person judged or punished in another case, the requesting state has the right to appeal. In other case, if one nation has already committed the principle of Speciality while the other nation didn't commit and extradite

[12] COUNCIL FRAMEWORK DECISION 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters Article 14

[13] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.12

the fugitive to the third nation. This will undermine the principle of Speciality because some nations may cover their intention in order to make their extradite request to be acceptable by request the crimes in extradited list in Treaty but will pursue other crimes or increase other crimes to extradited person

after extradition[14]." This will violate the mutual respect of sovereignty and destroy the extradition legitimacy and resulted in improper violation to extradited person right. Also, new evident may appear and cause a new criminal charge during criminal proceeding like investigation and trial. If the fugitive extradited to the requesting state and convict other new crimes, these new crimes will only be convicted when the requesting state and requested state had negotiated. So, this principle is an important point when the requesting state and requested state draft extradition treaty, even negotiating and drafting of individual treaties can be a costly and time-consuming exercise that may not be within the financial means of all States and bilateral treaties are common and effective, in reality, it is not possible to have a bilateral treaty with every country in the world, but the increasing globalization of crime requires States to have some means of international cooperation with all parts of the globe. For those nations that wish to embark on the treaty-drafting process with another nation, or perhaps a region, UNODC has prepared the Model Treaty on Mutual Assistance in Criminal Matters[15], which can greatly assist those tasked with drafting the documents and achieving a timely resolution of the drafting process. The nations can take the model as reference in order to make an effective treaty and ensure the criminal charge for suspect is correct. This principle can prevent the abuse of extradited competence especially in political persecution and unfair treatment in criminal proceeding. According to the Extradition Law of the people Republic of China[16], it applies the principle of Speciality in three applicable conditions. First, "the principle limits the pursue crime scope"[17], in this principle, it will limit the pursue crime scope because the state only can charge the crimes which are listed on the extradited list, all the crimes which are not listed in the extradited list cannot be charged. This can protect the extradited person's human rights and involved abuse use of the extradition. But when there is new crimes happened

[14] 引渡原则是怎样的
http://www.chinalawyeryn.com/xingshibianhu/fanzuihexingfa/20140321/28642.html
[15] Manual on Mutual Legal Assistance and Extradition p.3
[16] Extradition Law of the people Republic of China Article 14
[17] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.13

after extradition, the requesting state will not be restricted by the principle of Speciality. For example: According to the Treaty between the Portuguese Republic and the People's Republic of China on Extradition[18], it stipulates the person extradited in accordance with this Treaty shall not be proceeded against or subject to the execution of sentence in the Requesting Party for an offence committed by that person before his surrender other than that for which the extradition is granted, nor shall that person be re-extradited to third State. It indicates the principle of Speciality is not applicable for the crimes happened after extradition. Second, "the principle of Speciality only applicable within certain protection period, "the protection period" indicates a certain time after extradited person has set to be free. If the extradited person didn't leave the requesting state or return to the requesting state voluntarily"[19]. These kinds of situation will lose the protection of principle of Speciality. However, this period of time shall not be included the time when the extradited person fails to leave the requesting state for reasons beyond his control. For example: The Treaty between the Portuguese Republic and the People's Republic of China on Extradition[20] stipulates the protection period is within forty-five days after having been free to do so. In bilateral extradition treaty, there is different protection period standard because it considers different nations environment, geographical condition and practices. When there is conflict with general standard of extradition law, it should priority applicable these special standards. Third, "the applicable in principle of Speciality will exclude when the requested state approve the supplementary extradition or re-extradition to third nation[21]." Supplementary extradition is based on the principle of Speciality, "it indicates that when the requested state had already made the final extradition, and the requested state can accept for the requesting state's new request, it means the requested state can pursue the crime liability which is not in extradite list before extradition[22]." It based on the principle of Speciality, in general, the requesting state cannot prosecute or implement penalty the crimes which are not included in extradited list. If to do so, it should

[18] Treaty between the Portuguese Republic and the People's Republic of China on Extradition Article 14
[19] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.13
[20] Treaty between the Portuguese Republic and the People's Republic of China on Extradition Article 14
[21] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.13
[22] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.29

get the requested state's permission. But it cannot be prosecuted or implement penalty for the extradited person's crimes which it is happened after extradition. According to The Treaty between the Portuguese Republic and the People's Republic of China on Extradition[23], it stipulates that the person extradited in accordance with this Treaty shall not be proceeded against or subject to the execution of sentence in the Requesting Party for an offence committed by that person before his surrender other than that for which the extradition is granted, nor shall that person be re-extradited to third State, that person didn't leave the Requesting Party within forty-five days after having been free to do so or that person has voluntarily returned to the Requesting Party after leaving it, but it has mention that the requested Party has consented in advance, it indicates that is the requested Party are approved to the request. The above situations will be the exception and have to submit the necessary documents as normal extradition. This can prove the applicable in the principle of Speciality even though the treaty didn't mention about the supplementary extradition. In necessary document aspect, according to European Convention on Extradition[24], it stipulates that when the requesting Party has to submit the essential document to requested state even in supplementary extradition such as arrested warrant, detention warrant, the information about the extradited person and etc. "In practical, the requesting state may change the name or characteristic of crimes in extradited list depends on the new fact or legal system and resulted in changing the crime's characteristic and become more severe. if the new characteristic involve in political crime, military offence or other crime which is the exception of extradition, the requested state has the competence to reject the new crime character's conviction and sentencing[25]." For example: The Treaty between the People's Republic of China and the Republic of Tunisia on Extradition[26], it stipulates that if the requesting Party change the crimes characteristic which the crimes involved in the extradited list during criminal proceeding, unless the new crimes characteristic is still in the extradition scope, otherwise, it cannot prosecute or implement penalty to the extradited person.

[23] Treaty between the Portuguese Republic and the People's Republic of China on Extradition Article 14
[24] European Convention on Extradition Article 14
[25] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.30
[26] The Treaty between the People's Republic of China and the Republic of Tunisia on Extradition Article 6

"Re-extradition refers to the extradited person had escaped back to the requested state after extradition, it is the extradition which request the same request as before and restart the extradition proceeding. Therefore, it based on the same person and the same extradition crime and request. Re-extradition can be the proceeding extradition or the execution extradition because it can happen before the prosecution procedure or during execution to the requested state.[27]" The condition on the re-extradition mainly on the same offense and the same person, if the extradited person had new offense after escape, re-extradition cannot be apply and should back to the normal extradition procedure and restart the trail. If re-extradition happen in proceeding extradition, the procedure will keep in the same status after arrest the escape extradited person while the re-extradition happen during execution, the escaped extradited person had to serving sentence again and it will not restrict by the minimum sentenced period which normally are sixth months. Even there are two months left, re-extradition will also be applicable. According to the Treaty between the People's Republic of China and the Republic of Tunisia on Extradition[28], for re-extradition situation, the requesting party may request the person to be detained again, but a criminal detention warrant or arrest warrant must be issued, and to submit the document that prove the fugitive has been extradited and the necessary materials to prove that the escape is after criminal proceedings or before the execution of the sentence. Furthermore, the re-extradition request cannot be restricted by sentence period[29], In practical, the document doesn't need to submit again because the written judgement had clearly written the penalty information and situation. But it should pay attention on the punishment on the escape, it may increasing burden for escape extradited person sentenced period. For the procedure, it also no need to start again because the offense of the extradited person had already completed when he transfer to the requested state and the also stated the offence situation, guilty and penalty information in the written judgement. If the documents and the procedures started again, it will waste both parties time and judicial resources.

Section 2

Types of Extradition

[27] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.32

[28] The Treaty between the People's Republic of China and the Republic of Tunisia on Extradition Article 19

[29] Extradition Law of the People's Republic of China Article 7(2)

Extradition indicated the cooperation of different nation which based on the one nation's evidence, the other nation's criminal prosecution or to transfer the sentenced person to the requesting state, they will raise the extradition request with each other based these conditions. But there are some conditions will affect the operation of extradition and resulted in several types of extradition such as different extradition systems in different nations, the international convention and extradition theory. And different types of extradition will cause different extradition activities in practical and it will cause different procedure and rules in different norms.

1. Active extradition and Passive extradition

"The procedure of extradition is an instrument used in the international community by the different States, with the purpose of cooperating with each other to solve legal-criminal situations. This procedure is a tool that allows the transfer of individuals from one nation to another, when they are facing a criminal process or serving a specific sentence[30]." In this procedure, the nation raises the transfer of the individuals request is call the requesting state while the other accept or refuse request is called the required nation and derived the existence of two types of extradition - Active extradition and Passive extradition.

"Active extradition refers to the requesting state which indicates one nation request to transfer the suspect, defendant or sentenced person extradite to other nation while Passive extradition refers to the one corresponds to the required nation, it indicates one nation transfer or refuse to extradite the suspect, defendant or sentenced person to other nation[31]." In Active extradition, we can practice in four ways in order to reach the goal efficiently in practical.

First, "take advantage of bilateral extradition treaty and strive the maximum cooperation with requested state[32]." Since the bilateral treaty had set up the standard for the extradition conditions, this can save the time and resources because when the state receive the extradition case, the requesting state can check the constitute components of the crimes whether to meet the extradition condition and they save time for discussing the measure to transfer the offender, they can follow the rule and necessary document for the

[30] The extradition between countries
https://www.internationallawyersassociates.com/en/extradition-between-countries/

[31] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.20

[32] 我国主动引渡制度研究: 经验、问题和对策, 黄风
https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html

extradition procedure, also , they also save the resources because once the conditions are reach the standard the extradition conditions, the requested state will start the review and do the cooperation work in order to make the extradition sufficiently. In some bilateral treaties, they had already set the speedy measure in order to simplify the procedures.

Second, "the judicial departments participate and comply with the relevant procedure requirement of requested state[33]." Nowadays, the criminal procedure proceeding is not only based on the basic principle of criminal law, but also need the judicial departments to participate. In practical, requesting state has to issue the most important document which can support its extradited request the copy of arrest warrant. Even the emergency situation like temporary detention which is requested by diplomacy or Interpol, the requesting state and the requested state can communicate with each other in all communication media in order to implement the extradited request promptly and accurately. "For example: The Treaty between the China and Russia on Extradition[3435]", it stipulates the two nations can communicate with their judicial departments through diplomacy or through all the communication media which has committed by themselves. The participate of judicial department is benefit for the communication and negotiation with requested state and it can respond to the requested state's supplementary situation in review and can clarify the doubt with relevant nations in criminal procedure and judicial system promptly. Furthermore, it is convenient for the nations to negotiate and discuss the additional conditions.

Third, "find the alternative measures in order to keep the fugitive from impunity[36]." Nowadays, there are many new international crimes appear (especially economic crimes) and the offenders will try to escape from the punishment or arrest. In practical, the bilateral treaty may not be applicable in complicated case within several states and it is difficult for the state to establish the bilateral treaty to all the state. Therefore, the states have to use other measures to arrest them such as legal assistance, multilateral agreement or make the commitment between states in order to keep the fugitive from impunity.

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[33] 我国主动引渡制度研究: 经验、问题和对策, 黄风
https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html
[34] 我国主动引渡制度研究: 经验、问题和对策, 黄风
https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html
[35] The Treaty between the People's Republic of China and Russia on Extradition Article 11
[36] 我国主动引渡制度研究: 经验、问题和对策, 黄风
https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html

"For example: the case of Yu ZhenDong

Yu ZhenDong, who was the former managers of the Bank of China. According to information presented in court, the scheme involved efforts by the bank managers to launder the stolen money through Hong Kong, Canada and the United States, among other countries, and then immigrate to the United States from China with his wife by obtaining false identities and entering into sham marriages with naturalized U.S. citizens. Evidence also proved that the bank managers' true wife assisted her husband in laundering the proceeds of the fraudulent scheme and violated U.S. immigration laws by entering this country illegally and then securing U.S. citizenship and passports through fraudulent means[3738].

It is the first economic case that the fugitive extradited from U.S. to China, he had violated racketeering, money laundering, international transportation of stolen property as well as passport and visa fraud. Since China and U.S. don't have bilateral extradition treaty, but how can be still can repatriate to China. First, "U.S. had raised at least five serious charges for him such as money laundering and international transportation of stolen property. According to U.S. Code, it stipulates that the Whoever violates any provision of section 1963 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law[3940]." The Code also stipulates that any alien who is convicted of an aggravated felony at any time after admission is deportable[41]. He recognized that he will deport by U.S. government. Second, the U.S. judicial authority charged these felony crimes mainly based on the evidence and reference which supported by China, and China also provided the evidence of false statement in application and use of passport[42] which implement in China to U.S. These documents are given when Yu

[37] 我国主动引渡制度研究: 经验、问题和对策, 黄风 https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html

[38] Former Bank of China Managers and Their wives Sentenced for Stealing More Than $485 Million, Laundering Money through Las Vegas Casinos

[39] U.S. Code 1963- RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (Crimes penalty)

[40] 我国主动引渡制度研究: 经验、问题和对策, 黄风 https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html

[41] U.S. Code 1227 - IMMIGRATION AND NATIONALITY (Deportable aliens)

[42] U.S. Code 1542 - PASSPORTS AND VISAS (False statement in application and use of passport)

escaped to U.S.. According to the Agreement between China and U.S. on Mutual Legal Assistance in Criminal Matters[43], "the U.S and China also suggest the advantage conditions for him in order to force him choosing the confess and provide the necessary evidence for the guilty. Yu had make his benefit decision and choose to repatriate China willingly[44]." So, when facing the situations which nations didn't have agreement about extradition, they can cooperate with each other by given punishment of their crime and deprive their right gradually and create the condition for repatriation. These can show the cooperation of the nations and the flexibility of nations' judiciary regarding the fugitive in order to prevent the legal loophole of nations.

Forth, "use flexible and pragmatic attitude and handle the legal conflict in judicial cooperation properly[45]." When nations had legal conflict especially in jurisdiction or the different between two legal system. They should keep in mutual understanding, tolerance and concession in order to break the deadlock and make the suitable and correct condition. In reality, the requested state may attach condition in specific case when the criminal identification standards, different criminal systems or humanitarian considerations are different. And most of the nations accepted this kind of attach condition when they consider the advantages and disadvantages if they used their extradition law to handle the case. This can show the respect of the requested state and break the deadlock during legal conflict in active extradition.

For example, the case of Lai ChangXing

Lai is a former Chinese businessman and entrepreneur. He was the founder and Chairman of Yuanhua Group, based in the Special Economic Zone of Xiamen. He imported foreign products like cars, cigarettes and was responsible for one-sixth of the national oil imports at one time. In the late 1990s, he was implicated in corruption scandals involving a large smuggling ring.

Canada does not have the death penalty and is prohibited from deporting accused criminals to countries where they will face capital punishment. China claimed that he would not be executed if extradited from Canada[46].

[43] 中华人民共和国政府和美利坚合众国政府关于刑事司法协助的协定
[44] 我国主动引渡制度研究: 经验、问题和对策, 黄风
https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html
[45] 我国主动引渡制度研究: 经验、问题和对策, 黄风
https://wenku.baidu.com/view/fef16bc104a1b0717fd5dd59.html
[46] Lai Changxing

This incident can show the cooperation and the reputation of two nations. In this kind of international incident, this can be the useful reference in future in order to gain better practice and can gain the credibility of diplomatic commitment between nations.

"In Passive extradition, it distributes into proposing extradition and granting extradition. Proposing extradition refers to the situation that one nation suggest to extraditing the fugitive to the nation which have jurisdiction before receiving the requesting state's request while the granting extradition refers to start the extradition activity when received the requesting state's request[47]." Proposing extradition is rare in international treaty and nations extradition legislation. "According to United Nations Convention against Corruption[48], it stipulated that Without prejudice to their domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority of another State Party, if they consider that such information may assist that authority. to successfully initiate or conclude investigations and prosecutions, or to allow the latter State Party to make a request under this Convention. It only mentioned in the mutual legal assistance but didn't mention in extradition. This kind of extradition had disadvantages more than advantages nowadays because it will disturb one state's competent or unrespect to one state, for the authorized state, they may consider the concrete situation and decide not to participate in the concrete case, and if the other state suggest to extradited person to that state, that state may feel unrespect or even feel offend on their decision or even their competence.

"The granting extradition refers to the normal passive extradition, it investigates and judge to the request and to be the international cooperation. It starts the judicial procedure only when the requesting state submit the requesting and relevant documents[49]."

2. Extradition proceeding and execution extradition

"According to litigation stage of extradition person, it distributes into two extraditions, extradition proceeding and execution extradition. Extradition proceeding refers to the suspect or defendant who is in investigation, preliminary trial or trial stages. It aims to

https://en.wikipedia.org/wiki/Lai_Changxing

[47] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.20

[48] United Nations Convention against Corruption Article 46(4)

[49] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.20

bring the suspect or defendant into criminal prosecution and trial. Execution extradition refers to the sentenced person or the person who is serving sentence. It aims on the punishment or sentenced, but it is rare case in practical[50]." For extradition proceeding, it mainly focus on the investigation. Preliminary trial or trial stages in order to hold the suspect or defendant in a detention status and prevent the suspect or defendant not in impunity status. In investigation, the judicial organ will keep on finding the relevant evidence in order to accuse the suspect or defendant, and the judicial organ will issue the arrest warrant as the official document for the suspect or defendant after they found enough evidence to accuse. According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[51], it stipulates that the extradition should base on starting criminal procedure or the penalty on deprivation of liberty and the documents is the arrest warrant copy. In preliminary trail stage, the requesting state court will review the evidence and decide whether the evidence is legal and whether the evidence is enough for accuse the suspect or defendant. In trial stages, the requesting state court will make the sentence decision on the document that the preliminary trail submit and issue the written judgement as for the extradition necessary document when transfer the extradited person and have to submit the written judgement copy to the requested state. For execution extradition, it mainly focus on the person who is serving sentence. The requesting state will issue the written judgement to the requested state as the execution document ands the content should include the penalty information and situation. According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders, it stipulates that the requesting party's court should submit the copy of the written judgement which include the penalty information[52] and situation and for the absence situation, the requesting party should ensure the extradited person had the chance for appeal or retrial when he present[53]. But it has to pay attention on the absence situation, when the extradited person is absence

[50] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.21

[51] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 3.º e Artigo 9 º

[52] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 9.º

[53] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 7.º

in the trail, the execution extradition can not be executed because the extradited person didn't take his defense rights for his sentence or punishment and due to back on the litigation stage again, and his absence may become the component for increasing burden on his sentence.

Furthermore, "the distinguish between them also applicable on the extradited crimes standard. For extradition proceeding, the judgment should reach the severe level. The sentenced penalty should be in a certain period. For executed extradition, the remain sentence period should meet a certain period[54]." According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[55], it stipulates the sentence period for crimes should be more than one year and the remaining period should be more than six months after extradition. This can protect two party's benefit because if the sentenced period cannot reach the standard or the crimes is not severe to reach the standard, it will waste both parties time and judicial resources.

In reality, "the distinguish for extradition proceeding and execution extradition had changed into three categories. The extradited person who is convicted but didn't sentenced appear depends on legal reason because some nations criminal procedure is separate from the trial and sentenced[56]." When the jury are decided that the defendant are guilty and have to wait for the judgement from the judge, this period will be the vacuum period for the defendant and may cause escape, but some nations consider this situation as extradition proceeding and some nations are considered as execution extradition, for extradition proceeding view, it focus on the litigation stage because the judge hasn't issue the written judgement and there is no official document for the requesting state to submit the relevant penalty information and situation to the requested state. For execution extradition, it focus on the judgement because the situation had already confirmed that the defendant is on guilty but only waiting for the sentence judgement. The waiting period of written judgement is not the period for defendant to deny on his guilty or still in suspect

[54] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.22

[55] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 3.º

[56] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.23

status. Therefore, the written judgement is the execution document for the relevant organ to execute his penalty.

3. Speedy extradition

"Speedy extradition refers to the extradited person willing to extradite under conditions in order to simplify the formal extradition procedure and extradite efficiently. It can save the judiciary resources in order to accelerate international cooperation and practice the respect of extradited person's litigation right and will in order to shorten the detention time[57]." In practical, the requested state will simplify the extradition document and review such as appeal or even give up some principle such as principle of speciality. Speedy extradition started up when the extradited person agreed to the extradition agreement and it defines the extradited person give up his litigation right during extradition procedure. The extradited person had the right to express his will at any time before extradition, it means the extradited person may at any time notify the court that he consents to being surrendered to the extradition country for the extradition offence or extradition offences for which surrender is sought. When the extradited person is willing to extradite, they have to sign a written agreement normally and once the judicial department accepted, it cannot withdraw. The judicial departments had to pass the written agreement and the extradition request to the organ which can make decision on the extradition immediately in order to arrange the extradition. For the willing extradited person, the requested state had the right to send the extradited person to prison when waiting, but the court had the right to grant bail to the person. "According to New Zealand Extradition Act (1999), it stipulated that "If the court issues a warrant under subsection (2), the court may grant bail to the person[5859]." Under the willing to extradite situation, the requested state judicial will waive and terminate the review. Therefore, the requested state judicial can be not request the requesting state to provide the extradition request document or evidence. Also, it exempted the formal extradition request during normal process. According to Treaty on Extradition between Australia and the Kingdom of Netherlands, it stipulated that

[57] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.24

[58] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.24

[59] New Zealand Extradition Act (1999) Article 28(5)

"Extradition may be granted of a person sought pursuant to the provisions of this Treaty notwithstanding that the requirements of paragraphs 1 and 2 of this Article have not been complied with provided that the person sought consents to State, if the Requested State so declares, the Requesting State shall in such cases not be bound by the provisions of paragraphs 1 and 2 of Article 12[60]." Therefore, it simplified the review and procedure and it refers to the weaken in requested state's judicial supremacy and strengthen extradited person's will. "According to UK Extradition Act 2003, it stipulates that "The person must be taken to have waived any right he would have (apart from the consent) not to be dealt with in the category 2 territory for an offence committed before his extradition[6162]." In practical, there are advantages and disadvantages with the cooperation of speedy extradition and the principle of speciality.

For advantages, since the principle of speciality requires the requesting state can only transfer the extradited person which specify in extradited list while the requested state also consider the crimes can be prosecute or implement penalty. Also, the requesting state cannot transfer the extradited person to the third state without permission and should perform the commitment with requested state strictly in prosecution or sentencing issues scope. So, they can restrict and monitor with each other, when the requested state reviewed the extradition request, it should ensure the requesting state to obey the principle of speciality in order to perform the commitment and monitor the requesting state's disobey commitment under the principle of speciality. When the requesting state violate the principle, the extradited person and his defender had the right to against the prosecution and penalty of the requesting state. Speedy extradition can simplify the procedure in order to shorten the detention period, this can protect the rights of individual, and the principle of speciality can restrict the requesting state's judicial power in order to protect the extradited person not judging the crimes which is not included in extradited list. But it has to be attention on the civil liability, it only restricts on the criminal liability, the requested state can call to account on civil liability regarding the crimes which didn't mention in the extradited list.

[60] Treaty on Extradition between Australia and the Kingdom of Netherlands Article 5(3)

[61] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.26

[62] UK Extradition Act 2003 Article 128(5)

For disadvantages, Speedy extradition aims on the extradited person's will, the requested state insists on the judicial supremacy and emphasize the simplify of procedure, but the principle of speciality aims to use the extraterritorial exercise of judicial supremacy to restrict and monitor the requesting state's judicial operation and emphasize the formal procedure to review the extraction request. Speedy extradition procedure constricts the requested state's judicial supremacy while the principle of speciality extends the requested state's judicial supremacy. Also, the legislative of speedy extradition aims on the will of the extradited person and protect the human right while the principle of speciality aims on maintaining the requested state's judicial supremacy and the human right becomes the subsidiary element. So, they are conflict in legislation and operation, but in global world, the cooperation is important in order to save the time and judicial resources. According to United Nations Convention Against Corruption[63], it stipulates that States Parties shall, subject to their domestic law, endeavor to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies. So, in order to meet the goal, there are four methods to solve with different legislation adjustments. They are vagueness mode, selective mode, compatibility mode and exclusive mode.

"Vagueness mode refers to the nation didn't stipulate the applicable of the principle of speciality specifically even though they set up specific speedy extradition. According to Australia Extradition Act(1988)[64], it stipulated that "the person will be committed to prison without any proceedings being conducted under section 19 to determine whether the person is eligible for surrender in relation to any extradition offence; and the person will, if the Attorney-General issues a surrender warrant or a temporary surrender warrant, be surrendered to the extradition country[65]." And in practical, they didn't mention the speedy extradition procedure and they follow their extradition law, but it may violate the defendant rights or the court's competence, for example, if the state stipulate that the speedy extradition can implement when the defendant is agreed to sign up a consent, it will weaken the judicial competence. But if the extradition is agreed with the judicial organ, it may against the willing of the defendant. Therefore, it is better for the states to

[63] UNITED NATIONS CONVENTION AGAINST CORRUPTION Article 44(9)
[64] Australia Extradition Act (1988) Article 18
[65] 专论|赵丽娟:简易引渡与特定性原则关系探析
https://dy.163.com/article/E94O3GN00521TSSS.html

mention the speedy extradition procedure clearly in their extradition law in order to balance the judicial competence and the defendant will.

"Selective Mode refers to the applicable can be selective in the speedy extradition procedure, the nations can choose to be applicable or not applicable[66]." Some nations may not be binding by the principle of speciality when implementing speedy extradition procedure. It means they can account the criminal liability no matter the crimes are happened before extradition, the crimes which didn't list in extradited list and re-extradite the fugitive to the third state without requested state permission. "According to UK Extradition Act[67], it stipulated that ""The person must be taken to have waived any right he would have (apart from the consent) not to be dealt with in the category 2 territory for an offence committed before his extradition". In other case, some nations apply the principle of speciality depends on the willing of fugitive. According to New Zealand Extradition Act (1999)[68], it stipulated that "the court must ask the person whether he or she consents to being surrendered to the country in respect of the offence or any of the offences that are not extradition offences.[69]" So, the applicable of this mode mainly depends on the subjects, it can be the requested state or the extradited person.

"Compatibility mode refers to the principle of speciality can be apply in speedy extradition procedure, and the speedy extradition procedure had the same legal effect as normal extradition procedure[70]." According to New Zealand Extradition Act (1999)[71], it stipulated that "the extradition country has requested that the person also be surrendered for an offence that is not an extradition offence or offences that are not extradition offences, the court must ask the person whether he or she consents to being surrendered to the country in respect of the offence or any of the offences that are not extradition offences."

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[66] 专论|赵丽娟:简易引渡与特定性原则关系探析
https://dy.163.com/article/E94O3GN00521TSSS.html
[67] UK Extradition Act 2003 Article 128(5)
[68] New Zealand Extradition Act 1999 Article 29
[69] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.26
[70] 专论|赵丽娟:简易引渡与特定性原则关系探析
https://dy.163.com/article/E94O3GN00521TSSS.html
[71] New Zealand Extradition Act 1999 Article 29(1b)

"Exclusive mode refers to the principle of speciality is not applicable in speedy extradition procedure. According to UK Extradition Act 2003[72], it stipulated that that "The person must be taken to have waived any right he would have (apart from the consent) not to be dealt with in the category 2 territory for an offence committed before his extradition"[73]." In conclusion, these four methods present different legislation concept and t is the competition between judiciary power and the extradited person will. For vagueness mode, the legal effect for extradited person is not clear, the applicable of the principle of speciality depends on the legal system, but the legislation didn't mention it clearly but the result is the same, the extradited person has to be charged with his legal liability. For selective mode, when the selective right endue to the extradited person, it can protect the extradited person human right to the maximum level. But when the selective right endue to the requested state, the judiciary power will be the priority. For compatibility mode, the principle of speciality and the extradited person will can be used at the same time, it emphasized the requested state judiciary power and protect the human right at the same time. For exclusive mode, the requested state aims on judiciary power. No matter the nations choose which kind of mode, it had to think the legislation and its related law clearly because some of them aims on the judiciary power and some of them aim on the extradited person will. This decision should be balance between judiciary power and the extradited person because whatever the mode, the mode will have their advantages and disadvantages. For vagueness mode, since the legislation didn't stipulate the applicable of the principle of speciality clearly, the extradited person had to be charged with his legal liability without knowing the applicable situation of the principle of speciality, it may violate some of the extradited person legal right. For selective mode, the applicable of principle of speciality depends on the subject, when the right endue to the requested state, it may violate some of the extradited person, the requested state may not be binding by the principle of speciality when implementing speedy extradition procedure. It means the requesting state can account the criminal liability no matter the crimes are happened before extradition, the crimes which didn't list in extradited list and re-extradite the fugitive to the third state without requested state permission. But when the subject endued

[72] UK Extradition Act 2003 Article 128(5)
[73] 专论|赵丽娟:简易引渡与特定性原则关系探析
https://dy.163.com/article/E94O3GN00521TSSS.html

to the extradited person, it aims on the human right of the extradited person but will weaken the nation judicial power. For compatibility mode, the requested state also reviewed the crimes which didn't list on the extradited list, so "when extradition request occurred, it should mention all of the crimes, the procedure will be complicated. And the form to express the extradited person will, it only need the written agreement and review and review the written agreement without verdict, the lack of defense procedure may not guarantee the truthfulness of the statement of the extradited person[74]." For exclusive mode, it may violate some of the extradited person human right and legal right. Since the requested state aims on judiciary power, it means the requesting state can account the criminal liability no matter the crimes are happened before extradition, the crimes which didn't list in extradited list and re-extradite the fugitive to the third state without requested state permission. So, when choosing the mode in legislation, the nation should balance the judiciary power and the extradited person legal rights when making decision.

4. Incidental extradition

"Incidental extradition refers to when the requested state extradited the extradited person only fulfill at least one crime which is listed in the extradited list while the other crimes which are not fulfill the condition on the extradited list. These offenses will be extradited to the requesting state as well[75]." It means when the extradition request includes several separate offences, it is not required that all crimes must meet the sentence criteria. As long as one of the crimes meets the sentence criteria, extradition can also be granted for other minor crimes that do not meet the sentence criteria. According to United Nations Convention Against Corruption[76], it stipulated that "If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences. Furthermore, "according to European Convention[77] on Extradition, it stipulated that "If the request for extradition includes

[74] 专论|赵丽娟:简易引渡与特定性原则关系探析
https://dy.163.com/article/E94O3GN00521TSSS.html
[75] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.26
[76] United Nations Convention Against Corruption Article 44(3)
[77] European Convention on Extradition Article 2(2)

several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences[78].” These kind of regulations had already express the incidental extradition. “The incidental extradition should follow the rule of the double criminality principle, the conduct should offenses alleged as crimes in both requested state and requesting state jurisdictions, but some of the crimes are light and are not reach the severe level such as at least one year imprison. If the offense is administrative violation, the offense should not be extradited as incidental extradition[79].” For example, when a person involved in bribery and perverting the course of justice at the same time, and the extradition request these two crimes to the requesting state, these two crimes are fulfill the double criminality principle, but the bribery sentence more than one year imprison in both nations while the perverting the course of justice sentence less than six months imprison. In this situation, the perverting the course of justice is not fulfill the conditions of extradition, but it also can extradite to the requesting state in the extradition request as incidental extradition. Many international conventions and nations extradition act had this kind of regulation. According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[80], it stipulated that “If the request for surrender relates to facts that fulfill various legal types of crimes and some of them do not fulfill the condition relating to the minimum penalty limit, the requested Party may grant delivery for these facts as well.” This legislative mainly concern on the judicial resources because for the light offense, it will waste time and judicial resources, but if one of the crimes are fulfill the condition of extradition, it can extradite as well. It will save the time and judicial resources and benefit for fighting corruption[81]. “This extradition also reflected the cooperation of criminal

[78] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.26

[79] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.27

[80] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 3.º(4)

[81] 《联合国反腐败公约》中的引渡制度探析, 徐乃斌 http://rdxf.zuolang.com/article/default.asp?id=2391

justice cooperation, it provided a maximum assistance for requesting state during criminal proceeding. Also, "it reflected the applicable of the principle of speciality, it had prosecuted and executed the penalty in all crimes because the crime is listed in extradited list while the other light offense at the same time in extradition request[82]."

5. Partial extradition and conditional extradition

"Partial extradition refers to the requested state only extradite partial crimes which listed on the extradition request and denied the other partial crimes which listed on the extradition request.

Conditional extradition refers to the requested state require the requesting state to promise to do or not to do certain conditions, and these promises are the conditions of the performance of the extradition[83]." For example, the requested state requested the requesting state not to convict on a certain crime after extradition. In practical, most requested state requested the requesting state not to execute the death penalty. Conditional extradition is important to the human right, it can implement the goal of extradition which is charged with and penalty for the extradited person but also can protect the nation judicial power. Although many nations suggest to establish the treaty between nations as the basic and start the international judicial cooperation. But this factor is difficult to implement because many nations don't have bilateral convention between nations and the nations cannot establish the treaty with all nations in the world, therefore, many nations had given up this concept. Conditional extradition is the convention which the requested state and the requesting state deal with according to the specific case. The both parties also have their rights and obligations. The requesting state and the requesting state request can be implemented by the conditional extradition. This can save the time for the complicated procedure of normal extradition. Furthermore, many bilateral treaties cannot be established because of the extradition condition and principle problem, so the concept of pre-treaty is inflexible when apply on the international judicial cooperation. The conditional extradition can solve this kind of problem, the requested state and the requesting state can be compromised in order to cooperate better and implement the principle of reciprocity.

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[82] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.27

[83] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.28

Both partial extradition and conditional extradition had severe limit when they apply in extradition. Partial extradition combined with permit and deny while conditional extradition is the international cooperation, the requested state and the requesting state implement the extradition goal by bargain the maximum benefit for both nations. This can express the principle of reciprocity and the nations can be flexible to find the sufficient way to solve the problem although they had to compromise and may restrict on some power, but this compromise can gain the maximum benefit for both nations in order to maintain their sovereignty, safe and public advantages. "In both extraditions, they have to comply with the principle of speciality, they can implement base on the crimes are on the extradited list[84]." For partial extradition, According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[85], it stipulated that "If the requested Party refuses all or part of the request for surrender, it shall notify the requesting Party of the reasons for such refusal." For conditional extradition, According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[86], it stipulated that "The request for extension shall be accompanied by a statement of declarations by the person complained about the crime in question and, at the request of the requested Party, with the presentation of the documents or statements referred to in article 9."

6. Supplementary extradition

"Supplementary extradition refers to after the requested state make the final decision on extradition, the requested state make a new request and allow to charge on other offenses which are not allowed to extradite before and based on the principle of speciality[87]." Supplementary extradition happened depends on the requested state may not find the enough evidence or discover new offense of the defendant immediately when they raised the extradition request, and the supplementary extradition is the new request based on the

[84] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.28

[85] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 10.º(2)

[86] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 16.º(2)

[87] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.29

original request. This extradition express the judicial competence in extradition. But it should pay attention on the new request if it is listed in the extradition list, if the crime is not listed in the extradition list, the supplementary extradition cannot be apply and have to change to condition extradition. Normally, the requesting state cannot prosecute or implement penalty the crimes which are not included in extradited list. If to do so, it should get the requested state's permission. But it cannot be prosecuted or implement penalty for the extradited person's crimes which it is happened after extradition. According to The Treaty between the Portuguese Republic and the People's Republic of China on Extradition, it stipulates that the person extradited in accordance with this Treaty shall not be proceeded against or subject to the execution of sentence in the Requesting Party for an offence committed by that person before his surrender other than that for which the extradition is granted, nor shall that person be re-extradited to third State, that person didn't leave the Requesting Party within forty-five days after having been free to do so or that person has voluntarily returned to the Requesting Party after leaving it[88], but it has mention that the requested Party has consented in advance, it indicates that is the requested Party are approved to the request. The above situations will be the exception and have to submit the necessary documents as normal extradition. This can prove the applicable in the principle of Speciality even though the treaty didn't mention about the supplementary extradition. "In necessary document aspect, according to European Convention on Extradition[89], it stipulates that the requesting Party has to submit the essential document to requested state even in supplementary extradition such as arrested warrant, detention warrant, the information about the extradited person and etc. In practical, the requesting state can change the accusation depends on the new fact or legal in review. It should follow the principle of speciality if the new accusation become severe[90]."

7. Re-extradition to third state

"Re-extradition to third state indicated that after prosecution or implement penalty by the requesting state and it extradite the extradited person to the third state for prosecution or implement penalty again. If the requesting state plan to transfer the extradited person to third nation, it should get the primary requesting state approval. This can happen before

[88] Treaty between the Portuguese Republic and the People's Republic of China on Extradition Article 14
[89] European Convention on Extradition Article 14
[90] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.30

the first extradition or after the first extradition[91].” If the third state raised the re-extradition request before first extradition, it should submit the relevant documents to the requested state for review. According to the Treaty between the People's Republic of China and the Republic of Tunisia on Extradition[92], it stipulates that the re-extradition to third state can be allowed when the requested state are agreed with it and when several nations raised the extradition request to the same extradited person regardless of the same crime or different crimes, the requested state should consider the relevant situation especially involved in the crime’s location, time, nationality, the possibility of re-extradition to third state and etc. “When several states raised the re-extradition request, the requested state can agree to all request or only accept a part of the request[93].” There are two situations for re-extradition to third nation, first, it should get the requested state’s approval, second, the extradited person didn’t leave the Requesting state within specific period after having been free to do so or the extradited person has voluntarily returned to the Requesting state after leaving it. In the second situation, “it will be the normal extradition because the relationship between the requesting state and requested state is finished actually and no need to get the permission from the first requested state[94],” the extradition discretion transfer to the first requesting state, therefore, when the third state request to transfer the extradited person is the new request, it means it’s the new relationship between the third state and the first requesting state, and their relationship will change to the requested state and requesting state like normal extradition. Furthermore, it is the same as supplementary extradition, they are the international cooperation proceeding to pursue the extradited person’s offense before extradition, but the different is the collaborate partner, the collaborate partner of re-extradition to third state which is a new nation, and supplementary extradition is the primary requesting state.

8. Re-extradition

[91] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.31

[92] The Treaty between the People's Republic of China and the Republic of Tunisia on Extradition Article 7 and Article 8

[93] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.31

[94] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.31

"Re-extradition refers to the extradited person had escaped back to the requested state after extradition, it is the extradition which request the same request as before and restart the extradition proceeding. It can be the proceeding extradition or the execution extradition.[95]" The condition on the re-extradition mainly on the same offense and the same person, if the extradited person had new offense after escape, re-extradition can not be apply and should back to the normal extradition procedure and restart the trail. If re-extradition happen in proceeding extradition, the procedure will keep in the same status after arrest the escape extradited person while the re-extradition happen during execution, the escaped extradited person had to serving sentence again and it will not restrict by the minimum sentenced period which normally are sixth months. Even there are two months left, re-extradition will also be applicable. "According to the Treaty between the People's Republic of China and the Republic of Tunisia on Extradition[96], for re-extradition situation, the requesting party may request the person to be detained again, but a criminal detention warrant or arrest warrant must be issued, and to submit the document that prove the fugitive has been extradited and the necessary materials to prove that the escape is after criminal proceedings or before the execution of the sentence[97]." In practical, the document doesn't need to submit again because the written judgement had clearly written the penalty information and situation. But it should pay attention on the punishment on the escape, it may increasing burden for escape extradited person sentenced period. For the procedure, it also no need to start again because the offense of the extradited person had already completed when he transfer to the requested state and the also stated the offence situation, guilty and penalty information in the written judgement. If the documents and the procedures started again, it will waste both parties time and judicial resources.

There are some different between re-extradition and the re-extradition to third state. 1. "Re-extradition request is based on the same case as before, but re-extradition to third state based on the extradition request which there are several states had the same request at the same time and start the corporation with the third state after considering[98]." The target for

[95] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.32

[96] The Treaty between the People's Republic of China and the Republic of Tunisia on Extradition Article 19

[97] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.32

[98] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.33

both extraditions are different, for re-extradition, it request the conditions should be under the same case, the same person and the same states, it means if there are new offense after escape, re-extradition cannot be apply and have to restart the procedure again. The aim for re-extradition is to save time and judicial resources, but for re-extradition to third state, it aims on taking advantage on the same case and same person but with several states, its target is to save the time and judicial procedure on the same extradition request and the same person, if several states tried the same case in several states, it will waste states' judicial resources and it may take a long time to tried the defendant and resulted in violated some human rights of defendant because the defendant may need to be detained in foreign state for a long time and he may not adapted the environment in foreign state. Also, it may violate some of his rights such as if the defendant had a good performance during sentenced period, he may leave the prison earlier. "2. Re-extradition request is the corporation which based on the same crime and same fugitive, the re-extradition to third state is the corporation which based on the different crimes which offense before extradition[99]." The object for both extraditions are different, for re-extradition, the objects are the same offense, the same fugitive and same states, and the cooperation starts based on these conditions, re-extradition happen are based on the escape of the fugitive. For re-extradition to third state, the cooperation starts based on the same request within several states, and mainly focus on the jurisdiction within several states, the states considered all the concrete conditions and choose the suitable state for the trial or sentenced. Furthermore, it also happen in the case when the extradited person finished the sentenced in one state and transfer to the third state for other trail which the third state consider the extradited person had violated their law. "3. The procedure of re-extradition start when the fugitive escape to the requested state but the procedure of re-extradition to third state start depend on the priority, it can start before the extradition or start after extradition and it is not related on the escape of the fugitive[100]." The constitute conditions for both extraditions are different, for re-extradition, the constitute condition should appear the scape of the fugitive, but for re-extradition to third state had no this constitute condition, it mainly focus on the submit extradition request time within several state, it means if the requesting state

[99] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.34

[100] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.34

submit the extradition request first and the third state also had the extradition request later, the extradition procedure have to be finished within the requesting state and the requested state first, after their trail or executed, the fugitive can transfer the extradited person to the third state for another trail or execution.

9. Postponed extradition

"Postponed extradition refers to the extradited person had the criminal review procedure or executing the penalty in the requested state and have to postpone the extradition, the crime should not be the same between the requesting state and the requested state, otherwise the extradition cannot be postponed. Normally, the postpone reason is the health problem and need the health care. It can be postponed until the end of the review date or the executed penalty date[101]." The requirements are different depends on different treaty between different states. Mostly, the requirement is the requested state are still reviewing the criminal proceeding or executing penalty regarding the other crimes. "The other requirement for deferral of delivery is the verification, duly proven, by a medical expert, of an illness that endangers the life of the person claimed[102]." But some state will only focus on the requested state still reviewing the criminal proceeding or executing penalty regarding the other crimes. "The requested party is carrying out criminal proceedings against the requested extradition for crimes other than the crimes involved in the extradition request, or the requested extradition is being executed for deprivation of personal liberty, neither of which obstruct the extradition[103]." It mentioned that if the charge is the same as the extradition request in requested state, the judicial organ had the right to deny the requesting state extradition request or give up its jurisdiction and cannot implement postponed extradition. Since the basic condition for postponed extradition is granting extradition, so "the delivery of the person claimed may be deferred for when the process or the completion of the sentence ends[104]."

10. Temporary extradition

[101] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.34

[102] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 11º

[103] The Treaty between the People's Republic of China and the Republic of Tunisia on Extradition Article 15

[104] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 11º

"Temporary extradition refers to the extradited person had the criminal review procedure or executing the penalty in the requested state but still implement extradition[105]." But why will it happened, it happened on the serious which are happened in the requesting state, if the defendant cannot reach the trial immediately, it will affect the judgement result directly and cause the obstacle of the requesting state criminal proceeding and may violate the rights of other defendant in the same case, the defendant can be the witness or the principle offender. "And there are three conditions occurred during temporary extradition, first, The temporary extradition will occur the obstruct for the requesting state criminal proceeding[106]." It normally happen on the foreigner, when the foreigner are on the criminal proceeding in the requested state, the extradition request from the requesting state can not be apply because it will against the principle of reciprocity and the jurisdiction of the requested state. But for not applying the extradition, it will cause the obstacle of the requesting state because it may affect their criminal proceeding. In reality, if the requesting state cannot be tried the defendant on time, it may cause another obstacle for the requesting state, for example, the requesting had another serious case with the same defendant who also involved in other serious case. It may affect the other defendant of the case and cause them cannot be tried on time and due to violate their right. Second, "when the requested state allow to transfer the defendant, the requesting state should transfer back the defendant immediately[107]." It means even the extradition request are successful on the temporary extradition, the requesting state had the obligation to transfer back the defendant immediately after the criminal proceeding in order to keep the requested state criminal proceeding is on the normal status. The requested state allow to transfer the defendant mainly based on the defendant had offense the serious crime in the requesting state and if the requesting state cannot execute the criminal proceeding, it will affect their criminal proceeding seriously such as the defendant had offence the serious crime in the requesting state and there are other defendant in the same case. If the requesting state cannot tried the case immediately, it will affect the other defendants rights. But one thing have to pay

[105] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.36
[106] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.36
[107] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.37

attention, during the temporary extradition, “the extradited person are in detention in order avoid the escape, suicide or destroy evidence etc. And the period of detention in requesting state will be deducted from the penalty applied by the requested state[108].”

11. Transit extradition

“Transit extradition refers to one state extradite the fugitive to other state through the third nation territory or territorial airspace. It includes general transit extradition and Air transit extradition without stopover plan[109].” It is the international cooperation performance, the states provide the convenient to the relevant states in order to implement the criminal proceeding. In practical, the requesting state had to submit the official document to the requested state in order to arrange the measures, mostly, the requested state may arrange the specific passage to the relevant staffs and the defendant, and for the transportation, they can arrange the speed way for them to the trail or in detention, for the custom, they can check the relevant staffs and defendant documents in priority and keep their status in privacy.

“For general transit extradition, it has to stay on the territory of the requested transit state for transit extradition includes all the transportation and have to submit the official documents to the third state[110].” According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[111], the documents should include detention warrant or guilty verdict or official certificate from competent authority, the nationality of the person and a brief description of the case.

“For air transit extradition without stopover plan, the extradited person will take the civil aircraft and get the permission from transit state which has no plan to stop before. According to international law, the transit state should allow immediately as long as the transit act will not give the actual loss to it and this act will be performed as imply

[108] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 12º

[109] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.38

[110] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.38

[111] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 20º

cooperation[112].” “In international law, the air crafts are allowed to pass the states’ air territory without stop[113].” Therefore, the air crafts are free to pass the states territory without submitting the official documents, but for the air transit extradition, since the air crafts had no plan to stop on the schedule state, so when they plan to stop on the relevant state, they have to submit the relevant official document in order to prove that the air crafts, the relevant staffs and the defendant will not cause threaten to their state’s safety. Therefore, “the relevant state should notice the transit state about the transit extradition before and indicate the necessary proof document, when there is emergency situation, the about notice will be the transit extradition request[114].”

In conclusion, the international treaty and national law are the priority law to the states, and the requirements documents are only on the base on the official documents which can prove the defendant had offence the crime which are in the extradited list and no need to apply the other immigration document, this can simply the immigration procedure and save time. Also, it can perform the international cooperation with the states and can provide the convenient to the states. This can help the states to build up a good cooperation relationship in mutual assistance. But when encounter the complicated legal problems, the diplomacy had the right to deny the relevant transit extradition request such as the transition will harm the nation sovereignty, safety and public benefit and the crime which in transit extradition request exclude the politic character or military offence.

12. Factual extradition

“Factual extradition refers to the nation transfer the extradited person to the criminal proceeding state by repatriation or deportation. Although these two methods are not extradition, but they have the same result as extradition[115].” For the factual extradition, it is the other measure for the state to repatriate the fugitive out of their state because there are not enough conditions or evidence for them to implement the extradition and due to use other measures to expel out of their territory, this can happen when the defendant try to escape from the offense state and hide in the other state. It always happen in the

[112] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.39

[113] 梁西, 国际法, 武汉大学出版社, 2008 年 10 月 p.161

[114] The Treaty between the People's Republic of China and the Republic of Tunisia on Extradition Article 20

[115] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.40

international crime, the defendant will try to find the place to hide in order to escape the trail from the offense state. And this kind of defendant always offense the overstay regulations since they always escape in a hurry. When the requested state received the information about the defendant, they will use this kind of measure to expel the defendant in order to force them to escape the other state until they can arrest by the relevant state.

"For example, the case of Lai ChangXing

Lai is a former Chinese businessman and entrepreneur. He was the founder and Chairman of Yuanhua Group, based in the Special Economic Zone of Xiamen. He imported foreign products like cars, cigarettes and was responsible for one-sixth of the national oil imports at one time. In the late 1990s, he was implicated in corruption scandals involving a large smuggling ring.

Canada does not have the death penalty and is prohibited from deporting accused criminals to countries where they will face capital punishment. China claimed that he would not be executed if extradited from Canada[116][117]."

When facing the legal obstacle of extradition, the competent authority had to use repatriation method to reach extradition effect. In this method, it is important for both states to cooperate by taking evidence and provide convenience in multiple aspects.

"Deportation is the removal from a state of a person who illegally entered the territory of that state[118]." For deportation, the requesting state may mandatorily expel the defendant out of their territory, they mainly focus on the state social order and safety, they may received the arrest warrant from Interpol and take the deportation reaction in order to help them. They usually implement for illegal immigrants, they will expel the defendant when they had no citizenship, and they don't care about where the person goes as long as the defendant are get rid of their territory, and the Interpol or other neighbor state will notice the defendant track and cooperate with relevant state in order to arrest the defendant. For the document, the Interpol will issue the arrest warrant to the relevant state and try to cooperate with them in operation.

13. Disguised extradition

[116] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.41

[117] Lai Changxing
https://en.wikipedia.org/wiki/Lai_Changxing

[118] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.42

"Disguised extradition refers to one state use the deportation as the cover up method in order to transfer the foreigner to the criminal proceeding state or tempting the foreigner to the third state where can reach repatriation and retransfer the foreigner to the litigation state[119]." It means that one state places a person in such a situation that he falls or might fall under the control of the authorities of another state which is interested in submitting that person to its jurisdiction for the purpose of prosecution or punishment. When as a result of the said action the person comes under the control of agents of that other state, whether that person might be tried or punished or whether he may challenge such situation would depend on the law of the latter state. In the way just mentioned states can pass the strict extradition regulations. Usually procedures regulating these "other means", sometimes the process will be however concluded after the physical delivery of the person concerned. The reasons why two states might agree on a shortcut of formal extradition procedure through "other means" are various because the situations are under non extraditable offence or complex procedures. It is same as factual extradition, it had to expel the foreigner out of the state, but the different is to transfer the foreigner to proceeding state by not following the certain legal rule.

"For example, the case of Dr. Soblen

Dr. Soblen was accused of espionage in the United States. Released on bond, he fled to Israel, claiming asylum and citizenship as a Jew under the Israeli Law of Return. Israel…found that Dr. Soblen was not qualified for Israeli citizenship and placed him on a flight to New York. Interestingly, there were no other passengers aboard except US marshals. In flight, close to England, Dr. Soblen attempted suicide. The plane landed in Great Britain and Dr. Soblen was taken to hospital. The US wanted him, but the offence was not an extraditable one (political offence) under the bilateral treaty of 1931. But Great Britain found that Dr. Soblen had not been legally admitted into the country and ordered his departure on the first available plane of the day, presumably to be returned to Israel. It so happened that there were no flights for Israel that day and the first flight out was to New York, aboard the same plane that took Soblen from Israel"[120][121]."

[119] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.43

[120] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.44

[121] European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters p.3

In this case, the expulsion for Israel and the acceptation for Great Britain before are the factual extradition, but the act for the Great Britain sent Dr. Soblen back to New York is Disguise extradition. The reason to mention the said case is to show that these other procedures do not have the same guarantees of the extradition one, although guarantees might be equivalent in substance. The problem is that the said procedures are very speed, definitely more than the ordinary procedure ones. But, above all, these cases show that decisions are taken on the basis of (sometime high level) political evaluations. It has to pay attention on the disguise extradition, it is not an informal extradition, so it will deprive the extradited person entitled rights and legal guarantees.

Section 3

Extradition restriction

1. Non-extradition for national

"In extradition, the object for the extradition includes the person who is being wanted, suspect, sentenced person, and these kinds of people can be the national, or the third nation resident[122]." So to clarify the national of the extradited person is important because it may be the reason for them to avoid extraditing to the requesting state. According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[123], it stipulated that the Portuguese Republic reserves the right to refuse the delivery of its nationals and the Macao Special Administrative Region reserves the right to refuse to hand over nationals of the People's Republic of China and permanent residents of the Macao Special Administrative Region, but not permanent national residents of the Portuguese Republic. "Therefore, the common method for proceeding nationality principle is to prosecute in its own nation under non-extradition situation. For the applicable of nationality principle, the important thing is to clarify the nationality of the extradited person, there are three clarify standards to confirm the nationality, "first, the implementation time for the crime, second, the time when the requested state had made decision for the extradition request, third, the time when the

https://rm.coe.int/168007495d

[122] 马德才, 本国国民不引渡原则的发展趋势探析, 期刊:《江西社会科学》 2011

[123] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 4º

requested state received the extradition request[124]." These standards are used to clarify the national of the extradited person in order to meet the condition of nationality principle. To clarify the national is important because it can affect the result of the defendant or the suspect, sometimes they can avoid extradition by this principle and it is important for the states to stipulate the norm clearly on their extradition treaty. And the clarification also can maintain the nation sovereignty and jurisdiction during extradition and the related criminal proceeding. According to Treaty between the Portuguese Republic and the People's Republic of China on Extradition[125], it stipulated "the person sought is a national of the Requested Party at the time the request for extradition is received by the Requested Party." In this regulation, the treaty had used the third standard for clarifying the national of the extradited person. Although the regulation of nationality principle is not allowed to extradite the extradited person to other state, but there is exception for it. "According to the reciprocity principle, it can consider some conditions in order to maintain extradition, for example, 1. the two states have commitment in nationality problem before.[126]" The two states can take the other states commitment as the reference for their commitment or the states had already predict the problem regarding to the national in order to establish the commitment, for the time when they are setting the commitment, for non-extradition for national can be used if both states are allowed. "2. The two states are closed relationship and they have good political relationship and judicial cooperation[127]." Since both states had the good cooperation before, they can compromise the situation which are involved in the national. But it have to pay attention on it because both states gain the reputation and good relationship but may loss the defendant right, so both states had to think clearly before they allowed the national for extradition. "3. The extradited person had the citizenship in requested state, but he is long-term residence in requesting state[128]", it is the advantage factor that not extradite the fugitive from the requested state because they live in the requested state for a long time and can adapt

[124] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.46
[125] Treaty between the Portuguese Republic and the People's Republic of China on Extradition Article 3(1d)
[126] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.47
[127] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.47
[128] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.47

to social life easier, but it has to pay attention on clarifying the staying time and reason for the fugitive clearly because the fugitive may not really know the legal system and social well such as working visa. They may only work and know nothing on the requested state legal system. So both states have to think clearly for not extradite the national. “4. It takes advantage for investigation and collect evidence If the extradited person participated the litigation or review in requesting state[129].” In this situation, the extradited person can stay in the requesting state for helping investigation, but the extradited person should transfer to the requested state once the case is tried or the extradited person had no used for helping the investigation and the case. But the offender may take advantages in nationality principle and abuse to use in order to avoid the punishment or penalty.

“For example: the case of Delfo Zorzi(Roi Hagen)

Delfo Zorzi is an Italian-born Japanese neo-fascist and alleged terrorist. Delfo Zorzi/Roi Hagen was born in Arzignano, near Vicenza, Italy in 1947. In 1974 he moved to Japan and in 1989 he took Japanese citizenship with his present name, Roi Hagen.

Zorzi was a suspect in the Piazza Fontana bombing, In 2000, The Italian government requested extradition to Japan where Zorzi had moved to several years earlier, obtaining a refusal because, having obtained Japanese citizenship a few years earlier (while also retaining the Italian passport), Japanese law excludes the extradition of its citizens. But was later acquitted on appeal for lack of evidence in 2004. In 2005 the Court of Cassation acquitted Zorzi from the accusation. In 2014, the supreme Court of Cassation also acquitted Zorzi from the accusation[130][131]. “

In this case, the Japanese government excludes the extradition of its citizens, it is because some fugitive may get the hide state citizenship in any ways, therefore, it will become the exception of nationality principle in extradition request. In practical, to avoid protect the crime from accused by the national competent authority and the applicable of nationality principle which are abused by the extradited person. Therefore, many nations had stipulated some regulations regarding the certain conditions which allow extradition of nationals.

2. Non-extradition for political offence

[129] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.47

[130] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月 p.48

[131] Delfo Zorzi
https://it.wikipedia.org/wiki/Delfo_Zorzi

Non-extradition is public known principle in international law. It is important to define what is politic crimes because it is related to the relationship between individuals and state sovereignty, relationship between states, relationship between state interest and international public security and the relationship between individuals and international public security. "Political offence is an offence committed for a political purpose or inspired by a political motive, for which the alleged offender cannot be extradited (see extradition) or surrendered as a fugitive offender.[132]." It has political character in crime, it means when the object is related to state which need criminal law to protect such as state sovereignty and security, constitutional system and national security, it considered as political offence concept and the probability for happening. "There are narrow definition and wide definition, for narrow definition, it is traditional concept of political offense, there are two types of political offense especially in civil law system countries, they are pure political offenses and relative political offenses.

For pure political offense, it refers to the general crime which involved in politics or include politic nature and considered as political crime. There are two theories on pure political offenses, they are

subjective and objective theories[133]." For subjective theory, it based on the political factor, the offender had no political motivation when the political situation are not happen, but when there are political situation, the offender change their mind from it and violate the offense. It is important to clarify the mental condition from the offender when in trial because his mind can determine the reaction of the offense. Also, his offense is important for the state because the state can take the offender's motivation as the reference of the social situation and can observed the safety level of the society. For objective theory, it based on the object of the offense, it means when the offense had already violate state sovereignty and social security and without thinking about why the offender violate the offense. The state sovereignty and social security are important to the governor because it will affect the rule of governor directly. And the governor is a sensitive object in political offense because of his status. When the offender violated the governor, the motivation of the offender is important because if the offender infract the governor because of his private reason and not

[132] Political Offense
https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100334697
[133] 赵秉志、陈一榕, 试论政治犯罪不引渡原则
http://www.iolaw.org.cn/showNews.aspx?id=40995

related to the political factor, the offender will not consider as the political offender, but if the offender infract the governor because he want to reach some political goal, it will consider the offender as the political goal because the political goal always include the state's policy and it will affect the social security and state sovereignty. So, it is important to analyst the purpose of the offender.

"For political offense in extradition, the interpretation belongs to requested state[134]." It can protect and respect the requested state legal system, it is because there are different interpretation and the categories in different states, the interpretation belongs to the requested state can protect the defendant rights not violated by the requesting state, in practical, the requesting state may use the political offense reason in order to reach the other purpose from the offender, and the requested state had to review the document and evidence from the requesting state clearly in order to not putting its situation into political crisis.

For relative political offense, it refers to the general crime from the view of both subjective and objective but is related to certain political act. "It divided into compound political offense and implicated political offense[135]." For compound political offense, it is different compared with pure political offense, for compound political offense, it includes the pure political offense and the other non-political offense, in practical, the compound political offense perform as normal crime or it perform in political offense with other non-political offense such as terrorism. This kind of offense violated one state interest and social security and always in violation mode when they want to reach their goal. But the pure political offense perform as the political offense such as espionage, theft of state secrets. These kinds of offense are violated the state interest and it will not affect social security directly. But how to determine the compound political offense, "it can considered the three elements, first, the crime motivation should help or ensure to reach political goal. Second, there is direct relationship between criminal act and the political goal. Third, the component of political factor must more than the component of general crime[136]." For the first point, the offense act should include the political goal, if the offense occurred when there is no political intention, the offense cannot be considered as political offense and only be the normal crime.

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[134] 赵秉志、陈一榕, 试论政治犯罪不引渡原则
http://www.iolaw.org.cn/showNews.aspx?id=40995
[135] 赵秉志、陈一榕, 试论政治犯罪不引渡原则
http://www.iolaw.org.cn/showNews.aspx?id=40995
[136] 赵秉志、陈一榕, 试论政治犯罪不引渡原则
http://www.iolaw.org.cn/showNews.aspx?id=40995

For the second point, the offender who implement the offense should include the political goal which means that the offense can cause loss of state interest even though it may cause society security and involved in individual interest. For the third point, the offense should offense more than one offense and have to measure the quantity of offenses which means the violation intention as the main component, if the offence cannot take the high proportion of the political intention, it will not considered as the political offence and due to normal criminal crime. These three elements are important because it is the standard to recognize if the offence are fulfil political offence, but in practice, it is difficult to recognize the political intention because the intention of the offender is difficult to know especially their motivation, it only can recognize by their objective act, and the objective act may not be the reaction of their motivation, so when there are compound political offense, the states has to take lots of evidence to proof the offense involved in political goal and take many time to proof. So the requested state have to discuss all the evidences in detail in order to decide whether to take extradition action or not, it is because its decision may cause the violation of defendant or the requesting state interest.

"For implicated political offense, it divided into two types, one is the violated object, the manifestation of crime and the offender mental state do not have political characteristics, thus it is general crime. The other one is the crime which involved in political persecution clause[137]." It is difficult to recognize the offender mental even from the act which cannot express any political motivation. If all the crimes are related to the political motivation, it will waste time on criminal procedure and cause tension environment for the public. This may occur state interest loss and insecure environment. Therefore, this kind of political offence should define into wide interpretation of political offence.

"In practical, Murder the foreign head of state and his family and international crimes are the exception of political offense. According to the Treaty between the People's Republic of China and Spain on Extradition[138], it stipulated that the requested state deemed that the crime targeted by the extradition request is a political crime. For this purpose, terrorist crimes and acts that are not considered as political crimes by international conventions, it does not consider as political offence[139]." But the terrorism had rejected by many states as the political

[137] 赵秉志、陈一榕, 试论政治犯罪不引渡原则
http://www.iolaw.org.cn/showNews.aspx?id=40995
[138] The Treaty between the People's Republic of China and Spain on Extradition Article 3
[139] 林欣, 国际刑法问题研究, 中国人民大学出版社, 2000 年 4 月, p.269

offence because the terrorists always implement violation or cruel measures to reach their goal, if they are restricted by non-extradition for political offence, they may find this loophole as their escape judgement reason and keep the terrorists from impunity. Also, it cause the obstacle for judging their crimes and due to unsafety status to these states.

Although there are disadvantages in non-extradition for political offense, but it can do by "double review system which is an important character in extradition litigation, judicial department and administrative department have their authority in extradition. For judicial department, it takes part on state legal system, the basic principle in legal system and the view of judicial practice when reviewing. For administrative department, it takes part of consideration of state interest and the relationship between states when reviewing[140]." So, it is better for the state to decide how to cooperate between judicial department and administrative department in order to maintain the applicable of non-extradition for political offender and the right of offender. Also, it should pay attention on balancing the competence between judicial department and administrative department, it is because if either of them had more power on competence, it will occur the other judicial problem and cannot reach the fair judgement.

3. Extraneous considerations

Extraneous considerations are the classic protect human right term which involved in the extradited person race sex, religion, nationality or political opinion, or that that person's position. "According to UK Extradition Act (2003)[141], it stipulated that sexual orientation cannot be the reason for accusation. Extraneous considerations are developing, some states also includes mental or physical disability into this regulation. According to Canada Extradition Act 1999[142]," it stipulated that mental or physical disability or status or that the person's position may be prejudiced for any of those reasons. Aside from extradition, extraneous considerations also can use in expulsion, According to the Refugee Convention[143], it stipulated that cannot expel or return ('refouler') a refugee to the place

[140] 赵秉志、陈一榕, 试论政治犯罪不引渡原则
http://www.iolaw.org.cn/showNews.aspx?id=40995
[141] UK Extradition Act 2003 Article 81
[142] Canada Extradition Act Article 44(1b)
[143] The Refugee Convention 1951 Article 33(1)

where would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion[144]."

Extraneous considerations as the reason for extradition refusal, extradition law is not require actual existence from the above situation but it require the existence of possibility of the above persecution or discrimination. "In extradition treaty, the clause always express as "the Requested Party has substantial grounds for believing"[145]," According to Treaty between the Portuguese Republic and the People's Republic of China on Extradition[146], it stipulated that "Extradition shall be refused if the Requested Party has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing the person sought on account of that person's race, sex, religion, nationality or political opinion, or that that person's position in judicial proceedings may be prejudiced for any of those reasons. Although this clause had implied and direct admit the above situation cannot be the reason for extradition, but it give the wide discretion for the states to decide the concrete situation, therefore, when the case involved in this kind of clause, the states had to pay attention on the evidence of the applicant because it may cause the escape of the extradition by using this reason.

4. Military offence

"Military offence is different to general crime, it violated the military obligation and its social harm is limited. Normally, the punishment of military offence is implemented by specific military judicial organ and have specific criminal procedure. The litigation right or treatment of suspect, defendant or sentenced person will restricted by the military court[147]." This can show the unusual of military offence. Since it is unusual, so, the definition for it also unusual, the definition for the military offence is all the crimes which exclude the constitution element of general crime. Mostly, the military offense include the disobey of military disciplines. But it had to distinguish the crime that the solider offence and not just focus on his special status, and it also have to consider the intention of the soldier, if the soldier only offence the crime which are based on his individual interest, it will not constitute military offence. So the

[144] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.54

[145] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.55

[146] Treaty between the Portuguese Republic and the People's Republic of China on Extradition Article 3(1b)

[147] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.56

military offence can be apply only when the soldier use his authority to implement the offence. Therefore, when the judicial organ trial on the crime which involved in soldiers, they have to investigate the mental and background clearly in order to avoid mistrial for the defendant as the soldier or the normal resident.

5. Fiscal offence

"Fiscal offence refers to the crimes which involved the scope of state financial and economic control field such as the crime of tax invasion and foreign exchange evasion[148]." Generally, it is excluded in extradition cooperation. "According to European Convention on Extradition[149]," it stipulated that extradition shall be granted for offences in connection with taxes, duties, customs and exchange only when the contracted parties are allowed to do so. There are two theories to understand why fiscal offence is excluded in extradition cooperation. First, the object of fiscal offence is the economic scope of state[150]", compared to the state interest, the violation for the economic scope is narrow, although the economic will affect the state fiscal interest, but it won't affect the social security and the state sovereignty. And the state can implement economic policy to recover the economic rather than the state sovereignty and security cannot be recover by money or even time, these two factors have to use many measures or policy to recover the loss. For state sovereignty, it may cause the loss of its territorial while the social security may occur the other serious crimes and they needs more time and resources to recover or even cannot recover the loss. But it should pay attention on the severe crime may hide behind some fiscal offense because some of these crimes may threaten human life. "Second, fiscal offence based on the economic law[151]." Since fiscal offense are regulated by economic law, and extradition is based on the severe crimes and criminals case. Although some of the fiscal offense are severe in international, but it didn't involved in the scope of criminal, and it only involved great amount of money and without threaten on the state sovereignty and state social security. And as said in the first point, the loss of fiscal offense can be recovered by the state economic policy or measures or the money can get back when the trial was tried.

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[148] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.57

[149] European Convention on Extradition Article 5

[150] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.58

[151] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.58

6. Non-extradition to capital punishment

"Non-extradition to capital punishment refers to the requested state believe that the extradited person may sentence or execute death penalty after extradition and result to no extradition is granted[152]." According to Treaty on Extradition between Australia and the Republic of Portugal[153], it stipulated that "Extradition shall not be granted if the offence for which extradition is requested is punishable by death." "According to European Convention on Extradition[154]", it stipulated that extradition may be refused unless the requesting Party gives such assurance that the death-penalty will not be carried out[155]." "But there are few points have to pay attention when making such assurance, first, the assurance should severely follow the procedure of regulation,[156]" Since the capital punishment is severe problem for the defendant, so the relevant organs have to follow the regulations of the extradition treaty seriously, in practical, it always need the requested state to submit written agreement for not execute the capital punishment. In practical, the written agreement had legal binding, and most of the states are comply with the assurance. This measure is advantage for the requesting state because the fugitive can transfer to the requested state and can continue for the criminal proceeding in the requested state, it is because the fugitive may offence several offenses and involved in several suspects, this action can help to handle these kind of case and protect the other suspects rights. Furthermore, this obligation can express the promise of the requesting state and can raise the good relationship and cooperation within states. Also, it can raise the reputation of the requesting state in international. Therefore, the assurance can show the compromise between human right concept and the international community mutual interest. "Second, the commitment is under the situation of not sentenced to death penalty or not executed if the death penalty is sentenced.[157]" This assurance is the requesting state do not execute the death penalty after extradition, it means the requested state is only promise to not execute the death penalty which trail before extradition, but when

[152] 赵秉志, 死刑不引渡原则探讨, 期刊年份:2005 http://pkulaw.cn/fulltext_form.aspx?Gid=1509981856&Db=qikan
[153] Treaty on Extradition between Australia and the Republic of Portugal Article 4(1c)
[154] European Convention on Extradition Article 11
[155] 赵秉志, 死刑不引渡原则探讨, 期刊年份:2005 http://pkulaw.cn/fulltext_form.aspx?Gid=1509981856&Db=qikan
[156] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.62
[157] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.62

the fugitive is condemned to death penalty and escape after extradition, would it still be the promise included in the assurance is a problem, the problem occurred because of the assurance is only for the commitment according to the extradition content. If the fugitive escape after extradition, it should not include in the assurance because the escape act is the new crime for the fugitive, it should not include into the assurance and the requesting state had the rights to implement its judicial competence. Therefore, the new crime occur after extradition is not part of the commitment.

7. Torture

"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 threaten 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.[158]"

"According to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [159][160], it stipulated that "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." "According to the principle of privilege against compulsory self-incrimination in criminal procedure principle, there are three implication first, the defendant had no obligation to make any statement to the court that may put him in disadvantage situation,[161]" Since torture and other cruel, inhuman or degrading treatment or punishment are also included the defendant who are in the trial, in reality, it may happened that the judicial officers may use torture measure for the defendant in order to get the defendant conviction. The principle is to take the protection of the defendant because some defendant may not know the criminal proceeding or law well and

[158] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 1
[159] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.63
[160] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 3(1)
[161] 宋英辉等着, 外国刑事诉讼法 (Foreign Criminal Procedure Law), 法律出版社, 2005 年 1 月, p.30

they choose to keep right to silence. It is because they might get themselves in disadvantage situation if they didn't explain clearly about their defense point. And it is the measure for them to protect their human rights since everyone has the rights to do what they want to do. "Second, the defendant had refusal right to answer the questions from prosecutor or judge and keep in silence.[162]" In prosecution, the defendant had the right not to answer the questions from the prosecution or judge, this can protect the defendant human rights and they can used this rights for them not putting in disadvantage situation. And the prosecutor or judge cannot threaten him in order to get the evidence or information. The defendant had the right to keep silence until the end of the criminal proceeding and the prosecutor or judge should respect his right to silence in entire procedure. "Third, the suspect and the defendant had the right to provide the statement which is advantage or disadvantage for him,[163]" The defendant had the right to provide the statement which is advantage or disadvantage for him, but the statement should be in his willing and under consciousness. In practical, some defendant may provide disadvantages for him because of hiding some evidence or someone and sacrifice himself. Even though the prosecutor or judge know about that, they cannot threaten him for telling the truth or get the evidence and information. The prosecutor or judge have to respect the defendant statement. They should not put the defendant in disadvantage situation only based on his statement, but also the concrete evidence. And the defendant had the chosen rights to choose the statement which is advantage or disadvantage to him. But the judicial or court should tell him the rights during the beginning of the criminal proceeding.

Although there is no standard for clarifying torture because there is different legal system, culture, value concept and social customs in different state, but it can define the meaning of torture through the terms in convention or treaty. "According to European Convention on Human Rights[164], it stipulated that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment.[165]" Aside from the torture and punishment, it also include the prison of requesting state, the bad condition of prison cause fear and due to mental torture. Therefore, the prison condition of requesting state is an important condition for some competent authority to decide whether the extradition is granted. It also included the attempt

[162] 宋英辉等着, 外国刑事诉讼法 (Foreign Criminal Procedure Law), 法律出版社, 2005 年 1 月, p.30
[163] 宋英辉等着, 外国刑事诉讼法 (Foreign Criminal Procedure Law), 法律出版社, 2005 年 1 月, p.30
[164] European Convention on Human Rights Article 3
[165] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.63

torture, it extended the protection scope of human right. In this convention[166], it stipulated that "each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature." This convention required each state should take efficient legislative, administrative, judicial or other measures in order to avoid the torture act implement in their territory regardless of in war situation, war threaten, domestic politics or other emergency situation, they cannot be cited as a reason for torture.

8. Due process and special tribunal

Due process is the legal requirement that the state must respect all legal rights that are owned to a person. Due process balances the power of law and protects the individual person from it. It is an exercise the law permits and sanctions and it is the measure for the protection of individual rights. When a government harms a person without following the exact course of the law, this constitutes due process violation, which offends the rule of law. "According to United Nations Convention against Corruption[167], it stipulated that "Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present. Some states also consider the due process condition and fair execution and trial as the extradition cooperation condition.[168]" Therefore, this principle based on protecting the extradited person litigation right, so default judgement is deemed invalid in many states nowadays.

For special tribunal, it refers to a criminal court set up on an ad-hoc basis and set up specifically for the trial of particularly important cases by judicial organ. "According to International Covenant on Civil and Political Rights[169], it stipulated that "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

[166] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 4
[167] United Nations Convention against Corruption Article 44(14)
[168] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.64
[169] International Covenant on Civil and Political Rights Article 14(1)

public hearing by a competent, independent and impartial tribunal established by law.[170]" For the special tribunal, it usually set up temporary and for specific purpose. The common special tribunal always set up in the state which under war, it is because in the war situation, there may have some specific situation happen and they have to set up the special tribunal for those crimes. Captive is the classic example for setting up special tribunal, it is because the captive only appear under war and there is no formal regulations to norm this kind of person. So it needs special tribunal to control this kind of person in the state. And since their status is special, the special tribunal are using the specific law for them. It usually includes their rights and obligations in specific law. Once the state had make the commitment with the captive national state, the special tribunal will be dismissed. But it should pay attention on the nature of the special tribunal, if it involved in the military scope, the extradition may not be granted. According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[171], it stipulated that the requested state can refuse the extradition request by the trial in a special tribunal or executed by such nature of tribunal.

9. Lapse of time and amnesty

Lapse of time refers to the reason for a legal agreement ending. It means the extradition request lost the prosecuted or punishable because of some legal reasons. "According to Model Treaty on Extradition[172], it stipulated that "extradition shall not be granted if the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty.[173] "Limitation of prosecution is a law which forbids prosecutors from charging someone with a crime that was committed more than a specified number of years ago. The general purpose of these laws is to ensure that convictions occur only upon evidence that has not deteriorated with time. "According to the Treaty between Belarus and the People's Republic of China on Extradition[174], it stipulated that when the extradition request is received, it is impossible to pursue criminal prosecution or execute criminal sentence against the extradited person when

[170] International Covenant on Civil and Political Rights Article 14(1)
[171] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 6(1f).º
[172] Model Treaty on Extradition Article 3(e)
[173] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.66
[174] the Treaty between Belarus and the People's Republic of China on Extradition Article 3

time limit of prosecution and punishment are expired.[175]" For "when the extradition request is received", it means when the time received extradition request, the time limit of prosecution or punishment are expired regardless of the case is in starting or investigation, it also consider as lapse of time. For the crime which had severe effect to human or world, it cannot consider as the exception in extradition law. "According to Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity[176], the war and crimes against humanity are not applicable of lapse of time regardless of when the crime is implemented.[177]" Amnesty means an official statement that allows people who have been put in prison for crimes against the state to go free. "It can happen during criminal proceeding or after sentenced. It can divide into pardon and specific pardon. For pardon, the object is the unspecific crime or defendant who meet the certain conditions within a certain time. For specific pardon, the object based on the specific crime or defendant." For "when the extradition request is received", the extradition is granted if the amnesty is decided by the requesting state and the granting extradition is permitted, vice versa, If it happens before the grant extradition decision is made, the requesting state can be required to withdraw the extradition request.[178]"

10. Ne bis in idem

Ne bis in idem refers to no one shall be twice tried for the same offence. According to the applicable legal framework[179], in light of the interpretation given by the CJEU[180], several requirements should be taken into account for a situation to be considered a "bis in idem": The "same person" requirement – it concerns the same defendant. The "bis" requirement – it concerns a final decision. The "idem" requirement – it concerns the same acts. The "enforcement" requirement – the penalty has been imposed, it has been enforced, it is in the process of being enforced or can no longer be enforced. The "criminal nature" requirement –

[175] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.66

[176] Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity Preamble

[177] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.67

[178] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.67

[179] The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union p.8

[180] The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union p.8

The thin line existing between (punitive) administrative sanctions and criminal sanctions. “There are several characters in this principle, first, it is the constitutional principle and the principle of criminal proceeding in many states constitution law.[181]” It is the basic and important principle in most states constitution law because it protect both state criminal procedure and the defendant human rights, for the state criminal procedure, it can help to save the judicial resources and time on the same case. The purpose for the law is to punish the person who violate the social order and the state interest, so it is meaningless for judging the same offense twice because the defendant had already received his penalty. For the defendant, it is the protect measure for him not to judge for twice because he had receive the corresponding penalty and if his guilty judge again, it will violate his liberty right. “Second, it based on the effective referee,[182]” It means this principle start when there is existing referee. This condition is protect the court and the defendant, the referee will be the evidence to proof the case had be judged and has given the penalty to the defendant. And the referee is issued by the court, it had the credibility for the public to trust the defendant had already judged and decrease the unsecure emotion from the defendant. “Third, maintain res judicata principle.[183]” Res judicata determines that the effects on prior adjudication and valid final judgment, it has binding force or precluding a common party as to the same issues or claims raised in a later criminal action. It can protect the interest of court and defendant. For court, the adjudication will be the final judgement, it means the defendant cannot be appeal. It is important to the court because it can save the judicial resources on the same issues in the later criminal action. For defendant, it had severe meaning for him because when he finish the punishment in the referee, it means that he regain the liberty and do not bear the charge. If the offense tried again, it will violate his basic right. “Forth, the purpose of this principle is to maintain the law stability.[184]”It should keep the law in stable situation because if the issue keep on trial, the law will be short of credibility to the public, and the public will not trust the law and it may cause the disorder of society. And for the defendant, the unstable of law will cause him in insecure situation and violate his legal rights. Furthermore, the stable law can make the public to foreseen which kind of act will occur the relevant punishment. This can help to maintain the society order. In practical, effective referee and the re judicata situation are the main

[181] 宋英辉等着, 外国刑事诉讼法 (Foreign Criminal Procedure Law), 法律出版社, 2005 年 1 月, p.37
[182] 宋英辉等着, 外国刑事诉讼法 (Foreign Criminal Procedure Law), 法律出版社, 2005 年 1 月, p.37
[183] 宋英辉等着, 外国刑事诉讼法 (Foreign Criminal Procedure Law), 法律出版社, 2005 年 1 月, p.37
[184] 宋英辉等着, 外国刑事诉讼法 (Foreign Criminal Procedure Law), 法律出版社, 2005 年 1 月, p.37

components for the ne bis in idem. During extradition, the effective referee is the evident for the requesting state and requested state cannot judge the same defendant with same issues. When they received the effective referee, it means that the defendant had received the relevant punishment and both parties cannot judged the same issues again. And the requested state can reject the extradition request regarding on the same issue and the defendant because it is the main principle in general extradition law. And the referee should be in re judicata, it is important during extradition because the final judgement is the main evidence for proving the defendant who has been judged and it is meaningful for the requesting state to judge again due to the extradition is transfer the defendant into trial or execute the punishment. If the same issue judge again, it implied that the requested state didn't trust the requesting state law and it is unfavorable for the cooperation of both parties. Also, it can make a stable environment for the public in order to maintain the law. Otherwise, the public will be in unsecure situation and won't trust the law and cause social disorder.

11. Trial in absentia

Trial in absentia refer to a defendant in a criminal case who deliberately absents himself in trial and waives his right. There are three situations occurred in trial in absentia, first, a situation may occur when the defendant has never appeared at any stage of the trial, sometimes referred to as "total absentia". Second, there is a possibility that the defendant is present at least at the early stages of a trial. Third, the absence of the defendant may be directly enforced by the adjudicating judge. Grounds for such action involve disruption of the trial, misbehaviour or contempt of court, this kind of outcome can be thus described as "compulsory absentia".[185]No matter which situations, it deprives the defendant of basic litigation rights to a certain extent especially the right of defense. The right of defense means the defendant or suspect had the full defense during criminal proceeding and the they had the right to employ the qualify defender in order to help them defense. Furthermore, the state should protect the right of defense to the defendant or suspect by established legal aid system in order to exercise the right of defense fully. Aside from the right of defense, the defendant or suspect had the right to participate in litigation. It is important for them because it involved to their personal or property matter and they have the right to know and right to express opinions, the state had the obligation to protect their right to participate in procedure. During litigation, it endue the relevant person speaking right, this kind of person had the right to express their opinion during

[185] "a trial in absentia resulting in a decision" within the European Arrest Warrant framework

the entire criminal procedure. And their statement can be the advantage or disadvantage to themselves and will not threaten by the court or prosecutor. For the prosecutor or judge, they cannot take the threaten action to the relevant person even though they cannot get any useful information and evidence from them. And the prosecutor or judge should take the relevant person statement as the evidence in the entire proceeding even though they give the disadvantage information or evidence. It is important for the right to participate during litigation because it protected the subject, to be fair in litigation and it is the requirement and guarantee to enhance the authority and conviction of justice. Therefore, the trial in absentia is the restriction of extradition mainly on protecting the right of defense of extradited person, if the requesting state promise to arrange the retrial opportunity after extradition, it may accept the extradition request. "According to Model Treaty on Extradition[186], it stipulated that "extradition shall not be granted if the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defense and he has not had or will not have the opportunity to have the case retried in his or her presence.[187]" According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[188], it stipulates that Surrender may also be refused when requested with a view to serving a sentence imposed following a trial in the defendant's absence, unless the requesting Party ensures that the person complained against has the right and the opportunity to appeal the conviction or to request a retrial in your presence after delivery.

12. Lack of jurisdiction

Lack of jurisdiction refer to a court's total lack of power or authority to entertain a case. The reason for lack of jurisdiction may be failure on part of the parties to comply with conditions essential for exercise of jurisdiction or that the matter falls outside the territorial. "According to Model Treaty on Extradition[189], it stipulated that "extradition may be refused If the offence for which extradition is requested has been committed outside the territory of either Party and

[186] Model Treaty on Extradition Article 3(g)

[187] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.67

[188] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 7.º

[189] Model Treaty on Extradition Article 4(e)

the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances."

"For example: the case of Nikolay Shapenkov

Nikolay Shapenkov is a Russian who securing a sailor on board the cargo ship DD Leader, harbored in Shanghai on 21 December 2004. His crew mate Anatoliy was found dead on the next morning when he was supposed to report for duty on 12 January 2005, the Russian Federation requested the People's Republic of China to extradite the suspected of murder. The extradition request had met the conditions of extradition but he appeals about the jurisdiction. He appeals that the boat registered in St Vincent and The Grenadines and the nationality of the boat should belong to this state. But this state didn't accuse on this case. So, Russian had the jurisdiction to accuse Nikolay Shapenkov because of he is the citizen of Russia and the extradition request had accepted by China[190][191].

In this case, although the offence had been committed outside the territory of Russia and China, but we can clarify the jurisdiction by steps. First, both Russia and China had applicable on the principle of speciality, they both found that he had offence severe crime and the sentenced period is more than one year in both laws. Second, Russia had promised China that will not be subjected to torture or other cruel, inhuman, or degrading treatment or punishment after extradition. Third, Shapenkov appealed that the jurisdiction belongs to the boat nationality, St Vincent and The Grenadines, actually it is the priority for jurisdiction in this case, but since this state had no reaction on this case, so its jurisdiction means to be waived. And the jurisdiction will go to Russia and China. Therefore, the final action is settled by both states and China accepted the extradition request.

13. Humanitarian considerations

Humanitarian considerations based on all human beings are born free and equal in dignity and rights and everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of

[190] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.71

[191] 中俄案例（162）| 沙宾科刑事其他一案刑事裁定书（俄罗斯公民被引渡回俄罗斯）

sovereignty[192].” So, we can see many states had stipulated these kinds of conditions in their extradition law or the treaties. According to Agreement between the Macao Special Administrative Region of the People's Republic of China and the Portuguese Republic on the Delivery of Escaping Offenders[193], it stipulated that The delivery of a fugitive offender is refused if There are well-founded reasons to believe that the surrender is requested for the purposes of criminal proceedings or serving a sentence on the part of a person, by virtue of their race, sex, religion, nationality, language, territory of origin or their political beliefs and ideological, ancestry, education, economic situation, social condition or belonging to a specific social group, or there is a risk of worsening the person's procedural situation for these reasons. This regulation can provide the wide discretion for the competent authority and they can balance the humanitarian protection and the extradition cooperation in substantial situation. In practical, the humanitarian protection terms are the requested state last protection method for refusing extradition request, it means the requested state had considered all the conditions but these kinds of conditions cannot be the refuse reason in extradition request.

14. Immunity

Immunity refers to the state had the immunity on specific person, objects or incidents, “it includes the representative of diplomacy, the foreign head of state, head of government, minister of Foreign Affairs and the official who had the same status. But aside from these kinds of people, there are some people also had these kinds of immunity, they are foreign diplomatic agents stationed in third countries through state and their family, foreign officials who has state diplomatic visa or a diplomatic passport, other foreigners who have been granted relevant privileges and immunities by the state government, the representative who participate in the United Nations and its specialized organs international meeting, the officials and experts who participate in the United Nations and its specialized organs temporarily and the representatives of the United Nations and its specialized organs in the state.[194]”They had the immunity right because they are the representative of state and they had the international mission in order to perform their duties effectively. And these kinds of people are not granted in extradition.

[192] Universal Declaration of Human Rights Article 1 and Article 2

[193] Acordo entre a Região Administrativa Especial de Macau da República Popular da China e a República Portuguesa relativo à Entrega de Infractores em Fuga Artigo 6.º

[194] Regulations of the Peoples Republic of China concerning Diplomatic privileges and immunities

Mutual Legal Assistance

Section 1

Concept and Performance

"Mutual legal assistance is a form of cooperation between different countries for the purpose of collecting and exchanging information and also the evidence[195]." "It includes extradition, mutual recognition, enforcement of criminal sentence, criminal procedure transference and minor judicial assistance. It had the service and neutrality characteristics, for service character, it means to protect the criminal proceeding can be implement smoothly and litigant rights.[196]" In addition, "the mutual legal assistance divided into active and passive assistance, for active assistance refers to the requested state gives convenience, helpful and corporate action or measure with requesting state while passive assistance refers to one state provides omission assistance.[197]"

The mutual legal assistance can transfer of criminal proceeding which refer to transfer of criminal jurisdiction between states and transfer of criminals or execute the criminal judgment of foreign court, it means one contracting state execute the final verdict of other contracting state is in the punishment scope of depriving liberty, mulct or seize property and even disqualification. It is the expression for the principle of double criminality, if the request involved in more than two offences, the judged state should state which part of the offences meet the requirement. If the requested state agreed to execute the extra sanction by requesting state, the requested state should listen to the sentenced person opinion before making decision by its court. When executing the sanction of depriving liberty, the sentenced person should transfer to the requested state as soon as possible, the requested state court can change the nature of crime and the time of sanction, but the penalty cannot be aggravated and the detention time should be deducted in new sanction. When executing the sanction of mulct or seize property, the court or other authorities of requested state should convert the currency of the origin state at the current exchange rate. Also, the mulct can substitute the

[195] Mutual Legal Assistance

[196] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.104

[197] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.111

depriving liberty if two states also had the regulation in some conditions. But the sentenced time should not be aggravated. For the sanction of disqualification, it only can execute when the requested state had the same regulations in some conditions.

In international judicial assistance in criminal matters, there is an important organization to keep the process operate smoothly, that is the International Criminal Police Organization (INTERPOL) which is an international organization of criminal police cooperation among member governments, the aim in this organization is "to prevent and stop the criminal activities[198]" and its objects are sovereign states. This organization has six organs, the General Assembly, the Executive Committee, the General Secretariat, the National Central Bureaus, the Advisers and the Commission for the Control of Files. "For General Assembly, it organized by delegates of member states and it is the body of supreme authority in the organization. Its functions are to carry out the duties laid down in the Constitution; to determine principles and lay down the general measures suitable for attaining the objectives of the Organization; to examine and approve the general programme of activities prepared by the Secretary General for the coming year, to determine any other regulations deemed necessary; to elect persons to perform the functions mentioned in the Constitution; to adopt resolutions and make recommendations to Members on matters with which the Organization is competent to deal; to determine the financial policy of the Organization and to examine and approve any agreements to be made with other organizations. For Executive Committee, it composed of the President of the Organization, the three Vice Presidents and nine Delegates and it participants in monitoring and executing part. Its functions are supervising the execution of the decisions of the General Assembly; prepare the agenda for sessions of the General Assembly; submit to the General Assembly any programme of work or project which it considers useful; supervise the administration and work of the Secretary General and exercise all the powers delegated to it by the Assembly. For General Secretariat, it consists of the Secretary General and a technical and administrative staff entrusted with the work of the Organization. Its functions are put into application the decisions of the General Assembly and the Executive Committee; serve as an international centre in the fight against ordinary crime; serve as a technical and information centre; ensure the efficient administration of the Organization; maintain contact

[198] Constitution of the International Criminal Police Organization-Interpol Article 2

with national and international authorities, whereas questions relative to the search for criminals shall be dealt with through the National Central Bureaus; produce any publications which may be considered useful; organize and perform secretariat work at the sessions of the General Assembly, the Executive Committee and any other body of the Organization; draw up a draft programme of work for the coming year for the consideration and approval of the General Assembly and the Executive Committee and maintain as far as is possible direct and constant contact with the President of the Organization. For National Central Bureaus, it aims on the Members States to liaison with the organization, it is an official organ in Interpol and also the organ within states police system. Due to there are different police systems in Member States, so they shall appoint a body which will serve as the National Central Bureau. It shall ensure liaison with: The various departments in the country; those bodies in other countries serving as National Central Bureaus and the Organization's General Secretariat. Its functions are to communicate with above departments or organs, exchange the information, raise assistance request and accept entrusted matters by the Organization and National Central Bureaus. For Advisers, they shall be appointed for three years by the Executive Committee. Their appointment will become definite only after notification by the General Assembly. They shall be chosen from among those who have a world-wide reputation in some field of interest to the Organization. And their role shall be purely advisory. For Commission for the Control of Files, its members shall possess the expertise required for it to accomplish its functions. Its composition and its functioning shall be subject to specific rules to be laid down by the General Assembly and it is an independent body which shall ensure that the processing of personal information by the Organization is in compliance with the regulations the Organization establishes in this matter.[199]" Therefore, the mission for Interpol is facilitate the mutual assistance and cooperation within Member States in criminal. Its functions are attack the criminal activities in assistance and transfer the Member State request to another Member State for processing. Therefore, it is not a supernational police organ, it will not participate in the scope of political, military, religious or race.

[199] Constitution of the International Criminal Police Organization-Interpol

Section 2

Principles and Restrictions

In mutual legal assistance, there are two principles to follow in practical, and they are sufficiency of evidence and double criminality.

1. Sufficiency of evidence

"In order for a successful mutual legal assistance request to be prepared, there must be sufficient evidence to make that request. The amount of evidence required is dictated partly by the legislation of the requested State and partly by the nature of the assistance sought. Generally, the more coercive the means of obtaining the evidence, the more involved and complex the evidentiary requirements become[200]." In order to become the sufficient evidence, the states can use the following methods to implement.

1. "Locating or identifying of persons, usually investigate or monitor the location or the identification of the specific person which requested by the requesting state.[201]" It is an independent legal assistance form, its purpose is to investigate the location and identification of specific person, the requested state can request the legal assistance at any time. The competence for the judicial officers are only on investigation and monitor the location or the specific person, they don't have competence on arresting or detention. So when they discover the specific person, the requesting state should inform the requested state immediately and the requested state can arrange the relevant operation for arrange the specific person such as to apply the EAW.

2. "Retrieve documentary evidence, it performs as the requested state provide the state or individual documents or materials to the requesting state and even the investigation and trial service in criminals case.[202]" When retrieving documentary materials, the requested state can provide the documents copy or the original one if requesting state request, but the requesting state should give the documents or materials to requested state as soon as possible. This action is to protect the safety of the documents. The requesting state should inform the requested state as soon as possible if they lost the original one and have to inform to inform

[200] Manuel on Mutual Legal Assistance and Extradition p.69

[201] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.140

[202] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.141

the requested state as soon as possible as well when they found the original one. Otherwise, the requested state had to issue a new document on the relevant issue.

3. "Rogatoria, it means the requested state assist the items which listed in the request.[203]" The requesting state help to assist the items which are listed in the request, they help to investigate or find the evidence in their territory, they don't have the competence for arrest or detain the witness or relevant person. They only have the competence on asking and record the witness statement. The witness also had the rights not to answer the judicial officers question and keep in silence. Since the requesting state judicial officers only assist on the items which listed in the request, so the requested state had to pay attention when they decide the assist items in the request. The requested state had the right to reject on the items that they are not willing to investigate or the evidence that they are inconvenience to find.

4. "Evidence searching by special officer,[204]" it means the requesting state send the officer to the requested state for investigation. This activity can help to find out the evidence more details and understand the progress directly. The officer should report the evidence and the progress immediately to the requested state in order to accelerate the progress of their criminal proceeding. But the requested state had the obligation for pre-notice the arrangement, so the requesting state can send the officer to participate in investigation and taking evidence immediately. But "there are few points that the officer should follow during assistance, first, the requesting state had to state that the officer have to participate in the request.[205]" In the request, the requesting state have to state that the requested state have to send the officer for investigate or taking the evidence. This action can give the requested state time to arrange the officer and provide any measure for the investigation or taking evidence schedule. "Second, the activity in the requested state must lead by requested state competent authority,[206]" In the cooperation, the special offer should follow the instruction from the requested state leader, and the leader should give help to the special leader in all way as long as the request is legal in the requested state law. And the special officer has no

[203] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.143

[204] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.145

[205] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.145

[206] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.145

competence in the requested state, they have to ask the requested state leader when they want to take the investigation or taking evidence action.

5. "Detainee for testimony[207]", it means the requested state detain the detainee to the requesting state in order to provide testimony or assist investigation, and the requesting state had to transfer the detainee to the requested state by their commitment. In this situation, the requesting state have to detain the detainee back to the requested state as soon as possible when the detainee finish his part in the testimony, during the testimony, the detainee is under detention status and the detention time will be deduct in sentenced period.

6. "Interview, freeze and confiscation of property, its purposes are on investigation and taking evidence and to recover the criminal proceed. These measures are mandatory and they restrict the property right for the relevant person or even the human right. Therefore, these kinds of measures should implement strictly, it should follow the principle double criminality,[208]" if either of the state is not considered as offence, then either state cannot restrict on the property right or the human right of the relevant person. It is important because the relevant evidence or investigation will affect the property right or human right of the relevant person. If there are no evidence to proof that the property is involved in the offense, it cannot be freeze or confiscation of property and it will cause the violation of property right and human right of the relevant person. Therefore, the judicial organ should investigate seriously and clearly before interview, freeze and confiscation of property from the relevant person because it may violate the credibility of the judicial organ and may cause insecure in society.

7. "Hearing by video conference, the judicial organ of requesting state implement inquiry through the high technology instruments with the witness, examiner and the relevant officer who are in the requested state.[209]" The advantages on this measure is to investigate or trial directly, the relevant person can give the opinion and listen to the court immediately in the entire process. This can help to ensure the criminal proceeding are under fair condition. If the relevant person didn't appear on the scene of court, it may cause unfair to the relevant

[207] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.146

[208] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.148

[209] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.149

person because they didn't apply their legal rights and due to violate their rights. Also, using high technology instruments can save the necessary transportation time and the resources which arrange the relevant person to the testimony.

8. "Joint investigation,[210]" the provisional investigation organ are established by more than two states based on the strike for the criminal offences and start the investigate and preserve evidence activities. They will joint together for starting cooperation on investigation and preserved evidence activities, during the cooperation, they have to select the leader as the commander during operation and the members have to follow the instruction from the team leader. The function of the team leader is to plan the operation and try to distribute the team member in a sufficient way. The team leader can apply the suitable position for the team member in order to implement the operation in a sufficient way. In practical, both states member or leader have to follow the law of both states and they don't have privilege competence in the opposite state. When they want to start the investigation or preserve evidence activities, the team members should inform the team leader the activities plan immediately and get the permission from the team leader before taking such activities.

2. Double criminality principle

"Double criminality is a legal principle that requires the conduct of the person who is the subject of a mutual legal assistance who request the conduct to be viewed as a criminal offence in both the requesting and the requested State.[211]" "It should be emphasized that the test for double criminality is whether the conduct that is the subject of the mutual legal assistance request is criminal in both States, not whether the conduct is punishable as the same offence in each State[212]." Since the legal assistance aims to protect the criminal proceeding can be implement smoothly and to ensure the trial is in fair and objective status. The investigation or preserved evidence not only proof the defendant who has guilty but also can help to proof their innocent. Furthermore, it is soft measure compare to extradition, it may ignore some principles such as the principle of double criminality in a substantial situation. "In United Unions Convention against Corruption, it also considered double criminality as the refusal reason in mutual legal assistance but the double criminality can be

[210] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.151

[211] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.114

[212] Manuel on Mutual Legal Assistance and Extradition p.69

ignore in concrete situation and since the legal assistance don't have mandatory character, so it is allow to ignore some of the principle in extradition. For example, some states set the maximum amount of cash when foreigner brought to their state, and some states didn't mention the limitation in their state, in this case, the foreigner violated one state immigration law but the other state is not. Therefore, the state can protect their citizens right by not following double criminality, this can restrict the severe regulations of foreign state sometimes[213]."

Although mutual legal assistance is different with extradition, but it also had to follow some principle mandatorily, there are some situations may refuse the request in discretionary during mutual legal assistance because it can follow the principle more flexibly according to the substantial situation, but still have some restrictions in practical and the restriction mainly are on the interpretation in both states since their legal system and culture may different and due to different interpretation on their domestic law.

1. National or public interest

According to United Nations Convention against Transnational Organized Crime and the Protocol Thereto[214], it stipulated that Mutual legal assistance may be refused "if the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests." It is important because the main basic concept for the mutual legal assistance is to protect the interest of national within the member states, if the sovereignty, security, ordre public or other essential interests of one state are violated, it is difficult to cooperate with other states because it is against the concept or law of its territory. And all kinds of these cooperation cannot be implemented anymore. The nationals are one of the important interests to the state, some states are not willing to provide assistance for foreign prosecution because of their protection principle. The conditions for refusal are the object should be the national of requested state and the accused person is not in requesting state. This refusal can protect or restrict the broadness of foreign judicial jurisdiction and protect the legal rights of nationals during foreign criminal proceeding in order to prevent unfair trial or investigation. Furthermore, it can provide a certain legal protection or action when the nationals are prosecuted by national criminal proceeding.

[213] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.116

[214] United Nations Convention against Transnational Organized Crime and the Protocols Thereto Article 18(21b)

2. Severity of punishment

Although mutual legal assistance had neutrality character, and the investigation can be the advantage for them because can proof the suspect or defendant innocence. But the investigation can also be the disadvantage to the suspect or defendant. So, it is necessary for capital punishment to be the exception in mutual legal assistance because it involved in the life of the suspect or defendant. In practical, this cause problem to the state which still have capital punishment because they have to waive their jurisdiction in order to preserve the evidence. Usually the condition is waived to implement capital punishment. Therefore, it should handle cautiously when the requested state raised the condition of no capital punishment and should evaluate the value between the punishment and the evidence. So, "a central authority that is well versed in international criminal law and has experience in dealing with certain regions or countries where this outcome is likely can assist in anticipating that this issue may arise and be proactive in addressing it with the requesting State by obtaining necessary information regarding sentencing in the event of a conviction prior to the assistance being provided[215]."

3. Political offences and military offences

In mutual legal assistance, it always restricts to start the cooperation because it may involve the sovereignty or internal policy or legal system in one state. If the other state involved on it, it may violate the international principle such as reciprocity principle. Although some states raised the situations which can applicable for implementing mutual legal assistance, but they also need to consider if the mutual legal assistance can help to clarify the truth and help proctecting the interest of defendant, the mutual legal assistance can be implemented by the requested state under the innocence evidence. Therefore, it can ensure the political offense can be accepted in mutual legal assistance but as long as the evidence should be advantage to the defendant. It means the requested state only provide the evidence which are beneficial to the defendant to the requesting state under his willing and the defendant had the right to provide the evidence to the requesting state in order to proof his innocence. In practical, many states still keep the political offense and military offense as the refusal reason for mutual legal assistance. According to Law on judicial cooperation in criminal matters

[215] Manuel on Mutual Legal Assistance and Extradition p.71

(Macau)[216], it had stipulated that the political offence and military offense are the exceptions in judicial cooperation.

4. Human rights considerations

Human rights refer to the persons who are protected by international law or their basic rights. The severe actions such as race, act of aggression, slave trade or torture are prohibited and considered as illegal acts in international law because these kinds of actions are violated the human basic right. To protect the human basic rights and liberty are the basic principle in all international law and the member states should follow this basic principle when legislate their national law or treaty. There are many human right principles based on Universal Declaration of Human Rights. So, when implementing mutual legal assistance, "the human rights considerations are an important component in preparing an outgoing mutual legal assistance request and taking action on an incoming one. The following aspects of human rights will have to be looked at in relation to mutual legal assistance matters: 1. The right to liberty and security of the person. 2. The right not to be subject to torture or cruel, inhumane or degrading punishment. 3. The right to equality before the law. 4. The right to a fair and public hearing. 5. The right to counsel and interpreters. 6. The right to be presumed innocent. 7. The right not to be held guilty of offences retrospectively or to have retrospective penalties imposed. 8. The right to not be compelled to incriminate himself. When addressing a request from a requesting State, all of these factors need to be taken into consideration.[217]" And the responsibility for maintaining the human rights belongs to all the states because there is no international treaty to authorize specific state to protect the human rights. Therefore, sovereign states are the one to implement and protect human rights and they have to cooperate with each other in order to against all the violation which are against the development of international human rights cooperation or use human rights as an excuse to interfere in the internal affairs of sovereign states.

5. Double jeopardy

"Double jeopardy is a principle that can sometimes prove problematic when dealing with issues of mutual legal assistance. Various definitions take into account the following: 1. Has the person been punished for the crime in the requested and/or requested State? 2. Has the person been punished for the crime in a third State? 3. Sometimes the question is not whether

[216] Lei n.º 6/2006 Lei da cooperação judiciária em matéria penal Artigo 8.º
[217] Manuel on Mutual Legal Assistance and Extradition p.72

the person has been punished but whether the person has been (a) tried, (b) convicted or (c) acquitted?[218]"

According to Treaties on Mutual Legal Assistance in Criminal Matters Between People's Republic of China and the Republic of the Philippines[219], it stipulated that "the requested party is conducting criminal proceedings against the same criminal suspect or defendant involved in the request for the same crime, or has terminated the criminal proceedings, or has made a final judgment." In practical, it may happen in both states have conducting the criminal proceedings for the same defendant and same offense at the same time because the states have their own jurisdiction and will not announce to other state and both states didn't start the mutual legal assistance activities. These two states can exchange their evidences in order to beneficial to their criminal proceeding when they start the mutual legal assistance. Therefore, they are willing to start legal assistance in investigation and preserved evidence, or even establish the joint investigation organ. But this measure had to pay attention on the result, which means it will not cause the defendant into double jeopardy and have to make sure the relevant states had the same need and will.

6. Rule of speciality

In legal assistance, the scope should be specific and clear. It is because if the request is general, it is difficult for requested state to investigate substantially and start the execution, furthermore, it will increase requested state execution burden or even feel unrespectful. Therefore, the requested state can reject the request which had no substantial relationship for the case. "For the rule of speciality, it performs the restriction of using evidence in legal assistance in criminal matters, it means the documents, records or materials which received during legal assistance can only be used for the litigation purpose which listed in request. According to United Nations Convention against Transnational Organized Crime and the Protocols Thereto[220], The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Also, there are exception of rule of speciality in legal assistance in criminal

[218] Manuel on Mutual Legal Assistance and Extradition p.73
[219] Treaties on Mutual Legal Assistance in Criminal Matters Between People's Republic of China and the Republic of the Philippines Article 3(5)
[220] United Nations Convention against Transnational Organized Crime and the Protocols Thereto Article 18(19)

matters, it means the materials which received is beneficial to defendants in legal assistance, it will not restrict by the rule of speciality[221]." The above convention also stipulated that "nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay[222]."

Section 3

Kind of mutual assistance

International and interregional is the main forms in mutual assistance between states or region. For international mutual assistance, it established in a normal and traditional way, which is the treaty or convention. But interregional mutual assistance, its characters are different, first, it is regional locality which means that the member states are included specifically, they always link or near to each other in geography and is easy to build up the cooperation relationship, but not all the case are include all the member states in that area, some may accept the states which are not near them. Second, the member states of interregional organ always have the same race, history, language, culture or spirit, and some of them may have the similar politic, economic or social culture system. Therefore, this kind of organs have stable basic on politic, economic and social. Third, the purpose and the activities are mainly on maintaining interregional peace and safety and encourage the development of economic, society and culture and protect the mutual interests. Therefore, the interregional organ is the components of the international organization and their exist and activities can affect the development and peace in the world. In practical, they have their basic functions which means they have to maintain the international peace and safety. Therefore, the interregional organ is independent in their existing and activities under maintaining peace and safety situations. So, they can establish different legal relationship between different legal scope. For example, European Union, they have mutual recognition

[221] 黄风, 国际刑事司法合作的规则与实践 (Rules and Practices of International Juridical Cooperation in Criminal Matters), 北京大学出版社, 2008 年 7 月, p.123

[222] United Nations Convention against Transnational Organized Crime and the Protocols Thereto Article 18(19)

on arrest warrant. When one state issued a warrant, the other states will recognize and execute the warrant.

Section 4

Regions

This part is talking about Mainland, Hong Kong and Macau and Taiwan although their regions are in one state but they have different legal system and due to different application in legal assistance. First of all, we have to know why there are different legal system within China. Although Hong Kong and Macau had already turn over to China, but due to Hong Kong used UK legal system for a long time and Macau had been used Portugal legal system for a long time and implementing "one country, two systems" principle after turn over to China, so these two special administrative regions had different legal system with Mainland. In criminal law scope, there are some different with each other, like the legislative background, the legal content, and the operating mechanism. So, it occurred many obstacles when solving interregional criminal legal problems. The problems why is difficult to solve because of they have their own characteristics.

The characteristics in Hong Kong criminal law:

1. Hong Kong criminal law is the combination between common law system and civil law system and Hong Kong had been colonized by UK for more than one hundred years, so it was affected by them in many ways like culture, politics and etc, the legal system had belonged to common law already, especially in common law and equity law, but still had some public order and habits will affect Hong Kong people's mind since Hong Kong are ruled by China which is civil law system, so their criminal law had special characteristic because of the history.

2. Hong Kong had no unity written criminal code and criminal procedure law, their criminal scope is constituted by individual regulations and the mixture combine with jurisprudence and habit, they formulated individual regulations for each violation, like Crimes Ordinance, the Offences against the Person Ordinance and etc, they formulated some regulations for particular criminals, like "the Juvenile Offenders Ordinance and Fugitive Offender Ordinance[223]." And they also assist some targeted procedure, like investigative organ had

[223] Hong Kong e-Legislation
https://www.elegislation.gov.hk/

investigate competence to drugs etc, these enormous regulations and jurisprudences constituted a huge mixture system.

3. Hong Kong criminal law is learnt from UK, they will innovate and create from it, but at the same, they will reserve the original part which is applicable and formed criminal system which had Hong Kong characteristic. This criminal system still reserved after turned over to China aside from the one which had conflicted with basic law, and this can maintain the stable operation in legal system. Hong Kong criminal law stipulated that all the criminals once resorted to law, they can find in related law and accepted for penalty. These detailed regulations formulated all the crimes behavior had their related penalty, and this is convenience for judge to adjudge sentenced accurately. Simultaneously, the judge had free evaluation of evidence through inner conviction in creating jurisprudence, this can overcome the backward of law and adjust to social development.

4. Hong Kong had diversity penalty and executed methods. In penalty, they had normal and special penalty, for normal penalty, they had life imprisonment, mulct and etc, the special penalty, they got penal servitude, probation and etc, the judge will consider the case and judge a suitable penalty, they always combine different kinds of penalties in one case, like the penalties can combine with life imprisonment and mulct at the same time.

The characteristics in Macau criminal penal code:

1. The relationship between crimes and penalty, it shows the spirit on penalty is heavy in serious crimes and light penalty for light crimes. According to the Code[224], it stipulated that in serious crimes, the penalty can be security punishment and penalty extension, but it's not for analogy for crimes or dangerous condition or analogy for crimes or dangerous penalty or security punishment. Compared to Mainland criminal law, Macau penal code had gentle and light punishment characteristic.

2. Macau special criminal law had unique characteristic in penalty discretion and executed system. In Macau special criminal law, it stipulated that some crimes can be applicable on parole or suspend sentence. The special criminal law had stipulated that particular penalty extension condition on multiple tendency criminals, alcoholic criminal, drugs abuse criminal and etc.

[224] Macau Penal Code Artigo 1.º

3. International law is prior to domestic law. According to Code[225], it stipulated that all the perpetrators regardless nationality in Macau and the registered ships and aircraft should under Macau Penal Code except for the international convention or the agreement in the field of mutual legal assistance. And according to Code[226] , it can be applicable when it is applicable in Macau's international convention or the agreement in the field of mutual legal assistance, and Macau has the obligation to adjudge the crimes which happened outside Macau. When implementing international convention, the international crimes should have corresponding accusation in Macau Penal Code or China criminal law, otherwise cannot be applicable.

The legal conflict means there are different between different regulations between different regions and resulting in how to choose the applicable legal measures in the case which involved in different regions and the method for judgment. After turned over, the crimes which involved in three regions are getting more and more, and the conflict between regions are getting greater and greater, the conflict reason mainly on "one country, two systems", the content in criminal law are different and the long-term existed crimes involved in regions.

1. "under "one country, two systems",[227]" this principle is the basic and the direct reason why interregional occurred. After turned over to Mainland and to maintain the stable situation and prosperity, Hong Kong and Macau established special administrative regions and implementing high degree of autonomy and maintain capitalist system. According to Hong Kong Basic Law and Macau Basic Law[228] , it stipulated that Hong Kong and Macau will maintain the current status, it significant that there are no change on economic system, lifestyle and the legal system. There is no change in legal system significant that Mainland Supreme Court had no leadership nor guiding power to the Court of Final Appeal in Hong Kong or Macau. Also, Hong Kong and Macau had their own legislative right, independent jurisdiction and final adjudication, this indicated that Hong Kong and Macau had their own criminal system and not affected by Mainland's regulation and applicable. This is the domain reason that the conflict occurred.

[225] Macau Penal Code Artigo 4.º
[226] Macau Penal Code Artigo 5.º
[227] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p249
[228] Macau Basic Law Article 2 and Article 5

2. "The content in criminal law are different,[229]" this significant that they are different in legal system, legislative method and trial method. It includes the concept and constitution of crimes, the penalty species and executed method, etc. For instance, Hong Kong and Macau had already abolished death penalty, but Mainland still reserve it, and the different in the constitution of crimes resulting in different crimes on the same crime behavior. Different content is the basic reason for the legal conflict between regions. Since there are different criminal law in regions, it is difficult for Mainland to stipulate a unity criminal law, it only can be used the mutual legal assistance for strengthen coordination between judicial organs in order to reduce the criminal conflict.

3. "The long-term existed crimes involved in regions[230]", it significant that the situation is getting severe in the crimes which involve in regions. Since Hong Kong and Macau had turned over to Mainland, and many policy are planned for cooperation between regions, it make more convenience geographic condition and easier method for criminal, like drug-related crime, smuggling crime and etc, this crimes raised an urgent topic on the region organs to combat crimes jointly and also raise the serious problem on the existing in criminal law conflict[231].

How Mainland and Macau implement in legal assistance

It is important that to solve the conflict between Mainland, Hong Kong and Macau because there are no extradition within these regions, it will easier become as "fugitive paradise" for fugitives, it is very danger for regions safety and security. And these three regions should be cooperate. There are several kinds of international judicial cooperation, like multilateral international convention and bilateral international convention, but there are no extradition within these regions. Therefore, it appear the situations that rejected on providing assistance or didn't conduct on assisting matters completely.

Case A:

[229] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p250

[230] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p251

[231] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.252

"A is the Chinese which hold Hong Kong ID card who involved in the case on intentional homicide in Mainland on 2005 and was approved for arrestment by Mainland prosecute organ, when he entered to Macau on 2006, he was arrested in Macau immigration under the information is same as the red notice rom Interpol and sent him to Directorate of Judiciary Police (PJ). Finally, A sent to Mainland police by Interpol[232]."

Case B:

B is the Chinese which hold Hong Kong ID card who involved in the producing discs from foreign country within 2002 to 2005 and smuggling to China. The disc valued more than RMB 100 million and tax evasion valued more than RMB 28 million. Interpol had issued the red notice and she was arrested when she entered to Macau by Corpo de Polícia de Segurança Pública (CPSP), therefore, PJ noticed Interpol and arrest her in detention temporary. The assistant prosecutor had already agreed to transfer the criminal to Mainland, but her family help her to apply Habeas Corpus and got approval. Finally, the Court of Final Appeal decided to release B, the judgment indicated that "there is no regional law about transfer criminal between Macau and Mainland. Therefore, even though they are executing red notice from Interpol, but under invalidity particular law situation, no organs can transfer the criminals to Mainland. And there is no reason for detention, therefore, PJ should release her.

In these two cases, we got two solution, one is sending the criminal back to Mainland and one is released, they all about involved in transferring criminals. In case A, the criminal shouldn't send back to Mainland even though is executed the red notice by Interpol because "the Interpol had no right to do this[233]." And the competence of Interpol only can take the detention or assist detention from foreign country, but the relationship between Mainland and Macau is regional, and related on transfer criminal issues, it should use special criminal law[234] which is Judicial Cooperation in Criminal Matters[235], but Macau had authority to deal with other country or region regarding assistance in criminal matters only under China's authority. Therefore, Mainland and Macau is not the scope in this issue, but According to

[232]澳门与内地移交逃犯的法律问题——兼议澳门《刑事司法互助法》的原则规定
[233] Regulamento Administrativo n.º 9/2006 Artigo 21.º2
Organização e funcionamento da Polícia Judiciária
[234] Código de Processo Penal Artigo 217.º
[235] Lei n.º 6/2006 Lei da cooperação judiciária em matéria penal Artigo 1.º

Macau Basic Law[236], Macau and other region in China can implement the judicial relational and mutual assistant by negotiate even though there is "Guangdong-Macao Police Cooperation Mechanism since 2000[237]," and according to this mechanism, if the criminals escaped to Mainland, Macau can request Guangdong police organ help to arrest and transfer to Macau.

In case B, the problem is involved in detention and transfer criminal issues. First, detention shouldn't be discussed with transfer criminal issues because the criminals got detention is according to the red notice from Interpol, but not by transferring, and cannot understand as cannot transfer the criminals resulting in denied on detention. Although the court try to use this judgment by solving these two problems in a case, but it shouldn't be discussed together because they are independent. In fact, detention is one of security punishment and restrict personal freedom issue[238], the transferring criminals involved in criminal justice assistance, and the case can implement detention and it is legality in the above case. Therefore, the only method that Macau can do now is through illegal immigration and expulsion[239] [240], by immigration prevention and prohibit their stay and even through discovering illegal immigrant or illegal overstay, the detention can be held by police or other executer for expulsion procedure. This will also provide the legal evidence for detention. After the detention, can use expulsion to force them leaving Macau.

How Mainland and Hong Kong implement in legal assistance

There is totally different legal system between Mainland and Hong Kong. We can find their conflict by observing the classic case. In addition, although Mainland and Hong Kong also have no extradition agreement as Macau, but Hong Kong will use "Fugitive Offenders Ordinance" to do some procedure and law protection measures.

Case:

A, B and C are the one to invest an illegal bombing company in Mainland and smuggling to Hong Kong, when they did the same illegal activities at twice, they kidnapped D, E and F respectively in 1996 and 1997. When all the criminals robbed in next robbery, D was death

[236] Macau Basic Law Article 93
[237]珠澳口岸警務協作機制
[238] Código de Processo Penal Artigo 237.º
[239] Lei n.º 6/2004 Lei da Imigração Ilegal e da Expulsão
[240] Lei n.º 4/2003 Princípios gerais do regime de entrada, permanência e autorização de residência

because of that robbery. And after two years, they brought the illegal from Mainland smuggling to Hong Kong and robbed the goldsmith for twice. In 1998, China's first trial judged all criminals' behavior constitute illegal sale and purchase explosives, smuggling, ammunition and resulting in combined punishment for several offenses and death penalty, deprival of political rights for life and confiscation all the property.

In this case, the conflict is based on jurisdiction, the criminals' family claimed that in three ways: 1. Mainland judicial organ don't have jurisdiction 2. If Mainland judicial organ had the jurisdiction in this case, it significant that Hong Kong's judicial is not independent. 3. Only the case is judged by Hong Kong can implement "one country, two systems" principle and ensure that it will be the fair judgment and it can executed completely. And many Chinese academics thought that no matter they followed by jurisdiction from forum level nor territory jurisdiction. Mainland had the jurisdiction and didn't obstruct Hong Kong's independent judicial. According to China Criminal Procedure Law[241], it stipulated how to clarify the jurisdiction and under which situation, the jurisdiction way will use.

For instance, it reflect the problem about jurisdiction comprehensively. In this case, Mainland and Hong Kong had the jurisdiction, this significant that two regions had legislative conflict in this kind of regulation and this mainly shows on the conflict on statutory rules. There are several characteristics in this conflict: "1. the conflict of statutory rules is the most direct conflict within two regions and it is easier for public to discover.[242]" It is because the law expressed in rules, according to the law of thought, when people meets the similar or same cases, they will think of the rules in prior as the thinking formula of human being "2. The conflict always exist in the statutory rules within two regions,[243]" like jurisdiction, the applicable on crimes and the final execution in judgment and etc, the conflict always existed the conflict in these ways. Sometimes they will exist in international convention "3. The existing of criminal law is different.[244]" In Mainland, they expressed the criminal law in written, but in Hong Kong, they always express the regulations in jurisprudence and only few regulations are in written form. Furthermore, the language is

[241] China Criminal Law Article 19-24

[242] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.66

[243] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.67

[244] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.67

different between Mainland and Hong Kong even though Hong Kong had try their best to translate the language before or after turned over to Mainland, but some words are difficult to translate the meaning or words exactly the same as Chinese "4. In the basic of "one country, two systems",[245]" when the case is involved in two regions, the active level of statutory rules will become stronger and may occur fierce confrontational conflict because in normal stage, they will just exist in hidden way, but when the case involved in two regions, they will against to each other because they are in the same level condition. "5. Since there is conflict between two regions on statutory rules and it already been the biggest obstacle for two regions to cooperate.[246]" As said above, two group of local people will only know their local law and use this mind for thinking and inference judgment and resulting in support their own rules or law and don't trust other rules or law in their psychology. When the case is involved within two regions, they hope to use their statutory rules to be the judgment. And that's why the obstacle between Mainland and Hong Kong is getting bigger and bigger and still had a long to research a useful method to stop this thinking and solve the transfer fugitive problem.

When Hong Kong before turned over to Mainland, there are many cooperation in the field of economic, culture and society, etc and they did gain many experiences on it, but in legal part, the cooperation is lesser, actually there is no conflict between "two systems", and if there are conflict between "two systems" at that time, it involved in two sovereignty countries, and this can solved by international convention, but after turned over to Mainland, these "two systems" are under "one country", and they operate independently. We just can consider this relationship as "interregional legal conflict", this significant that there is conflict between different region and under different legal systems in one country. When there are several legal systems appear in one country, they recognize the natural person and legal person from other legal systems, but at the same time, they also recognize other legal systems can use in the country, this constitute interregional legal conflict and the situation in China is this stage. From the above view, we can observe that interregional legal conflict in China is complicated, it is almost the same as legal conflict in international law aside from the sovereignty countries. There are several characteristics in interregional legal conflict.

[245] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.68

[246] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.68

1. "The conflict happened in the area of China[247]"

Hong Kong is one part of China after turned over to China, therefore, the conflict between Mainland and Hong Kong is the conflict in China and it is the sovereignty country, so it is the domestic law conflict.

2. "The conflict is under different legal system within different regions[248]"

Interregional legal conflict is not the conflict between different regulations within domestic law nor the conflict within different normative level, but it is the conflict between the territorial jurisdictions within one country. In Hong Kong, for the effectiveness of Hong Kong special administrative region regulations, the territory will only include the special administrative region, and Mainland regulations only can use the list which is on Hong Kong basic law and only can use in Mainland, these two regulations are applicable in different regions respectively. This conflict is under different legal system within different regions.

3. "The conflict between the same levels of legal conflict"

Interregional legal conflict should be in the same levels of legal conflict. This is important because of the vertical conflict shouldn't be existed in law theory nor unity law principle, Mainland and Hong Kong should be in the same level in legal position, it shouldn't exist the situation which one region's regulation is higher nor prior than others. The legal conflict between Mainland and Hong Kong also include the characteristic from China legal system, they includes as follow:

1. Interregional legal conflict of Mainland and Hong Kong which is in special unitary state like Scotland and England

2. The legal conflict of Mainland and Hong Kong belongs to the conflict which legal system is different, one is socialist system and one is capitalist system.3. The legal conflict of Mainland and Hong Kong not just reflect on the regions' regulation, but also performed within the regions under international convention.

4. Mainland and Hong Kong have their own court and don't have united final appeal court. Therefore, there is no final appeal court to coordinate the Interregional legal conflict.

[247] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.74

[248] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.75

After we know about the characteristics of interregional legal conflict, we can set some guidelines when formulate concrete cooperation measure. For the basic of cooperate regions' legal conflict, should follow the below basic principle:

1. "One country, two systems" principle

"One country, two systems" is a complete theoretical system and it is experienced in history. The conflict and the cooperation of Mainland and Hong Kong are the products based on "One country, two systems". Therefore, when solving the conflict between Mainland and Hong Kong, it should base on it, and when improving the conflict between central government and Hong Kong, should use this principle as the general principle, and when cooperated the relationship between Mainland and Hong Kong, it should be the priority principle. When understanding the meaning of this principle, it should separate the content into two ways, it significant "one country" principle and "two systems" principle. In his relationship, "one country is the basic and "two systems" is the reality and result. If only had "two systems" without "one country", it will become the split state behavior, but if only had "one country" without "two systems", it is not truth. After turned over to Mainland, central government keep on comply with "One country, two systems" principle and didn't inference on special administrative regions' legal matters, and Hong Kong is in high degree of autonomy and central government keep on cooperating with Hong Kong by creating develop condition. In addition, when solved the conflict between two regions, should consider the unity of country and also the different socialist system, these two systems are admitted by constitution law and Hong Kong basic law. When take measures on solving legal conflict, should respect and maintain two regions' different systems.

2. Principle of equality of jurisdiction

According to Hong Kong basic law[249], Mainland and Hong Kong belong to different jurisdiction, Mainland is implementing civil law system while Hong Kong is implementing common law system. Equality of jurisdiction significant that the legal position should be totally equal in jurisdiction and it shouldn't occur the situation that one's law system is priority or is higher. Although in administrative, central government is not the same level as Hong Kong and Hong Kong is under central government's leading and report to central government, but in judicial, Mainland and Hong Kong is the same level in legal position, it significant that when two regions had legal conflict, should solve by equal coordination, no

[249] Hong Kong Basic Law Article 95

party can compose the will or command to others and force others to accept the suggestions. In practice, should avoid the below two tendency which will destroy the equality of two jurisdiction.

"1. The tendency from Mainland's civil law system.[250]" People who support on this point indicated that since there are 29 regions in Mainland are using the same legal system and Hong Kong is one of special administrative region in China and allowed them to use their own legal system, but when there is legal conflict with Mainland, it shouldn't accommodate their specific and should take their civil law system as reference in order to solve conflict and maintain the united law especially on crimes, it can maintain same crimes same penalty from using same standard.

"2. The tendency from Hong Kong's common law system.[251]" People who support on this point indicated that Hong Kong is using common law system in theory, but common law system had more than hundred years history, it create the modern legal culture, it contains the law traditions, but also had the law supremacy spirit. Under the reality level, it contains strictly common law and equality law and also had a high-quality judicial officer team and well-trained lawyers team, but Mainland only had several year history, many legal system still incomplete, the quality of judicial officers and lawyers may lack of management. The judgment in Mainland had no credibility in international or in domestic. Therefore, when there is legal conflict between Mainland and Hong Kong, it should take Hong Kong's regulations as reference for cooperation because Hong Kong's legal system is more normative and advanced.

However, these two views are harmful and avoid to use these views. Principle of equality of jurisdiction is to maintain two legal systems are in same level in legal position and ensure that in the same condition, mutual recognition is the method to admit others and should respect and maintain others legal system.

"3. Principle of combination with mutual recognition and agreement[252]"

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[250] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.79

[251] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.80

[252] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.81

Although there are different between in the law concept nor statutory rules or legal principle with two regions, but when in solving the conflict, should adhere to the principle of combination with mutual recognition and agreement. In conflict, the agreement will be pass only when two regions knows each other or mutual recognition. Since different kind of people will have their own thought on one thing, it should cause misunderstanding like Hong Kong people how to think of Mainland legal system nor how Chinese think of Hong Kong legal system. It is difficult for people to change mind about it. Therefore, to strengthen the knowledge of each other legal system, history and analyst concretely. In addition with mutual recognition, this can decrease the misunderstanding from each other.

"4. Principle of promoting stability and development[253]"

Developing and promoting two regions' social stability and economy, culture etc is the basic requirement when formulating interregional legal assistance. According to this requirement, all the measure and methods in solving the conflict should advance in social stability and the development in economy and culture etc within regions, and advance in attacking serious crimes or organizing crimes within regions in order to create a safe and good life environment to both regions citizens.

"5. Principle of reality and operability[254]"

When formulate the mechanism and method of interregional legal assistance, should adhere to the principle of reality and operability. It significant that consider the reality and operation when formulate or design the mechanism and method of interregional legal assistance. The mechanism and the method actually is the operating regulations of interregional legal assistance. Therefore, if the interregional legal assistance is perfect in form but had no operability, it can implement in reality.

"6. The principle of effective on crime punishment[255]"

When establishing interregional legal assistance, the target should base on the joint punishment and the prevention in all involved crimes activities within regions in order to maintain the safety within regions. There are two points to pat attention when implementing

[253] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.82

[254] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.83

[255] 內地與港澳法律體系的沖突與協調 (Conflicts and Concordance between the legal system of Mainland and that of Hong Kong and Macao), 王仲興 郭天武, 中山大學出版社, 2009 年 6 月, p.84

this principle: “1. Simplicity, since interregional legal assistance implementing within one country, therefore, the process in procedure should be simple and convenient, not like complicated as international legal assistance 2. Timeliness, in legal assistance, it should be timeliness, prompt and decisive in order to improve the efficiency[256].”

In Hong Kong, apart from international legal assistance, they also use the “Fugitive Offenders Ordinance” to do some procedure and law protection measure

1. Double criminality principle

Double criminality is a crime punished in either the country or region where a suspect is being held and a country asking for the suspect to be handed over or transferred to stand trial. It is also known as dual criminality. “Double criminality is a requirement in extradition procedures as extradition is allowed only for offenses alleged as crimes in both jurisdictions.[257]” The law does not require that the name by which the crime is described in the two countries or regions shall be the same, nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries or regions. It is enough if the particular act charged is criminal in both jurisdictions. In Hong Kong, they will put the crimes into catalog due to the crimes name and the structure may be different. The catalog won’t list all crimes’ name, but they will distributed into group and the catalog will put the similar crime or same crime into distribution. The fact that a particular act is classified differently or that different requirements of proof are applicable in the two countries does not defeat extradition. In an international extradition case, it is not essential that the two statutes be perfectly harmonious for the purpose of double criminality. Double criminality exists if the necessary character of the criminal acts of each country is same and if the laws are substantially similar.

It is a fundamental requirement of international extradition that the crime for which extradition is sought be one provided for by the treaty between the requesting and the requested nation. The second determination is whether the conduct is illegal in both countries.

2. Double review mechanism (Judicial review and administrative review)

[256] 中國區際刑事司法協助新探, 趙秉志, 中國人民公安大學出版社, 2010 年 1 月, p.6

[257] Double Criminality Law and Legal Definition
https://definitions.uslegal.com/d/double-criminality/

"Judicial review:

The judicial review process is Hong Kong court reviewing relevant requests under the laws of Hong Kong, including the following:

- Consider whether to issue the arrest warrant and start up the judicial procedure.
- During the hearing of the delivery committal, start the procedural and substantive review for the request;
- Consider the evident for criminals' rejection in order to adjudicate whether the case is under the restrict situation in Fugitive Offenders Ordinance.[258]"

According to the Ordinance[259], it stipulates that a person shall not be surrendered to a prescribed place, or committed to or kept in custody for the purposes of such surrender, if it appears to an appropriate authority like the offence in respect of which such surrender is sought is an offence of a political character (and irrespective of how that offence is described in the prescribed arrangements concerned).

"After the committal order had issued, and the surrender request appeal, the administrative authority will conduct an administrative review in accordance with the relevant fugitive arrangements or agreements and the restrictions and guarantees of the relevant legislation.

Administrative review:

- It includes the preliminary review and the late administrative decision
  - The preliminary administrative review is whether the preliminary examination request is submitted by the relevant authorities and request in recognized path and the documents are all properly certified and conform to the basic statutory requirements[260]."

In this year, Hong Kong government suggest to amend Fugitive Offenders Ordinance, but why is the government suggest to amend the Ordinance suddenly, it is because of the case of Chen, he is a Hong Kong people and go travel to Taiwan with his girlfriend (Pun) in the beginning of 2018, but after the argument in hotel, he killed his girlfriend and abandon her body in suitcase and throw it outside hotel. After that, he escaped from Taiwan to Hong Kong, he withdrew his girlfriend's debit card and the police start to trace him. And the police arrested him in money laundering and ask him the crime process. And Chen

[258] 香港和內地移交逃犯的安排路向(只有中文版)
[259] Fugitive Offenders Ordinance Article 5
[260]香港和內地移交逃犯的安排路向(只有中文版)

had finished the sentenced in Hong Kong in 2020 but Taiwan had announce that they won't issue the visa and due to cannot judge him for the murder offense. Since there is no extradition between Taiwan and Hong Kong even though the crimes was happened in Taiwan.

Hong Kong government announced to amend the "Fugitive Offenders Ordinance" because of this case and they found that it is the legal loophole in "Fugitive Offenders Ordinance".

In this case, we can observed that there is legal loophole between Taiwan and Hong Kong, and the Chief Executive of Hong Kong tried to amend the Ordinance but getting a big social voice on it, it is because the public think that will affect human right and democracy, as discussed in previous pages. The conflict of statutory rules is the most direct conflict within two regions and it is easier for public to discover. It is because the law expressed in rules, according to the law of thought, when people meets the similar or same cases, they will thinking of the rules in prior as the thinking formula of human being, and since there is conflict between two regions on statutory rules and it already been the biggest obstacle for two regions to cooperate. As said above, two group of local people will only know their local law and use this mind for thinking and inference judgment and resulting in support their own rules or law and don't trust other rules or law in their psychology. When the case is involved within two regions, they hope to use their statutory rules to be the judgment. Also, the content in criminal law are different, this significant that they are different in legal system, legislative method and trial method. It includes the concept and constitution of crimes, the penalty species and executed method, etc. For instance, Hong Kong and Macau had already abolished death penalty, but Mainland still reserve it, and the different in the constitution of crimes resulting in different crimes on the same crime behavior. Different content is the basic reason for the legal conflict between regions. In practical, Taiwan did negotiate with Hong Kong for three times about extradite Chen back to Taiwan on December 2018, but there is no reply on it and after two months, the Chief Executive of Hong Kong raise the amendment program on Ordinance. It raised another question about the territorial problem, China still thinking of Taiwan is one part of China and it may affect the relationship between Mainland and Taiwan.

The amendment content of Ordinance tried to handle the extradition arrangement with the region that they didn't have extradition including Mainland, Taiwan and Macau by case. Also, it shift the surrender competence from Legislative Council to Chief Executive, it significant that can transfer the surrender to China without representative system.

In addition, why the amendment also get a big voice in international. It is because they don't trust Mainland's judicial, as said in previous pages, some people may tender on Hong Kong's common law system because they may think that Hong Kong is using common law system in theory and it create the modern legal culture, it contains the law traditions, but also had the law supremacy spirit. Under the reality level, it contains strictly common law and equality law and also had a high-quality judicial officer team and well-trained lawyers team, while Mainland only had several year histories, many legal systems still incomplete, the quality of judicial officers and lawyers may lack of management. The judgment in Mainland had no credibility in international or in domestic. The foreigners may think that the Ordinance will become the excuse for Mainland to surrendered the criminals by political reason and it will threaten for the people is resentful to Mainland's competence or policy because they think that people should have rights for the fair and open review, the review should under human right dignity and under procedural justice. These are the basic condition in international society. According to the Ordinance[261], Chief Executive in Council had the authority to amend the Ordinance. If the procedure cancelled by the Council review, the crisis will be wider if only Chief Executive has the surrender competence. For instance, some journalists had been put in jail when they are interviewing or reporting. This will threaten the journalists who live in Hong Kong and use any excuse to surrender to Mainland. And some foreigners will considered that that when they go to travel or transit in Hong Kong, is also advocated as criminals by Mainland and surrender them to Mainland for review.

The Hong Kong government should consider clear and carefully on the point that public worried about because it will also affect the international position of Hong Kong and the relationship between China and other countries or regions.

How Mainland and Taiwan implement in legal assistance

[261] Fugitive Offenders Ordinance Article 25

For Mainland and Taiwan, it is a sensitive topic because of their history background and the present status. For some states, they consider Taiwan as the state while some states consider Taiwan is one part of China and it becomes the regions of China. And the view of China and Taiwan is different, China consider is one part of their state while Taiwan consider they are the state and is not belong to China. No matter which consideration, their legal system and legislative are not the same because of the history background. In practical, they don't have extradition treaty and can only be cooperate in mutual legal assistance. There are Kinmen Agreement and Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement for legal assistance between China and Taiwan.

"For Kinmen Agreement, it is the first formal agreement for the cooperation of China and Taiwan. It established the repatriation principle which based on "humanity, safety and convenience",[262]" the Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement was established. "Their mutual legal assistance are implemented as following: 1. Services of document 2. Investigation and preserved evidence 3. Transference of crimes 4. Trial recognition 5. Humanitarian visits 6. Delivery of offenders[263]."

Since the agreement is based on the repatriation, therefore, it has some points to discuss the agreement as follow:

"1. The repatriation object should be smuggler, criminals and suspects.

For smuggler, it means a person who entry into a country illegally. But for criminals, it based on the concepts in Roman Law, "mala in se" and "mala prohibita", these two concepts belongs to natural crime which means the illegal act violated social ethics and morals. And the administrative offence belongs to statutory crime which means the illegal act are not violated the scope of social ethics and morals, but the penalty will be given on those who violate the administrative obligations due to the society need and the purpose of administrative measures.[264]" In this concept, it interpreted that crimes are including criminal crime and administrative offences, but the problem of China and Taiwan is the definition of the criminal crime. In China, they didn't distinguish between criminal crime

[262] 引渡逃犯與人員遣返之比較研究 —以我國現況為中心, 國立政治大學, 楊雲驊副教授, 許恒達助理教授, p.131

[263] 引渡逃犯與人員遣返之比較研究 —以我國現況為中心, 國立政治大學, 楊雲驊副教授, 許恒達助理教授, p.135-136

[264] 引渡逃犯與人員遣返之比較研究 —以我國現況為中心, 國立政治大學, 楊雲驊副教授, 許恒達助理教授, p.143

and administrative offence. They give the penalty depends on the criminal law and its relevant law. But in Taiwan, they did include the administrative offence into criminal crime if the offence is severe. It is the problem to clarify if the offender is under criminal crime or administrative offence because it can affect the constitute condition of repatriation. For the criminal and suspect, it had distinguish in international law nowadays because their status are different, for criminal, the offence of the defendant had already been confirm but for suspect, they considered as no guilty status under the principle of presumption of innocence and resulted in their legal rights will not be the same. Therefore, it is necessary for both parties to clarify which type of people should be included in repatriation.

"2. Double criminality

Double criminality is one of the traditional extradition principles, but both parties had different views on application. China deemed that it should not applicable on double criminality while Taiwan deemed it should apply. And double criminality mainly base on the principle of nation sovereignty, the principle of legality and the principle of reciprocity.[265]"

For the principle of nation sovereignty, it means the nations is the subject for judicial cooperation and is the performance of nation sovereignty. And it is the problem between China and Taiwan again, since the constitute condition aims on the "nation", it implied that the subject should be nation but not the region. For China, they deemed that not to apply on the principle of double criminality because they consider Taiwan is one part of them and does not exist the require conditions of double criminality. But for Taiwan, they deemed that should apply for the principle of double criminality because they consider it is the nation and should follow the rule of double criminality.

For the principle of legality, it means the nation only prosecute on the offense which constitute penalty and deprive personal liberty. As said before, China didn't distinguish the criminal crime and administrative offence, and Taiwan consider the administrative offence is included in the criminal crime if the administrative offense is severe. And due

[265] 引渡逃犯與人員遣返之比較研究 —以我國現況為中心, 國立政治大學, 楊雲驊副教授, 許恒達助理教授, p.145

to the administrative offence also can be the condition for the repatriation. In this situation, both parties had to discuss the scope of offence clearly when they make the commitment. For the principle of reciprocity, it refers to implements on the environment in which parties support one another for short- or long-term advantage through the balancing of rights, duties and interests.

It is important for distinguishing mutual legal assistance and extradition, for mutual legal assistance, it only take assist on the requested party request and does not include the criminal proceeding, but for extradition, the assistance include assisting arrest, detention, prosecution and execute the criminal proceeding. Therefore, when applying the mutual legal assistance, the restriction of the extradition can be ignored even the principle of double criminality

Furthermore, it is important to clarify which party criminal law should be follow in both parties since their legal system is different, so, the Agreement only stipulate that both parties have to make the commitment for the situation that one party deemed the act is crime while the other party deemed not. Therefore, double criminality is one of the important consideration elements for both parties when make the commitment.

"3. The repatriation of political and military offender[266]"

Although non-extradition for political offense and military offense is the extradition principle in international, but the repatriation is different with extradition. First, the legal system between both parties are not the same, their concept for political offense and military offense may not the same because of their background and due to not mention in the Agreement. The Agreement only stipulated that "the repatriation can be implement when the situation involved in severe interest[267]." It means even the situation involved in political or military offense, both parties have to discuss and make a commitment according to the substantial situation. Second, since the application of non-extradition for political offense is getting narrower and narrower because of the tendency of international crime. Therefore, the nations have to pay attention when applying the non-extradition for political offense and military offense principle. Therefore, it is sensity for both parties to make decision when decide the category of crime especially on their background.

[266] 引渡逃犯與人員遣返之比較研究 —以我國現況為中心, 國立政治大學, 楊雲驊副教授, 許恒達助理教授, p.148

[267] Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement Article 6

"4. The repatriation of capital punishment offender[268]"

Although the capital punishment are still one of the extradition principles in international, but the status is getting narrower and narrower and the nations are cautious when applying. For the standard of capital punishment, it always depends on the condemned prisoner nation law, but both parties didn't recognize on each other's laws, so it is difficult for either law to judge whether the offence is applicable for capital punishment. In practical, since the human rights are getting develop, the application of capital punishment will be lesser and lesser, so it is not a big conflict for both parties, but they have to pay attention when making decision because the fugitive may escape the penalty by hiding in the opposite party.

"5. The repatriation of nationals[269]"

Although the repatriation had the similar characteristic of extradition, but they are different on the purpose and object, for repatriation, it aims to repatriate the offender back to their nation, they don't involve in any other third place. But for extradition, it can be requested state or requesting state, but also the third state nation. For the Agreement of China and Taiwan, they only repatriate offender back to the original nation. But both parties don't trust each other law because of their concept of religious, politic and legal system, they think that if the offender repatriate to each other, the corresponding party will violate the rights of offender and jurisdiction. So, they may not willing to repatriate the offender to the corresponding party.

Although they have many points to decide when applying the mutual legal assistance, but there are still some basic conditions can follow.

"1. The requesting party had jurisdiction on the criminals or suspects[270]"

Although the Agreement didn't mention "jurisdiction", but the cooperation is based on the both jurisdictions, otherwise, the cooperation cannot be implemented. Normally, territorial principle are used in general criminal law, and it refers to the place that the

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offender had violated its law regardless of the nationals. Therefore, the place which the offender had violated their law had the jurisdiction. In this condition, it means the offender had violated the requesting party law. But it had exception on it, the requested party can apply the principle of nationals defense the territorial principle. Therefore, the two parties had to discuss clearly which principle they prefer during the mutual legal assistance.

"2. The repatriated person involved in major criminal suspicion[271]"

Since the repatriation can affect the repatriated person human right such as liberty. Therefore, the requesting party have to provide the relevant evidences for proofing the repatriated person had the major criminal suspicion. Although the Agreement didn't mention about the requirement of proof documents of criminals or the suspects, but the documents should include all the evidences which can proof the criminals or suspects are on major criminal suspicion no matter the status is in investigation or prosecution, and the requesting party should report all the information to the requested party immediately in order to proof the relevant person had major criminal suspicion. This can protect the human right of relevant person and maintain fair criminal proceeding.

"3. The crime should reach a certain serious level[272]"

Aside from the evidence to proof the relevant person had major criminal suspicion, the evident also used for proofing the criminal had reach a certain serious level of offence because it affect the human right of the defendant, for the minor offence, it is not necessary for both parties to use time and resources for repatriate. Normally, the punishment should be sentenced more than one year as international practice. For the scope of administrative offence, both parties had to pay attention on which level reach the repatriate conditions when making commitment.

"4. The repatriated person must not in undergoing judicial proceedings in the region[273]"

In extradition, it also mention that the extradition cannot be granted if the relevant person are under criminal proceeding. Therefore, the mutual legal assistance should follow the

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rule of extradition. According to the Agreement, it stipulated that "if the requested party has undergone judicial proceedings against the repatriated person, it should repatriate after the termination of the proceedings[274]." It implied with both parties had recognize both jurisdiction of judicial organs, but since difference party had its own judicial proceeding such as criminal proceeding, civil proceeding and administrative proceeding. So, both parties had to make clearly on which judicial proceeding should account into undergoing judicial proceeding situation. Normally, the investigation, review and prosecution, trial and execution procedures are the criminal procedures, but "the pre-investigation procedure which means one party had discovered some relevant cue in the repatriation request but the investigation didn't start, or one party had raise the repatriation request but didn't discover any cues and under jurisdiction. This is important for both parties to compromise because in China, they don't considered the pre-investigation procedure as the start of investigation procedures, but in Taiwan, they didn't have this restriction[275]."

In conclusion, since China is using the principle of "one country, two systems", and it cannot establish a united criminal judicial cooperation shortly. In the current situation, interregional legal assistance is the most important criminal judicial cooperation program within regions, because there are no extradition within these regions, it will easier become as "fugitive paradise" for fugitives, it is very danger for regions safety and security. For Mainland and Macau or Mainland and Hong Kong, prefer using the mode of case agreement because in several years, Hong Kong and Macau still keep on implementing high degree of autonomy, independence legislative power and judicial power. And the legal systems are different with Mainland, the content in criminal law are different, this significant that they are different in legislative method and trial method. It includes the concept and constitution of crimes, the penalty species and executed method, etc. and the different in the constitution of crimes resulting in different crimes on the same crime behavior. Different content is the basic reason for the legal conflict between regions. Since there are different criminal law in regions, it is difficult for Mainland to stipulate a

[274] Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement Article 6
[275] 引渡逃犯與人員遣返之比較研究 —以我國現況為中心, 國立政治大學, 楊雲驊副教授, 許恒達助理教授, p.161

unity criminal law, it only can used the mutual legal assistance for strengthen coordination between judicial organs in order to reduce the criminal conflict. For Macau and Hong Kong, prefer using bilateral agreement mode, since we got the similar culture, social, history and basic law and we both had high degree of autonomy, independence legislative power and judicial power. It is easier for us to establish bilateral agreement even though our legal system is different but we can take other regions as reference. And these three regions should be cooperate. But the content should be consider seriously. For Taiwan and Hong Kong and Macau, prefer using case agreement mode, since the identity of Taiwan is a bit sensitive, if using bilateral agreement mode, it may occur the problem between Mainland and Taiwan, and it may not solve the problems immediately. Before the amendment of Fugitive Offenders Ordinance of Hong Kong, the already use this mode for the criminal legal assistance, but Macau, there is no any criminal legal assistance with Taiwan, since Macau and Taiwan is the same legal system, it is easier for us to establish criminal legal assistance and can learn from Hong Kong as reference.

Conclusion

In this global world, we got many things to be compromise in order to maintain world's order, such as economy, environment etc. By maintaining the orders, we have some rules or laws to help in order to make a maximum benefit for all the States or countries. And there are many commitments are mainly constituted by different area and they will appear in different kinds of form such as protocol, treaty, agreement etc. By creating the law, there are some rules to follow in order to implement sufficiently. The methods that international States cooperate in criminal area are mainly on extradition and mutual legal assistance. But there are some principles and restrictions to follow when implementing extradition and mutual legal assistance. No matter which kind of form, the purpose is to maintain the order of international, and this is the main point for the existing of extradition and mutual legal assistance.

For both extradition and mutual legal assistance, their functions are to help the relevant nation to implement the criminal proceeding smoothly, but they still have difference, for extradition, it always implement strictly because most of their principle are applicable on the international law, and the nations should follow the principles strictly, the conditions for the extradition also be serious because it usually involved in depriving the liberty of the fugitive. For the nations, it had to use time and judicial resources for arranging the extradition. It will increase the nation burden and the resources. For mutual legal assistance, it is softer than the extradition because it does not involved in depriving the liberty of the fugitive, and the function for them is to help the requesting party to implement the criminal proceeding smoothly. Since their functions are not different, so the requirement and the conditions are also difference. The nations have to choose the suitable form for them in order to take the advantage on helping the criminal proceeding operate smoothly.

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