CHAPTER 19

EXTRADITION

Definition :

It is quite possible for a person to escape to another State after committing a crime in his own State. Such cases have started occurring more frequently with the result of the development of the air traffic. A question arises as to whether fugitive shall be tried in the country where he has fled away or in the State where the crime has been committed. Normally, a State finds itself in a difficult situation to punish a person who has committed a crime elsewhere primarily because of the lack of jurisdiction, and therefore, such persons are sometimes surrendered to the State where the crime has been committed. Surrender of an accused or of a convict is known as extradition.

The word extradition has derived from two Latin words *ex* and *traditum*. Ordinarily, it may mean 'delivery of criminals', 'surrender of fugitives' or 'handover of fugitives'. Extradition may be defined as surrender of an accused or a convicted person by the State on whose territory he is found to the State on whose territory he is alleged to have committed, or to have been convicted of a crime. According to Oppenheim extradition is the delivery of an accused or a convicted individual to the State where he is accused of, or has been convicted of, a crime, by the State on whose territory he happens for the time to be.[1]

The above definition makes it clear that in extradition two States are involved. They are firstly, the territorial State, i.e., a State where an accused or a convict is found, and secondly, the requesting State, i.e., a State where the crime has been committed. A State which demands for the surrender is known as requesting State because a person is surrendered by the territorial State only upon a request by another State. Request is made normally through the diplomatic channel.

PURPOSE OF EXTRADITION :

A criminal is extradited to the requesting State because of the following reasons :

(1) Extradition is a process towards the suppression of crime. Normally a person cannot be punished or prosecuted in a State where he has fled away because of lack of jurisdiction or because of some technical rules of criminal law. Criminals are therefore extradited so that their crimes may not go unpunished.

(2) Extradition acts as a warning to the criminals that they cannot escape punishment by fleeing to another State. Extradition therefore has a deterrent effect.

(3) Criminals are surrendered as it safeguards the interest of the territorial State. If a particular State adopts a policy of non-extradition of criminals they would like to flee to that State only. The State therefore would become a place for international criminals, which indeed would be

1. 'International Law', Vol. I, Ninth Edition (1992), p. 949.

dangerous for it, because they may again commit a crime there, if they would be left free.

(4) Extradition is based on reciprocity. A State which is requested to surrender the criminal today may have to request for extradition of a criminal on some future date.

(5) Extradition is done because it is a step towards the achievement of international co-operation in solving international problems of a social character. Thus, it fulfils one of the purposes of the United Nations as provided under Para 3 of Article 1 of the Charter.

(6) The State on whose territory the crime has been committed is in a better position to try the offender because the evidence is more freely available in that State only.

IS EXTRADITION A LEGAL DUTY OF A STATE ?

Grotius was of the view that a State of refuge has a duty either to punish the offender or to surrender him to the State seeking his return. The principle of 'prosecution or extradition' was recognized by him as a legal duty of the State where the offender is found. The legal duty of the State according to him is based on natural law. Vattel also had a similar view. He regarded extradition as a clear legal duty imposed upon States by International Law in the case of serious crimes. The principle of prosecution and extradition was expressed by the maxim *aut dedere aut puniare.*[1] However, in practice the principle has not been followed by the States, and therefore, it could not become a rule of International Law. In modern times, a fugitive criminal is not surrendered in the absence of extradition treaties.[2] The Supreme Court of the United States of America in *Factor v. Labubenheimer* clearly stated that :

> international law recognizes no right to extradition apart from treaty. While a government may, if agreeable to its own Constitution and laws voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so..... The legal duty to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.[3]

A legal duty to surrender a criminal therefore arises only when treaties are concluded by the States and after the formalities have taken place

1. See H.O. Agarwal, 'Application of *aut dedere aut puniare* in Combating International Terrorism' (Paper submitted in the Teacher's Seminar of International Law Association, held in New Delhi on March 31, 1988). The principle has been adopted in the Genocide Convention 1948 ; the four Geneva Conventions on Humanitarian Law 1949 and their Protocols of 1977 ; the Tokyo Convention on offences and certain other acts committed on Board Aircraft 1963 ; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 ; the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 ; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973 ; Convention Against taking of Hostages, 1979 ; Single Convention on Narcotic Drugs 1961 ; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 ; Convention for the Suppression of unlawful acts against the Safety of Maritime Navigation, 1988 ; Convention Against Recruitment, Use, Financing, Training of Mercenaries, 1989 and Convention on Psychotropic Substances, 1971.
2. See Oppenheim, Op. cit., p. 950 ; Arnold McNair, 'Extradition and Ex-territorial Asylum', Vol. XXVIII (1951) p. 174-177.
3. 290 U.S. (1933) p. 287 ; Also See *Rauscher v. United State* 119 US (1886) p. 407.

which are stipulated in the extradition treaties. Only in exceptional cases, a State may extradite a person on the basis of reciprocity. However, this is done not because of any legal duty on their part, but because of reciprocity or courtesy.[1]

LAW OF EXTRADITION :

In International Law, rules regarding extradition are not well established mainly because extradition is a topic which does not come exclusively under the domain of International Law. Law of extradition is dual law. It has operation—national as well as international. Extradition or non-extradition of a person is determined by the municipal courts of a State, but at the same time it is also a part of International Law because of the involvement of two States and also because of the implementation of the international commitment of the State. Many attempts for the conclusion of a multilateral treaty have been made by the States from time to time in this regard, but they all have failed in their attempts in laying down a general rule regarding extradition.[2] International Law Commission has also not yet taken this topic for its consideration for codification despite the inclusion of the topic of extradition in 1949, in its provisional list of fourteen topics for its codification. It is desirable if a multilateral convention is concluded so that general rules of International Law may be settled regarding extradition. Some States are parties to schemes of extradition between a group of States having geographical affinity. For instance, the European Convention on Extradition was signed on December 13, 1957 by the Member States of the Council of Europe, and the Arab League Extradition Agreement was approved by the Council of the League of Arab States on September 14, 1952. Such regional conventions contribute to the trend of creating general rules of extradition. Presently, in the absence of any multilateral treaty or convention, extradition is done by States on the basis of bilateral treaties wherein provisions are made in accordance with the municipal legislation. Thus, many States have national legislations. They have made rules regarding extradition of a fugitive criminals. For instance, in India, rules regarding extradition have been made in the Extradition Act of 1962. Extradition is done by India only when the conditions laid down in the Act are satisfied. Similarly, other States also have extradition laws.

Bilateral treaties, national laws of several States, and the judicial decisions of municipal courts led to develop certain principles regarding extradition which are deemed as general rules of International Law. Important amongst them are as follows :—

(1) EXTRADITION TREATIES :

The first and for most important condition of extradition is the existence of an extradition treaty between the territorial State and the requesting State. A person may be extradited only when a treaty exists and after the formalities have taken place which are stipulated in the extradition treaties. If a criminal has succeeded in escaping into the territory of another State or if he is erroneously handed over, without the formalities of extradition having been complied with, by the police of the local State to the police of the prosecuting State, such local State can ask for his formal extradition but the State having custody of a person is not bound by the

1. ... Edition (1994), P. 318.

rules of International Law to extradite him.

Savarkar case.[1]

In this case an Indian who was prosecuted for high treason and abatement of murder was being returned to India from Great Britain for his trial, escaped and swam ashore in Marseilles harbour. A French policeman arrested him and handed him over to the British policeman who had come ashore in pursuit. Although the French Police man was informed of the presence of Savarkar on board, the French Policeman who made the arrest thought he was handing back a member of the crew who had committed an offence on board. France alleged a violation of territorial sovereignty and asked for the return of Savarkar to it as restitution. The Permanent Court of Arbitration decided in favour of Great Britain. It was observed by the Arbitration that there is no rule of International Law imposing.........any obligation on the power which has in its custody a prisoner to restore him because of a mistake committed by the foreign agent who delivered him to that power.

(2) EXTRADITION OF POLITICAL OFFENDERS :

It is a customary rule of International Law that political offenders are not extradited. In other words, they are granted asylum by the territorial State. During the days of monarchs, the extradition of political offenders was very common. They used to prefer extradition so as to avoid intervention in the affairs of another State. But the practice underwent a complete change with the beginning of the French Revolution. Perhaps, for the first time, the French Constitution of 1793 under Article 120 made a provision for granting asylum to those foreigners who exiled from their home country for the cause of liberty. Later on, other States followed the principle of non-extradition of the political offenders gradually. Indian Extradition Act of 1962 also lays down a similar provision under Section 31(a). At present, non-extradition of the political offenders has become a general rule of International Law. It is one of the exceptions of extradition.

Basis for the non-extradition of the Political offenders :

The rule of non-extradition of the political offenders is based on many considerations which are as follows :—

(1) The rule is based on the elementary consideration of humanity. No State would like to extradite a person if he is not a criminal. If it does, it will not be in compliance with the law of natural justice.

(2) If political offenders are extradited, it is feared that they would not be treated fairly. It is a duty of the territorial State to ensure safeguards to the surrendered fugitives for a fair trial in the requesting State. Since it is a difficult task, they are not extradited.

(3) The rule also protects the political offender from any measure of extra-legal character which the requesting State might attempt to take against them.

(4) The object of the political offenders to take shelter in another country is not the same as those of the ordinary criminals.

(5) Political offenders are not dangerous for the territorial State as may be in the case of ordinary criminals.

Exceptions to the Political Offence Exception :

On some occasions, fugitives take undue advantage of the principle of

1. *France v. Great Britain Concerning Savarkar, Hague Court Reports, p. 275 (1911).*

non-extradition of political offenders by posing themselves as political offenders. In order to check the abuse, an attempt was made to restrict the principle in certain cases. In 1856, Belgium introduced the *attentat* clause in its extradition law. Article VI of the Act provides that an attempt on the life of the head of a foreign government or of members of his family shall not be considered to be a political offence, or an act committed with such an offence, when it in fact constitutes murder, assassination or poisoning. Some other European States followed this practice,[1] but the *attentat* clause has not been accepted as a general rule of International Law because sometimes the Head of the State may be titular head. He may not be the most important and powerful man in a State. For instance, the Queen of England or the President of India may not be as powerful as the Prime Minister.

At present, the only restriction which has been imposed by the rules of International Law on the non-extradition of the political offenders, is that of the crime of Genocide. The Genocide Convention of 1948 has laid down under Article VII that genocide, conspiracy to commit genocide, direct and indirect public incitement to commit genocide, attempt to commit genocide and complicity in genocide shall not be considered as political crimes. Thus, no person charged with any of the above offences would take the plea that he is a political offender. Further, a person committing an international crime such as crimes against humanity, war crimes, piracy, hijacking, slavery, white slavery and other forms of traffic in women and children, counterfeiting, kidnapping of internationally protected persons and apartheid would be extradited or not depends much upon the provisions of the treaties by which they have been regarded as international crimes. It is submitted that in order to suppress such crimes it is desirable, in the interest of international community, that the offender is extradited, even if the crime is politically connected. Such crimes should be regarded as exceptions to the exception of political offence. However, at present, only a few international crimes fulfil the requirements which the law of extradition demands. They, for instance, are the Narcotic Convention, the Tokyo and Hague Conventions on aircraft hijacking, the Counterfeiting Convention and Slavery Convention. In these cases, obligation to extradite a person arises by multilateral treaties. But the above conventions shall be binding only upon those States which have become parties to them. Further, since these conventions do not constitute self-executing obligation, the question of extradition arises only when they have been embodied in bilateral extradition treaties. Thus the position of the extradition of a person committing an international crime is not consistent. Perhaps there is no case where extradition was requested and granted to a person for an international crime, other than for war crimes and crimes against humanity arising out of World War II. Although, there is some agreement on the notion that international crimes should be treated as an exception to the exception of political offence, no rule has emerged as yet. The position is likely to remain fluid as long as International Criminal Law is not codified.

Although the principle is now widely accepted that political criminals should not be extradited, there is probably no rule of customary International Law which prevents their exhibition.[2] If a State wishes to

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1. The Clause has found its way into many treaties. For instance, see Article 4(2) of the Extradition Treaty between Germany and Turkey of 1930 ; Article 4(2) of the Extradition Treaty between France and Czehoslovakia of 1928 ; 4(2) of the Extradition Treaty between ... Belgium and Poland of 1931.

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impose any restriction on the rule of non-extradition of the political offenders, it may do so in its extradition treaties by which the principle itself is regulated. For instance, extradition treaty between India and Canada concluded on February 6, 1987 provided under Article 5(1)(a) that extradition may be refused if the offence in respect of which it is requested is considered by the requested State to be a political offence or an offence of a political character. However Para 3 of the above Article stated that certain offences shall not be regarded as political offence or an offence of political character. They are : unlawful seizure of aircraft, unlawful acts against the safety of civil aviation, crimes against internationally protected persons, an offence related to terrorism, murder, manslaughter, assault causing bodily harm, kidnapping, hostage taking, offences involving serious damage to property or disruption of public facilities and offences relating to firearms, weapons, explosives or dangerous substances, or an attempt or conspiracy to commit the above offences. The above offences shall also not be considered as political offence. The extradition treaty concluded between India and Britain in 1992 also prevent the suspected terrorist from arguing that their offences are political to avoid extradition. The Treaty obliterates the political factor from crimes of violence as a defence against extradition. It follows that the Treaty has laid down many exceptions to the exception of the rule that the political offenders are not extradited.

Meaning of Political Offence :

Although the notion of non-extradition of the political offenders is generally accepted, one of the most complicated questions which arises in this regard is to define the term 'political offence'. The question has become more complex because whether or not the offence, which is the subject of a request for extradition, is a political crime is decided by the municipal courts, and this has led to the emergence of divergent views taken by the judges of the different municipal courts. In a few cases, judges did not consider it necessary to lay down an exhaustive definition of the term political offence. Hence, they did not make any attempt to define the term. International publicists have also made attempts to define it, but their views are also too divergent. However, it is important as well as necessary to set a scope of the term political offence as the extradition or non-extradition depends upon it.

Re Castioni Case :

In the last decade of the nineteenth century, a leading case on this issue decided by the British Court was that of *Re Castioni*.[1] In this case, Castioni who had returned to Switzerland from abroad, joined the revolutionary movement in the Canton of Ticinio (Switzerland), and in the course of it, he committed the murder of Rossi, a member of the Government. It was pleaded on behalf of Castioni in writ of *habeas corpus* that his offence was a political offence for which extradition was not available. He claimed protection under Section 3 of the Extradition Act, 1870. Lord Denman, J. ; laid down that in order to bring the case within the scope of the Act, and for an offence to be political, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of over act, in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the Government in its hands.....The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political

1. (1891) IQB 149.

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object, and as a part of the political movement and rising in which he was taking part.......[1] His extradition was refused on the finding that his motive for the act was political. The deciding factor for an offence to be considered as political, according to the Court was that the act should have been committed in the course of a political struggle or disturbance during which two or more parties in the State are contending and each party seeks to impose the Government of its choice on the other. In other words, the act should be done against the established regime, by the other party, seeking to establish its own regime.

Re Munier Case :

In the case of *Re Meunier,*[2] which came before the Court three years after Castioni, the principle laid down in *Re Castioni* was repeated. In *Re Meunier,* the petitioner was a French anarchist who was charged with causing explosions at a cafe and also in certain barracks in France, one of which resulted in death of two individuals. Cave, J., upheld his extradition and held that :

> "in order to constitute an offence of a political character, there must be two or more parties in the State each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other ; for the party with whom the accused is identified.....namely, the parties of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens."

The Principle laid down in *Re* Castioni, and *Re* Meunier was followed for a fairly long time by other States as well. The Federal Court of the United States, in 1894 in *Re* Ezta held that in order 'to bring an offence within the meaning of the words 'political character' it must be incidental to and form part of political disturbance.[3] The Federal Tribunal of Switzerland in *Re* Pawan,[4] the Supreme Court of Brazil in *Re* Benegas case[5] also applied the strict principle laid down in the Castioni case. According to these decisions, an offence is considered to be political if it is directed against the State or the Constitutional Order, or be otherwise 'inextricably involved in conditions disturbing the constitutional life' of the country. It should be committed by an organised movement to secure power in the State against the established regime.

Criticisms of the Re Castioni and Re Meunier Cases :

It is to be noted that the above approach in defining the term political offence appears to be too narrow and rigid. Many acts of individuals such as terrorist acts of personal vengeance or for gain and acts having an entirely local impact are excluded from the category of political offence. The above approach stresses that the object of the crime should be to overthrow the government. It is submitted that an offence may be described as political even if the object of its commission is not to overthrow the government. For instance, if a group of persons persuades the Government to do or not do any particular act, and in the course of their persuasion,

1. (1891) 1 QB at p. 156 and 159.
2. (1894) 2 QB 415.
3. (1894) 62 Federal Court p. 972 at p. 999.
4. [illegible]

hey commit certain crimes, their object is not to overthrow the government, yet the crime may be considered as political. Further, the above view does not take account of the motive of the crime. An individual may fear of not getting fair trial from the government of his own State on social, economic, religious or cultural grounds which are inextricably woven with the policies of the government. Such persons are not treated as political offenders according to the above approach taken in Castioni and Meuniere cases.

Ex parte Kolczynski case :

All these reasons, perhaps, prompted to the Court in *Ex parte Kolczynski and Others*[1] to lay down a wider meaning of the concept of political offence. In the above case Lord Goddard, C.J., deviated himself from the established principle set in Castioni case. He also felt it necessary on considerations of humanity to give a wider and generous meaning to the term political offence. Cassels, J., in the above case observed that the offences for which extradition was requested were committed in circumstances, in which, if surrendered, the accused would, although being tried for those offences, be also punished for an offence of a political character. He, therefore, said that the political offence 'must always be considered according to the circumstances existing at the time when they have to be considered'. After having made the above observations, he added, that it is submitted on behalf of the men that if they should be extradited they may not only be tried for the offences for which their extradition is requested, but they will be punished as for an offence of a political character, and that offence is treason in going over to the capitalistic enemies.....They committed an offence of a political character, and if they were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime.

Conclusions :

From the above decision it appears that the meaning of the term 'political offence' has been made wider than that laid down in Castioni case. According to this approach, it is not necessary that the crime should be committed by an organised party to overthrow the established government. Even membership of a political party was not regarded as necessary. The definition laid down by Cassels, J., in the above case reveals that if any ordinary crime is committed in the course of committing any offence against the State, that would be considered political because of its close association with the politics of the State and also because the prosecution for the ordinary crimes on the facts amounts to a prosecution for the political crime as well. Thus, the Court refused to be tied down to the former view of the two political parties contending for power within a State in order to constitute a political offence.

It may be noted that all those offences which are committed by an organised party or by an individual with an object of overthrowing the established Government should be considered political. In addition to such crimes, other common crimes may also be considered political if they are so inextricably involved with the latter in such a way that the two cannot be separated. Thus, the principle of non-extradition of the political offenders applied more especially to the so-called relatively political offences in the wide sense, namely, acts which have the character of an ordinary crime appearing in the list of extraditable offences but which, because of the

1. (1955) 1 All ER 31. Also see Re Pe... Bernonville, ILR (1955)...

attendant circumstances. In particular, because of the motive and the purpose is one of a predominantly political complexion. If an offender commits any crime because he is not satisfied with the policy or policies of the government, there is a reason for considering such offenders as political on the ground that the crime would not have been committed otherwise. This also includes religious, social and cultural offences. The essential point involved in such crimes should be that they are committed because of the dissatisfaction of the policies of the government. It is a duty of the court to see that the criminals are not allowed to go unpunished, but at the same time the court should also take into consideration of the fact that they are protected from the legal processes of the requesting State. The court should also see that there are substantial grounds for believing that the offender once extradited shall not be prosecuted to or in substitution for the offences mentioned in the warrant. The consideration of this point is important in view of the fact that once the extradition is granted the accused cannot raise the defence in the court of the requesting State that as a political offender he is not justiciable before it. In view of these considerations, it may be noted that it would be desirable if the courts of different countries, with their differing ideas of public order, examine the question of political offenders in each case on merits in the light of its facts. Due regard should be given to the prevalent political conditions and the circumstances under which the crime has been committed.[1]

(3) DOCTRINE OF DOUBLE CRIMINALITY :

The doctrine of double criminality denotes that a crime must be an offence recognized in the territorial as well as in the requesting State. No person is extradited unless this condition is fulfilled. The doctrine appears to be based on the consideration that it would offend the conscience of the territorial State if it has to extradite a person when its own law does not regard him a criminal. The requesting State would also not ask for the surrender of a person for those crimes which are not recognized in its State. The doctrine thus satisfies double purpose. It helps the requesting State to enforce its criminal law, and to the territorial State in the sense that the rule protects it from fugitive criminals. In order to ensure that a crime is recognized in both the States, a list of extraditable offences is attached in the extradition laws of some States. But, generally, a list of crimes is embodied in the treaties for which extradition is done. The Indian Extradition Act of 1962 has adopted both the procedures in this regard. The Second Schedule appended to the Act lays down a list of crimes. The list applies in cases of extradition to Commonwealth countries and also to those countries with which India has no treaty. When a treaty is concluded with any State, a list is attached therein for the extraditable offence. Extradition is therefore limited to such offences only.

The rule of double criminality has put a State into a difficult situation when it has to request another State for extradition in respect of those offences which do not find place in the list of crimes embodied in a treaty. In order to overcome the above difficulty it is desirable that instead of laying down the names of various crimes specifically in the treaties, some general criterion should be adopted. For instance, any offence punishable with a definite minimum penalty under the laws of both the States should eligible a person for extradition appears to be more appropriate. The above would enable the States to extradite the offender even for those offences which are

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not laid down in the treaty. France applies the above principle in extraditing a person. Extradition treaty concluded in 1987 between India and Canada has also laid down the above principle under Article 3, Para (1) by stating: 'An extradition offence is committed when the conduct of the person whose extradition' is sought constitutes an offence punishable by the laws of both contracting States by a term of imprisonment for a period of more than one year.' Thus, all the offences are extraditable offences for which the minimum punishment of one year or more is provided under the laws of both the countries. The extradition treaty concluded between India and Britain in 1992 also provides that extradition may be made for those crimes which carry the sentence of imprisonment for twelve months or more in both the countries.

Crimes Punishable by Death in the Requesting State :

In those cases where a crime is recognized in both the States, i.e., in the territorial as well as in the requesting State, but the crime for which the extradition is demanded is punishable by death in the requesting State and not in the territorial State, a further difficulty may arise in extraditing a person. Territorial State may hesitate to extradite such a person as it would offend its conscious if it has to extradite a person to whom death sentence would be provided while its own laws do not provide for the death sentence for that offence. In order to overcome this difficulty, extradition treaties generally provide that extradition shall be granted only when the requesting State gives an assurance that the death penalty shall, if imposed, not be executed. India and Canada in their Extradition Treaty of 1987 laid down under Article 6 that extradition may be refused when the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not provide such punishment for the conduct constituting the offence, unless the requesting State considers sufficient that the death penalty shall, if imposed, not be executed.

In *Soering* v. *United Kingdom*,[1] Soering after committing murder in the United States, for which the punishment was death sentence, fled to the United Kingdom where he was found guilty for manslaughter and not for murder. Before the Divisional Court, Soering argued that he should not be extradited in view of Article IV of the U.S.-U.K. Extradition Treaty which provided that "if the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out." The British Embassy, in Washington, thereupon, asked for such an assurance which was given in the form of a sworn affidavit by the Commonwealth Attorney for Bedford country. Later, he was given order for the surrender to the U.S. authorities.

(4) RULE OF SPECIALITY :

According to this principle, a fugitive is tried by the requesting State only for that offence for which he has been extradited. In other words, the requesting State is under a duty not to try or punish the fugitive criminal for any other offence than that for which he has been extradited, unless he has given an opportunity to return to the territorial State. The rule has been made to provide safeguard to the fugitives against fraudulent extradition. The rule of speciality is incorporated generally in the extradition

1. 28 ILM 1063 (1989)

law of a State. Indian Extradition Act of 1962 has incorporated this principle under Section 31(c). An important case on this rule is that of *United States* v. *Rauscher*.[1] Wherein the accused was extradited on the charge of murder, but he was tried and convicted in U.S.A., on a minor charge of causing cruel and unusual punishment on a member of the crew. He made an appeal before the Supreme Court of the United States which quashed the conviction and ordered the release of the prisoner on the ground that unless otherwise provided for by the treaty, the prisoner could only be charged with the offence for which he was extradited unless he was given a reasonable time to return to the country which surrendered him. This principle has also been evoked in Tarasov's case.[2] It is to be noted that the accused can raise this principle when a treaty or the national law provides for this principle. In their absence, his plea cannot be entertained.

(5) PRIMA FACIE EVIDENCE :

There should be a *prima facie* evidence of the guilt of the accused. Before a person is extradited, the territorial State must satisfy itself that there is a *prima facie* evidence against the accused for which extradition is demanded. In C.G. Menon's case the Madras High Court held that 'the need for offering evidence to show that *prima facie* the offender is guilty of the crime with which he has been charged by the country asking for his extradition has been well recognized.'[3] The purpose for laying down the rule of *prima facie* evidence is to check the fraudulent extradition. The territorial State has to see that the demand is not motivated by any political reasons. The requirement of *prima facie* evidence is laid down in the national legislation of a State. Indian Extradition Act provides this requirement under Section 7(4). In addition to this, States in their treaties incorporate a provision to this effect.

(6) TIME-BARRED CRIMES :

A fugitive criminal shall not be surrendered, if he has been tried and has served sentence for the offence committed in the territorial State. Thus, extradition is not granted if the offence for which extradition has to be made has become time-barred. Rule to this effect is laid down in the national extradition laws. Section 31(b) of the Indian Extradition Act provides that extradition may be refused if prosecution is barred by a lapse of time under the law of the requesting State. An important point in this connection is that which date should be considered relevant for determining the issue, i.e., the date of the request of extradition, or the date of receipt of such request by the territorial State, or the date on which the Magistrate submits his report to the government recommending the fugitive's extradition, or lastly, when the government makes an order for extradition.[4] It is to be noted that the date on which the government passes the order for the extradition of fugitive is an important one. If the fugitive can be prosecuted on this date, he may be extradited.[5] Extradition treaties should clearly lay down provisions regarding this point. If it is silent on this question, a problem of the interaction of the two municipal law systems may arise.

(7) EXTRADITION OF OWN NATIONALS :

In many cases a person after committing a crime in a foreign country flees back to his own country. Whether a State would extradite such

1. (1886) 119 US 407.
2. See Order of the First Class Magistrate (New Delhi) of March 29, 1963.
3. AIR (1953) Madras, p. 729 at p. 763.
4. R.C. Hingorani, 'Modern International Law', Second Editioln, p. 183.
5. *Ibid.*

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persons, i.e., its own nationals, to a State where crime has been committed is a controversial point and practice of States considerably differs on it. Many countries such as Italy, Germany, Switzerland and France have adopted a principle for not extraditing their own nationals to a foreign State. Those who support the view give arguments that national judges are regarded as natural judges. Foreign judges cannot be trusted. Moreover, it is not dignified for a State to extradite its nationals for conducting a trial in the foreign country. Again, they do so as a step to protect their own nationals. However, they prefer to inflict punishment to such persons in their own States. On the other hand, Great Britain, the United States and India have favoured the practice of extraditing them, if a treaty provides for extradition of such persons. Nationals of the States of the former category therefore attempt to flee back in their own country in order to avoid extradition, though they may be punished there for the crimes committed in foreign countries. It is desirable that a person should be given punishment by the State where the crime has taken place. It remains in a better position to try the offenders in view of the fact that witnesses are readily available in that country alone. Extradition treaties therefore should contain a clause for the extradition of 'all' or 'any' persons so as to include their own nationals as well. Extradition treaty concluded between Canada and India has inserted a clause under Article 1, Para 1 that "Each Contracting State agrees to extradite to the other......any person who, being accused or convicted of an extradition offence.....committed within the territory of the one State, is found in the territory of the other State." The above provision follows that the extradition of Canadian or Indian Citizens is not precluded by both the States.

Extradition or non-extradition of its own nationals depends upon the wordings of the extradition treaties. Nationals may therefore be extradited if there is no bar in the national extradition law or in the treaty. But if the restriction is imposed therein regarding the extradition of its own nationals, it becomes a duty of the territorial State to punish them so that crimes may not go unpunished.

(8) MILITARY OFFENDERS :

A person having a charge of committing military offences such as desertion[1] are not extradited. They are granted asylum by the territorial State on legal and extra-legal grounds, and also as a security measure. After the First World War, Holland refused to extradite the German Head of the State W. Kaiser. Similarly, Brazil refused to surrender to Denmark a person charged with the crime of assisting the enemy in time of war, maintaining that this was a political offence. Extradition treaty between India and Canada of 1987 also provides under Article 52(a) that extradition shall be refused if the offence in respect of which it is requested is considered by the requested State to be a purely military offence. But the practice of non-extradition for military offenders has not gained universal acceptance. For instance, a person committing war crimes is extradited to the requesting State. General Assembly of the United Nations in 1967 adopted the Declaration on Territorial Asylum wherein it was laid down that States shall not grant asylum to any person with respect to whom there are serious charges for considering that he has committed war crimes. Further, Genocide Convention under Article VII lays down that Genocide shall not be considered as political crime for the purpose of extradition. The Convention goes on to say that contracting States pledge themselves in such cases to

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grant extradition in accordance with their own laws and treaties in force. The above provision implies that if the military personnels commit a crime of genocide, they shall be extradited and shall not be granted asylum by the State of refuse.

(9) EXTRADITION FOR AN OFFENCE OF FISCAL CHARACTER :

Offence of a purely fiscal character may broadly mean the offences relating to revenues, taxes, excise and customs, etc. Such offences generally involve the public interest as opposed to a private interest. Presently, such offences are being committed very often and the offender after committing an offence flees to another State. Can a person committing an offence of fiscal character be extradited ?

Extradition for a fiscal offence has not been generally practiced by the States, despite the fact that there is nothing in international customary law which prohibits it. Indifferent attitude of the States towards the extradition in relation to such offences led the offender to flee to other States in order to escape fiscal liability. Dr. Dharam Teja in 1978 escaped from India in order to avoid the recovery of Income-tax arrears amounting to rupees four crores. No extradition proceedings could be initiated against him as there was no criminal charge against him. In order to suppress similar and other economic offences it is desirable that the economic offenders are extradited. Rules of International Law do not prohibit for the extradition for the offences of fiscal character. Consciousness of States for the suppression of such offences has led the States to provide a clause for the extradition of such offenders in their extradition treaties. Extradition treaty between India and Canada expressly lays down under Para 3 that "Extradition shall be ordered for an extradition offence notwithstanding that it may be an offence relating to taxation or revenue or is one of a purely fiscal character.

Sometimes difficulty may be experienced by the States in relation to the extradition for the economic offender regarding the satisfaction of the requirement of the principle of double criminality. However, this has been overcome by those States which extradite for offences which are subject to a definite penalty, both in the requesting and territorial State. It is submitted that in future States in their own interest would include the provisions for the extradition for an offence of fiscal character in their extradition treaties.

(10) EXTRADITION OF FOREIGN NATIONALS FOR CRIMES COMMITTED IN FOREIGN COUNTRIES :

Foreigners are not extradited for the offences committed in foreign countries. They may be tried and punished only in that State where the crime has been committed. Their extradition cannot take place even in a State where the crime has grave or immediate consequence. It is so because of the jurisdictional problems. However, it is desirable if foreign nationals for their acts committed in foreign countries are extradited to the State whose safety, stability or public order has been threatened by the acts. No doubt, extradition in such cases should be done when it has been thoroughly examined by the State (where the crime has been committed) regarding the impact and consequences of the offence in the requesting State. It is to be noted that extradition of foreigners committing crimes in foreign countries can take place only when the extradition treaties include a provision regarding it. Extradition treaty between Canada and India has included the provision for the possibility of extradition for the

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extra-territorial offences by stating under Article 2 that Extradition shall also be granted in respect of an extradition offence..... committed outside the territory but within the jurisdiction as assessed by the requesting State, if the requested State would, in corresponding circumstances have jurisdiction over such offence. This is of course, an innovative provision which the two countries have inserted in the Treaty in recognition of the fact that terrorist activities have trans-national connections and impact.

Law on Extradition, at present, is based on the basis of bilateral treaties and national laws. Since they are practised in many countries, they can be regarded as to have become general principles of International Law. However, in no way, they are binding on all the States. It is quite possible that an extradition treaty or extradition law of a State, remains silent on any of these points, or they might contain provisions otherwise. While in the former case, difficulties are bound to arise, latter would be regarded as violative to the general principles of International Law. Nevertheless they shall be binding on the parties. It is desirable that the International Law Commission take up the topic of extradition for its consideration and codification. The topic once codified is likely to be of great helo in the suppression of the crime and in achieving international co-operation in social fields which is one of the purposes of the United Nations as provided under Para 3 of the Article I of the Charter.

EXTRADITION LAW IN INDIA :

In India for the first time an Extradition Act was enacted in 1902. Before it, extradition in India was regulated on the basis of the British Extradition Act of 1870. The Act of 1870 was a law for whole of the British Empire. The surrender of fugitive criminals amongst the countries of British Empire was regulated by another Act, i.e., the Fugitive Offenders Act of 1881. Thus, extradition to and from countries of British Empire was treated on different footings to that of extradition from other countries. The Indian Extradition Act of 1903[1] was enacted to provide for more convenient administration in British India and to supplement the Extradition Act of 1870 (as modified from time to time) and to the Fugitive Offenders Act of 1881. Thus the Act of 1903 was supplementary to the above two Acts. The Act of 1903 continued to be in force after India became independent. All those extradition treaties which were concluded by the (British) India before 1947 were also continued by India. It considered itself to be bound by all the extradition treaties of (British) India. In 1956, India prepared a list of 45 pre-independence extradition treaties which were stated to be in force.[2]

In 1962, Indian Extradition Act was enacted.[3] The Act stipulated under Section 2(d) that all extradition treaties made before August 15, 1947 is binding on India. A question arises whether other contracting States have also considered themselves to remain bound by such treaties. On inquiry, it was revealed that only few countries considered themselves to be bound by pre-independent extradition treaties.[4] Attitude of many other countries is not clear since they did not give replies to the quarry. Germany and Portugal expressed the view that extradition treaties are not operative with India. It is to be noted that India considered that the pre-independence extradition treaties with these States are still operative. The same is the

1. Act IV of 1903.
2. *See* Lok Sabha Debates, 12th Session, 1956, Appendix 4, Annex No. 42, cited in H.O. Agarwal, 'Succession to Extradition Treaties, Supreme Court Journal, (1977) p. 53 at p. 59.
3. Act XXIV of 1962 (For the Text on an Act See Appendix V).
4. R.C. Hingorani, 'The Indian Extradition Law', Appendix V p. 119.

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case with France. When it was suspected that Dharam Teja had fled to France, the Prime Minister of India declared in the Parliament on August 24, 1966, that India has no extradition treaty with France, and therefore, his extradition cannot be requested to that country. But the list of countries, with whom India has extradition treaties, includes France as one of the treaty State. It appears that India itself is not quite sure as to which pre-independence treaties are operative.

In accordance with the provision of Section 3(1) of the Act of 1962, the Government of India is required to make notification to all those States with which it had extradition treaties before independence. In the absence of such notification, continuance of the pre-independence treaties would not be of any practical utility. It is desirable that it should be done by the Government to remove doubts and uncertainty without waiting for such a need which may arise in individual cases.

In the past, India has secured the extradition of criminals from foreign countries. Instances of such cases are those of Dr. Dharam Teja from United Kingdom in 1971[1] ; Jirhand from the United States of America in 1975 ; Sucha Singh from Nepal ; Manohar Narang and his brother Om Prakash in 1976, and Mubarak Ali from the United Kingdom. The case of Tarasov is one where request was made by U.S.S.R. to India for his surrender. He was alleged to have committed a theft on a board of the Soviet ship. On complaint made by the Soviet Vice-council in Calcutta, he was discharged by the Order of First Class Magistrate in the absence of any *prima facie* case which would be made against him.

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